CERTAIN ASPECTS OF MARITIME BOUNDARIES,

WITH PARTICULAR REFERENCE TO IRAQ

by

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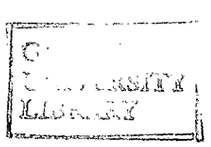

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ABBREVIATIONS

AJIL	American Journal of International Law
Al-Aklamj	Al-Aklam Journal (Baghdad)
BYIL	British Year Book of International Law
Cam law j	Cambridge Law Journal
CLP	Current Legal Problems
Cmnd	Command Papers (United Kingdom)
Columbiaj trans nat law	Columbia Journal of Transnational Law
Cornell int law j	Cornell International Law Journal
CTSCZ	Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958
Eco law Q	Ecology Law Quarterly
EZ	Exclusive Economic Zone
For Aff.	Foreign Affairs (New York)
Gen. Ass.	General Assembly
Geo hand b ser	Geographical Handbook Series
Geo. j	Geographical Journal
His j	Historical Journal
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text
ILC	International Law Commission
ILM	International Legal Materials

Indian j IL	Indian Journal of International Law
Int aff.	International Affairs (London)
Int Lawyer	International Lawyer (Chicago)
Int relat.	International Relations (London)
Ira rev int relat	Iranian Review International Relations
JAIL	Japanese Annual of International Law
J law E Dev.	Journal of Law and Economic Development
J marit law com	Journal of Maritime Law and Commerce
JRCAS	Journal of Royal Central Asian Society
Jur Rev.	Juridical Review
L N Doc.	League of Nations Document
L.N.O.J.	League of Nations Official Journal
L N Pub.	League of Nations Publications
L.N.T.S.	League of Nations Treaty Series
M.E.J.	Middle East Journal
Mia Law Q	Miami Law Quarterly
Mod Law Rev	Modern Law Review
NR	Natural Resources Lawyer
Ocean dev int lawj	Ocean Development and International Law Journal
OPEC	Organization of Petroleum Exporting Countries
Pak horizon	Pakistan Horizon (Karachi)
P.C.A.	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
RSNT	Revised Single Negotiating Text
San Diego law rev.	San Diego Law Review
SI	Statutory Instruments
ST/LEG/SER	United Nations Legislative Series
Stud Com int dev	Studies in Comparative International
Summarj	Summar Journal (Baghdad)
Surv int aff	Survey of International Affairs
Trans Grotius Soc	Transactions of the Grotius Society
TSCZ	Territorial Sea and Contiguous Zone
U.A.E.	The Union of Arab Emirates
U.K.T.S.	United Kingdom Treaty Series
U.N.	United Nations
UNCLOS I	The First United Nations Conference on the Law of the Sea
UNCLOS II	The Second United Nations Conference on the Law of the Sea
UNCLOS III	The Third United Nations Conference on the Law of the Sea
U N Doc.	United Nations Document
U.N.T.S.	United Nations Treaty Series
U.N.Y.B.	United Nations Year Book

YBILC	Year Book of International Law Commission
YBWA	Year Book of World Affairs
YLJ	Yale Law Journal
Wld today	World Today (London)

INTRODUCTION

The surface of the earth has an area of approximately 190 million sq. miles, 58 million sq. miles of which are land and 132 million sq. miles are sea.(1) Thus, approximately, seventy one per cent of the globe is covered by water.(2)

It is worth pointing out that one of man's enduring enterprises in the use of the sea has been fishing. In addition, the sea has been exploited as a highway for exploration and an important means of transport. It follows that, from ancient times the sea has represented a source of food, energy and transport; and of danger to those communities which feared attack from pirates and enemies.(3)

For hundreds of years, it has been suggested that substantial wealth lies on the seabed and many have dreamt of accumulating this imagined wealth. However, only recently has it been realized that, not only could those dreams come true, but also that the visions of submarine riches were vastly underestimated. Perhaps the unknown resources of the sea are much greater than those which have already been discovered.(4)

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(1) Report of U.N. Special Committee on Geographical Disadvantage - Comprehensive Proposal for Accommodation of Geographically Disadvantaged Countries: Third UNCLOS, Committee II. Reproduced in Ocean Dev. Int. Law; Vol. 3, No. 2, 1975, p.183.

(2) Papadakis, N. "The International Legal Regime of Artificial Islands", 1977, p.16.

(3) Bowett, D.W., "The Law of the Sea", 1967, p.1.

(4) Luard, Evan, "The Control of the Seabed", 1974, p.3, Auguste, Barry B.L., "The Continental Shelf: The Practice and Policy of the Latin American States, with Special Reference to Chile, Ecuador and Peru. A study in International Relations", 1960, p.32; The European Continental Shelf; Gas Finds Pose Problems for EEC", Common Market, 1965, July, Vol. 5, p.148.

Geologists have located great reserves of minerals beneath the waters of the continental shelf.(5) Deposits of several types appear on the continental shelf of the world for example phosphorite, glauconite, colcareous shell, sand, gravel, oil and gas.(6) Moreover, it has been scientifically proven that the continental shelf contains not only huge mineral reserves but also biological and fishery resources and deserves particular attention in order that they may be fully discovered and utilized.(7)

The other side of the coin is just as interesting. In the second half of the twentieth century a vast new world is opening up to man due to technological advances: the exploration and exploitation of the seabed and subsoil beneath the sea at great depth is becoming a reality.(8)

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(5) Brown, E.D., "Deep Sea Mining: The Legal Regime of 'Inner Space'", YBWA, 1968, Vol. 22, p.165; Barry Frank J., "Oil and Gas Interests on the Shelf" In Alexander, L.M., ed: Law of the Sea; International Rules and Organization for the Sea. Proceedings of the Third Annual Conference of the Law of the Sea Institute 1968, 1969, p.225.

(6) Mero, John L., "The Mineral Resources of the Sea, 1965, pp.53 et seq., Theberge, N. Bartlett, Address in the Proceedings of the John Bassett Moore Society of International Law Symposium and the American Society in November 16, 1974, In International Law of the Sea and the Future of Deep Seabed Mining, Edited by Joyner, Christopher, 1975, p.4.

(7) Borchard, Edwin, "Resources of the Continental Shelf", AJIL, Vol. 40, 1946, pp.53 et. seq.

(8) Juda, Lawrence, "Ocean Space Rights: Developing U.S. Policy, 1975, p.1; Auguste, op.cit., Ref.(4)at 1, pp.37,38. It is most likely that no industry had faced greater technical problems in dealing with the sea than the offshore oil industry. However, since 1934 a number of improvements in technique and the introduction of a completely new method of oil exploitation made it possible to extract oil from the subsoil by way of installations built into the sea. Drilling platforms were built on poles in the sea in comparatively shallow waters. The oil can be taken by tankers to the oil refineries, but loading from an installation into a

Contd...

On the other hand, the swift development of nations which require more minerals,(9) make it clear that reserves of such a nature must be sought.(10)

This change certainly introduces new areas of potential conflict or cooperation.(11) Thus in recent years, the law of the sea has attracted great attention. Although until recently nobody worried about the legal status of the seabed,the principle of the freedom of the sea has now suffered considerably. The jurisdiction of coastal States over waters adjacent to their coasts presents new problems. The width of the territorial sea, for example, has become a point of debate. The acceptance of the legal regime of the continental shelf causes many

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(8) contd.
floating object has technical disadvantages. See Luard, op.cit., Ref. (4) at 1,pp.6-23; Mero, op.cit., Ref. (6) at 2, p.98; Gotlieb, Allan and Charles Dalfen, "National Jurisdiction and International Responsibility: New Canadian Approaches to International Law", AJIL, 1973, Vol.67, pp.237 et. seq.

(9) The demand for oil and other forms of energy for example, is increasing so fast that total demand for them is expected to double in this decade. Thus, all possible sources must be exploited. See Luard, op. cit., Ref. (4) at 1, pp.6-23. It may be cited that Secretary Ickes of the U.S.; noting the dwindling production from land drilling for oil believes that the continental shelf may replenish these reserves. In an interview he is quoted as saying:
"The continental shelf may well be the site of our last totally unexplored great domestic source of petroleum".
See Borchard, op.cit., Ref. 7 at 2, p.53; The New York Times, November 4, 1945.

(10) Auguste, op.cit., Ref. (4), at 1 , pp.37-38.

(11) Juda, op.cit., Ref. (8) at 2 , p.1; Beesley, J.A., "Some Unresolved Issues on the Law of the Sea", N.R.L., 1971, Vol. 4, p.635.

difficulties, and also the increasing possibility of exploiting the seabed and subsoil at greater depths has entailed quite a number of new uncertainties. Obviously, the changing realities have made it imperative to alter the structure of the rules of law pertinent to the subject.(12)

In 1949, the U.N. admitted that advancement in technology was giving man greater confidence to work on the seabed, which in turn reflected the unsuitability of the existing legal framework. To fulfil this demand, the General Assembly asked the ILC to take up the question of the law of the sea. Having studied, and worked on a programme, the ILC submitted a report on the subject to the General Assembly.(13)

In 1958, the first Law of the Sea Conference (UNCLOS I) was held in Geneva, Switzerland. Two important topics, amongst many others, were to be dealt with by the conference: to develop a precise breadth of the territorial sea and to determine the rules governing the continental shelf. Whilst the question of the width of the territorial sea could not be resolved, a convention on the continental shelf was adopted.(14)

(12) Lissitzyn, Oliver J., Forward to Juda, op.cit., Ref. (8) at 2, p.v.

(13) YBIL, 1949, p.278; Juda op.cit., Ref. (8) at 2, pp.36-40.

(14) Juda, op.cit., Ref. (8), at 2, pp.46-58; The European Continental Shelf, op.cit., Ref. (4), at 1, p.148; Smetherman, Bobbie B. and Robert M. Smetherman, "Territorial Seas and Inter-American Relations: With Case Studies of the Peruvian and U.S. Fishing Industries", 1974, pp.22-24; Ratiner, Leigh S., "United States Oceans Policy: An Analysis", J. Mart. Law Com., 1971, Vol. 2, No. 2, p.226.

Once again in the second Law of the Sea Conference (UNCLOS II), held in 1960, the question of the width of the territorial sea was not resolved and the Conference broke up.(15)

However, many factors have led the General Assembly of the U.N. to call a third Law of the Sea Conference (UNCLOS III) which to date has convened eight sessions. Among these factors are: the new claims and policies of many States with respect to jurisdiction over adjacent areas of sea and also the increasing awareness of the vast economic importance of the resources of the sea offered by improved methods of exploitation and stimulated by the rapidly growing need for such resources due to the world-wide population explosion.(16)

The foregoing obviously reflects the importance associated with the simple concept of "the sea". An even more controversial issue, among others in this area of international law, is the question of delimiting marine boundaries. This is simply because exercising the rights vested in a State requires the limits of areas falling

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(15) Dean, Arthur H., "The Second United Nations Conference on the Law of the Sea; Response" AJIL, 1961, Vol. 55, pp.675-680; Garcia-Robles, Alfonso "The Second United Nations Conference on the Law of the Sea", AJIL, 1961, Vol. 55, pp.669-675.

(16) Burke, William T., "Comments on Current International Issues Relating to the Law of the Sea", NRL, 1971 July, Vol. 4, pp.661-662; Oda, Shigeru, "The Extent of the Territorial Sea - An Analysis of the Geneva Conferences and Recent Developments", JAIL, No. 6, 1962, p.7.

within this jurisdiction to be defined.

As to the justifications for this choice of topic, one may not be surprised, having realized all the many aspects adduced above, that the subject "marine boundaries" is the object of this study. Additionally it is obvious that the present day is a time of exceptional activity in the reform of the law of the sea. The third justification for this choice of topic is the increasing understanding of the vast economic importance of the natural resources existing in the Arabian Gulf, as will be seen.(17) And fourthly Iraq is uniquely suitable for a case study of this kind, not only because of the short frontage of her coastline which no doubt greatly affected the delimitation of her marine boundaries, but also because such a subject is of the utmost importance for a nation such as Iraq, whose fate and prosperity are so closely connected with the sea.(18)

It must be emphasized, however, that this thesis is concerned solely with canvassing the question of continental shelf and territorial sea boundaries. The problems raised by the present thesis have been examined in their own context, which is strictly that of delimitation. Other questions relating to the general regime of territorial sea and continental shelf have been considered for that purpose only.

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(17) See below chapter (4).

(18) Al-Muhana, F.R. "Freedom of Passage Through Straits with Particular Reference to the Strait of Hurmoz", Ph.D. Thesis submitted to the University of Baghdad, 1978, pp.4-6.

It must be remembered that in a work of this nature, which is simply concerned with the study of the delimitation of territorial sea and continental shelf boundaries in general, as well as with those of a particular state, an essential consideration is that of exercising discretion in limiting the factual details of the subject. Extensive coverage of relevant details may be necessary in certain circumstances, whereas in others a brief reference which best illustrates the point will suffice. Every case, therefore, will be treated according to its merits in the following two parts.

The first part examines the question of territorial sea and continental shelf limits in three chapters. The second part explores the boundaries of the Iraqi territorial sea and continental shelf. Prior to that an introductory description of the Arabian Gulf, with which that part deals, serves to set the stage for all that follows.

PART ONE

THE LIMITS OF COASTAL JURISDICTION: DELIMITING TERRITORIAL SEA AND CONTINENTAL SHELF BOUNDARIES

For centuries international law jurists have been confronted with the question of determining the territorial jurisdiction of coastal States over waters adjacent to their shores. In brief, the general consensus of opinion and practice in modern times has transferred its support from the theory of mare clausum to that of mare liberum. In other words, from a belief that areas of the high seas could be appropriated by particular nations, to an idea that the high seas are free and open to all for all purposes.(1)

However, it is now firmly established as an unarguable premise, that the high seas cannot be appropriated by any one or group of States.(2)

On the other hand another opposing movement, advocating the exclusive rights of States in waters immediately adjoining their coasts, has come to be more obviously recognised. This surely amounts to stating that it is almost universally agreed, and is generally

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(1) Knight, H. Gary "The Law of the Sea: Cases: Documents and Readings" 1976-1977 ed., pp.13-23; O'Connell, D.P. "The Juridicial Nature of the Territorial Sea", BYBIL, Vol. 45, 1971, pp.305-347. Dean, Arthur H., "The Second Geneva Conference on the Law of the Sea", AJIL, Vol. 54, 1960, pp.756-762.

(2) Bishop, William W., "General Course of Public International Law", Hague Recueil, Vol. 115, 1965, II, p.297; Knight, ibid., pp.13-32; Goedhuis, D., "The Changing Legal Regime of Air and Outer Space" ICLQ, Vol. 27, 1978, p.577; Dean, ibid., pp.756-762.

accepted, regardless of changes over the centuries, that all coastal States are entitled to exercise sovereign rights, subject only to rules of international law, on limited areas of the sea which are adjacent to their shores.(3) These zones over which comprehensive, exclusive authority is exercised and honoured,(4) are called the "territorial sea".(5)

Furthermore, at the present time it is generally recognized in international law, as will be explained later,(6) that coastal States enjoy not only sovereignty over their land territories and territorial seas,(7) but also certain rights beyond this marginal belt. Underlying this view is the belief that although the high seas are res communis, there is nothing to impede exploration

(3) See O'Connell, op.cit., Ref. (1) at 8, pp.303-383.

(4) The sovereignty of a coastal State over its territorial sea is limited by permitting a right of innocent passage for foreign ships. See Brown, E.D. "The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ", Maritime Policy and Management, Vol. 4, No. 6, 1977, p.329; Daintith, T.C. and others, "Oil and Gas Law", 1975: Reprinted with Corrections 1976, Part One, p. A.201; Colombos, C. John, "The International Law of the Sea", 6th Revised ed. 1967, p.87; Morris, Joseph W.; "The North Sea Continental Shelf: Oil and Gas Legal Problems", Int. Lawyer, Vol. 2, No. 2, 1968, p.192.

(5) The term "territorial sea" is preferable to the expression "territorial waters", as the latter was sometimes taken to include internal waters and territorial sea combined. See Whiteman, H., Marjorie M., Digest of International Law, 1965, Vol. 4, p.2. Brownlie, Ian "Principles of Public International Law", 1973, p.181; Shukairy, Ahmad "Territorial and Historical Waters in International Law", Palestine Monographs, No. 24, p.21.

(6) See below p.133.

(7) While a State enjoys sovereignty to the full extent over its land territory, this sovereignty over its territorial sea is limited by international law. For further details see Brown, op.cit., Ref. (4) at 9 p.329.

and exploitation of particular parts of the submarine areas. However, this exploration and exploitation must not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters.

This part is devoted to a study of the boundaries of the territorial sea and continental shelf and falls into three chapters. In the first chapter it is necessary to begin by considering the question of base-lines from which maritime zones are measured. In chapter two the outer limit of the territorial sea and the continental shelf will be examined. Consideration is given to the delimitation of marine boundaries between opposite and adjacent states in chapter three.

CHAPTER ONE

BASELINES

First, mention must be made of the fact that the matter of establishing baselines from which the territorial sea of each coastal State is measured, is the key to the delimitation of all maritime boundaries. To demonstrate this, it may be sufficient to state the following:

1. The location of the baseline determines the maximum edge of the internal waters of the State concerned.
2. It also represents the inner limit of the territorial sea from which the outer limit is measured. It is thus clearly vital in judging whether or not certain adjacent waters are within the territorial sea of a particular State. Irrespective of the breadth of the territorial sea, the movement of the baseline further seaward means that parts of the sea, which would otherwise have been considered territorial sea, become internal waters of the littoral State. Consequently the territorial sea would be measured from a line further seaward thus carrying the territorial sea into parts of what would normally have been considered to be a high sea.(1)
3. It serves indirectly to determine the other marine areas such as the contiguous zone.

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(1) McDougal, Myres S. and William T. Burke, "The Public Order of the Oceans: A Contemporary International Law of the Sea", 1962, p.306; Knight, op.cit., Ref. (19) at 8 , p.137.

4. Finally, the inner limit of the continental shelf and the international seabed area depends, to some extent on the location of the baseline.(2)

Therefore, it appears that the baseline is of great importance, as its placement is fundamental in the process of determining how far the maritime boundaries of the coastal State extend, as well as what form of jurisdiction each belt is subject to.(3)

Having begun with this very brief discussion, it is worth stating that in the eighteenth and early nineteenth centuries, the words "shore" and "coast" were frequently mentioned along with the cannon shot-rule, since they were adequate. An exact baseline was, if not irrelevant, unnecessary, in view of the fact that the extent of the territorial sea depended on the location of the cannon itself.(4) But, having called for a specific limit of territorial sea, the need for an exact point or baseline for measurement arose.(5)

Drawing baselines, however, is a matter upon which

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(2) Whiteman, op.cit., Ref. (5) at 9, p.137.

(3) Namely whether the coastal State exercises sovereignty or sovereign rights for the purpose of exploration and exploitation. Ibid., p.138.

(4) See below pp. 71 et seq.

(5) This is important particularly in certain areas where the rise and fall of tide is great, as in the Bay of Fundy. See Swarztrauber, Sayre A., "The Three-Mile Limit of Territorial Seas, 1972, p.218.

inconsistent views have been expressed in the past.(6) In general, the low-water line rule has been the prevailing state practice up until the present time.(7) It was hence incorporated in the basis of discussion for the 1930 "Hague Conference". No. 6 of the said basis ran as follows:

> "Subject to the provisions regarding bays and islands, the breadth of territorial waters is measured from the line of low-water mark along the entire coast."(8)

Despite the inclusion of the above provision in the basis of discussion, the conference adjourned without adopting any provision in this respect and the baseline question was left unsolved.

However that may be, it is to be observed that in spite of the prevalence of the low-water line rule, drawing baselines is not so clear cut as may be thought. Had all coasts of States been nicely formed, sharply cut or gently rounded, without any distinctive or special configuration, it would have been easy to establish a

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(6) For example, although the U.S. and the U.K. were in agreement on a three-mile limit of the territorial sea, they could not agree on a rule in accordance with the drawing of the baseline which should have been established. Ibid; for further details see Knight, op.cit., Ref. (1), at 8, pp.159-160.

(7) It was adopted in 1812 in the case of the Kingdom of Denmark and Norway. In 1909 when Italy adopted this rule it had been recognized by all the maritime states. Swarztrauber, ibid., p.218.

(8) League of Nations, Basis of Discussion, p.30.

satisfactory baseline and consequently determine what areas of the sea were within the territorial sea of any particular State.(9) But unfortunately shores are so varied in aspect that no single article in any legal document can cover the variations in the configurations of the hundreds of miles of coastline found throughout the world.(10) Moreover, man-made construction of coastlines adds another difficulty to the problem. Moreover, the perspectives of coastal inhabitants, which may significantly affect community policies in delimitation areas of the sea, are no less varied.(11)

The establishment of a baseline, therefore, is usually affected by two types of factors: geographical and predispositional.(12)

At any rate, problems concerning baselines lie principally in three main categories:(13)

I - The natural baseline is variously called the shore-line, the low-tide line or the low-water mark.

II - The line separates internal waters and territorial sea in ordinary indentations into the coastline, such as bays, river mouths and estuaries, that is to say, in cases where it serves as an artificial coastline for the purpose of delimiting territorial sea.

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(9) Knight, op.cit., Ref. (1) at 8, p.135.

(10) Smith, H.A., "The Law and Custom of the Sea", 3rd ed., 1959, p.9. Smith states that hundreds of incidents have arisen at sea because of the difficulties of drawing baselines.

(11) Knight, ibid., p.136.

(12) McDougal and Burke, op.cit., Ref. (1) 11, p.307.

(13) Boggs, S., Whittemore, "Delimitation of Seaward Areas under National Jurisdiction", AJIL, Vol. 45, 1951, p.251.

III - The legal situation of islands, which means that baselines are affected by islands and which islands are to be ignored, if any, in delimiting territorial seas.

These problems will be our concern in the following sections.

Section One

The Natural Baseline

I. The General Rule

It may be useful at the outset to note that in drawing the line enclosing internal waters and thus providing baselines from which marine boundaries are measured, the generally recognized rule, if coastlines are fairly regular in the sense that they are neither deeply indented nor fringed with islands, is that the line of low-water mark follows exactly the indentations of the coast.(14)

Not only the Hague Conference, as noted above supported this rule, but the ILC also preserved it in its draft, and in the words of the Geneva Convention on the TSCZ, it is the normal baseline.(15) Even where shallow

(14) Whiteman, op.cit., Ref. (5), at 9, pp.137-141; Colombos, op.cit., Ref. (4), at 9, p.113; Boggs, op.cit., Ref. (13), at 14, p.251. However, since the area between the low-water mark and the high-water mark is usually neither extensive nor servicable for purposes other than navigation in inland water, this question has not caused great controversy. For further details, see Knight, op. cit., Ref. (1), at 8, p.154.

(15) McDougal, Myres S. and William T. Burke, "Crisis in the Law of the Sea, Community Perspectives versus National Egoism", YLJ Vol. 67 (1), 1957, p.576.

indentations arise, as on many coasts, such as Start Bay in the English Channel, it is agreed to ignore them in establishing a baseline.(16)

II. The Straight Line Rule

Accordingly difficulties appear only when shores diverge from what is considered "normal" and exhibit a great variety of physical features such as indentations, shoals and rocks,(17) as in Norway, Greece or Western Scotland.(18) It is important for practical reasons in the latter cases, namely coasts with special configurations, to enable the State to have full jurisdiction over these waters which are substantially enclosed within its land territory.(19) Therefore, in such localities, the rule of straight baseline joining appropriate points may be employed.

III. The Anglo-Norwegian Fisheries Case(20)

The question of drawing baselines was considered by the ICJ in the Anglo-Norwegian Fisheries Case.(21) Confronted by the map of Northern Norway, with its "rock

(16) Because indentations are significant only when they do affect the outer limit of the territorial sea. See Smith, op.cit., Ref. (10) at 14, p.9.

(17) Those which vary in their sizes, shapes etc. See McDougal and Burke, op.cit., Ref. (1) at 11, p.307.

(18) Smith, op.cit., Ref. (10) at 14, p.9.

(19) Ibid.

(20) ICJ Report, 1951, p.116.

(21) Ibid., Bishop, William W., "Judicial Decisions" AJIL, Vol. 46, 1952, pp.348-370.

rampart" "Skjaergaard"[22] of islands, islets, rocks and reefs, forming a network of fjords, bays and indentations, the ICJ was asked by the two governments to pronounce on the validity of: (a) the method employed for the determination of the Norwegian Fisheries Zone; and (b) the definition of the Norwegian baseline by the application of a straight baseline rule.[23]

In its judgement, the Court held that it had no difficulty "in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory".[24] The Court noted that the parties were agreed as to this criterion, but that they differed as to its application. The Court, however, announced that it was under an obligation to decide whether the relevant water-mark was that of the mainland or the "skjaergaard". It stated

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(22) A Norwegian term meaning literally rock rampart and embracing the various islands, islets, rocks and reefs. Bisbop, ibid.

(23) On July 12, 1935, the Norwegian Government had issued a Royal Decree defining the limits of Norwegian territorial sea. The Decree employed the straight baseline rule connecting 48 specified points of the headlands of mainland, islands, and isolated rocks, irrespective of the length of the lines drawn between each of two points. Of the baselines, 25 were more than ten miles in length and some of them were much more. The three longest being 44, 40 and 39 miles respectively. The outer limit of the Norwegian territorial sea was drawn four miles from these baselines by parallel lines. The U.K. Government did not contend with the right of Norway to have a four mile territorial sea. She also abandoned her protest against the trace parallel method. See ICJ Reports, 1951, pp.125-128, 129.

(24) Ibid., p.128.

that the skjaergaard constituted a whole with the mainland. Consequently, it decided that the outerline of the skjaergaard should have been considered in the process of delimiting the Norwegian territorial sea. In the court's view, this was justified by "geographic factors" as well as "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage".(25)

By a vote of 10 to 2, therefore, the court in principle upheld the Norwegian system. It decided that "the method employed for the delimitation of the fisheries zone by the Decree of July 12th, 1935 was not contrary to international law".(26) Moreover, by eight votes to four, it held that "the baselines fixed by the said Decree in application of this method are not contrary to international law".(27)

However, it is intended to examine the Judgment(28)

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(25) Ibid., pp.128-133.

(26) Ibid., p.143.

(27) Ibid. Two of the Judges, Sir Arnold McNair and Judge Read, the Canadian Jurist, gave elaborate dissenting opinions. Judge Hackworth, concurred in the operative part of the Judgment due to the existence of an established historic title, but offered no opinion. Judge M. Hus Mo, while accepting the general principle, was unable to agree with its application in certain specific cases. Ibid., pp.144-206.

(28) It would appear that since the court dealt with a unique geographical configuration of coastline being, as the court repeatedly stressed, exceptional (ibid. pp.133, 135), no exaggerated importance should be given to its findings. The Judgment therefore, has not to be interpreted as having created any new principles governing the delimitation of the territorial sea.

only in so far as it is pertinent to the subject. In this respect, it is to be noted that the essential point in the judgment is the approval of the straight baseline rule as applicable, not solely across bays, but also between islands, rocks and penetrating sea belts lying inter fauces terrarum, subject only to certain general conditions. The court stipulated that in order to establish a straight baseline that line "must not depart to any appreciable extent from the general direction of the coast".(29)

Certainly, the last phrase is the most important condition to apply to the straight baseline rule as it gives the key to the decision, although other criteria are laid down. Having said this, it must be admitted meanwhile that the admissions of the court itself are not entirely precise. A very good example which may be given of such imprecision is "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them",(30) and the question as to whether such areas are correlated to the land mass in such a way as to be sufficiently considered as interior waters.

IV. The Geneva Convention

As was noted above, the ILC sought to adopt the general principle of the "low-water mark" in its draft. It did so, and the Geneva Conference approved it formally

(29) ICJ Reports, 1951, p.133.
(30) Ibid., p.133.

in 1958. The normal baseline from which the limit of the territorial sea is measured, is in the words of the Geneva Convention of 1958 on the "TSCZ","the low-water line along the coast". Article 3 of the Convention runs as follows:

> "Except where otherwise provided in these articles the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large scale charts officially recognised by the coastal State".(31)

Additionally, in the light of the 1951 judicial precedent, the ILC recommended permitting a coastal State to depart from the general principle, namely the low-water mark. The Commission had permitted coastal States under particular circumstances to delimit their territorial sea according to the straight baseline rule.(32) This recommendation was also approved by the Geneva Conference. In such cases, the convention permitted the drawing of a baseline by joining appropriate points on the coast and measuring the territorial sea from this line. Article 4(1,2) of the Geneva Convention provides that:

> "1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

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(31) Brownlie, Ian, "Basic Documents in International Law", 2nd ed., 1972, p.79.

(32) See YBILC, 1952, Vol. II, pp.32-33; YBILC, 1953, Vol. II, p.65; YBILC, 1954, Vol. II, p.3.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters".(33)

In this connection it may be noted that, as drawing baselines according to the straight baseline rule involves converting belts of high seas into territorial sea, the Geneva Conference thus resisted all attempts made to expand this rule, in such a way as to apply it in cases where only slightly irregular coastlines existed.(34) Article 4 of the Convention therefore stipulates the essential prerequisites for the employment of the straight baseline rule in certain localities, namely where the coast is deeply indented, or where there is a fringe of islands.

Finally, it is pertinent to note that both the ILC and the Geneva Conference sought to introduce a maximum length for a single baseline between any two particular points, however such attempts were unsuccessful.(35)

V. Rules Emerging From UNCLOS III

The UNCLOS III has considered the question of baselines. The "Informal Composite Negotiating Text"(36)

(33) Brownlie, op.cit.,Ref. (31), at 20, pp.79, 80. For the perspectives of articles 3and 4 of the Geneva Convention on the "TSCZ" see Knight, op.cit., Ref. (1) at 8, p.138. For further details, see ibid., pp. 170-174.

(34) Dean, Arthur, H., The Geneva Conference on the Law of the Sea, in the "International Law in the Twentieth Century, Ed. by Gross Leo, 1969, p.315.

(35) Ibid., pp.314-315.

(36) The latest version of the draft Articles of the UNCLOS III, hereinafter "ICNT".

which has been produced in the sixth Session of the Conference, admits the general rule in drawing baselines namely the low-water mark. Article 5 of the ICNT which is identical to Article 3 of the 1958 Convention on the TSCZ provides that:

> "Except where otherwise provided in the present Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State".(37)

However, in spite of the fact that the principle adopted in Article (5) has been universally accepted in the practice of States, a few simple shortcomings in that text have been observed. Firstly, not every State produces official charts. Merchant ships' captains probably use charts produced by their own national States or sources other than the coastal State concerned.(38)

Secondly, there is no indication in the text to serve as a guide to ascertaining whether the baseline referred to in Article (5) is that of the cartographic depiction on the chart, or the actual coastline configuration.(39) Thirdly, for several reasons, even though sounds are based

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(37) ICNT, A/CONF. 62/WP. 10/Add. 1 p.21.

(38) These charts may vary considerably from the national charts. See Hodgson, Robert D. and Robert W. Smith, "The ISNT (Committee II) a geographical perspective", Ocean Dev. Int. Law, 1976, Vol. 3, No. 3, pp.225-229.

(39) Coastal charts become out-of-date quickly, and even such a highly developed State revises its charts only on a 2 to 3 year schedule. See ibid., pp. 228-229.

upon low-water, coastal charts depict the high-water line,(40) and although "approach" or "harbour" charts show the low-water line, they are of little use because they cover only small areas of the coast.(41)

Returning to the UNCLOS III, this Conference will show that exceptional cases justify the application of other rules by reason of geographical circumstances, economic interests and historical perspectives. This was expressly admitted by the ICNT. Article 7 (i) provides that:

> "1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in the immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured".(42)

Here again, although this provision followed the pattern of international practice, in one respect at least the text may be criticised. Language of this kind, it appears, can only lead to coastal States using the text to further extend their territorial seas by the enclosure of all islands or all coastal indentations with straight baseline systems. The enclosure of true interior waters within the baseline, requires the development of more restrictive criteria for their delimitation by providing a maximum length for any single baseline between any two points.

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(40) This is because it is deemed to be steadier and of greater use to the mariner as visual identification of position at a particular moment, ibid.

(41) Ibid.

(42) U.N. Doc. A/CONF. 62/WP. 10/Add. 1, p.22.

Section Two

Artificial Coastlines

A further point worth mentioning is that the straight baseline rule, which was outlined earlier, is not the sole deviation from the general principle governing the drawing of baselines, namely, the normal baseline (shore line). Here it is necessary to stress that coasts throughout the world are not the same, as sometimes there are bays or outerworks of harbours and so forth. It is reasonable, therefore, for such exceptional cases to be considered as making up portions of the shore. It is thus permitted to employ artificial baselines for certain coastal conditions such as bays, historic bays, harbours et cetera, to close off internal waters from the territorial sea, and to serve as a baseline from which to determine the latter.(43)

However, in a work of this nature, which is not simply concerned with the study of baselines, it is outside our realms either to consider every aspect of such cases, or to state in detail the international legal regime governing each, beyond indicating briefly some of these problems. The following discussion will be devoted to an examination of the subject, concentrating on principles as regulated by the 1958 Geneva Conventions on the Law of the Sea.

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(43) Colombos, op.cit., Ref. (4) at 9 , pp.113-191.

I. Bays

It may be observed that one of the most controversial problems regarding the delimitation of the territorial sea is that of bays. Since the earliest days of the concept of territorial sea, writers have considered the problem of bays, but this term is so indefinite that they have never agreed upon its precise definition.(44) It may be added that this concept has been applied in various senses in common usage.(45)

It does not seem necessary to repeat what has been said in this respect and may be sufficient to note that in the early nineteenth century, it was generally assumed that bays could be regarded as inland waters, at the point where the length of the line drawn across the mouth of the bay narrowed to a distance not exceeding the double width of the permissible territorial sea.(46) Partisans of the three mile limit of territorial sea reckoned that only when the mouth of a bay narrowed to ten miles, could it be closed off.(47) This limit was adopted by both the Anglo-French and the North Sea Fisheries Conventions of August 2, 1839 and May 6, 1882 respectively.(48)

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(44) "A bay is a subordinate adjunct to a larger body of water; a penetration of that larger body into the land; a body of water between and inside of two headlands". See Knight, op.cit., Ref. (1) at 8, p.195.

(45) For further details see Whiteman, op.cit., Ref. (5) at 9, pp.207-219.

(46) Swarztrauber, op.cit., Ref. (5) at 12 , p.222.

(47) The U.K. argued in her note to the Yugoslav Government of May 5, 1949 that only the six-mile limit or, exceptionally, the ten-mile limit could be recognized. See Swarztrauber, op.cit., Ref.(5), at 12, pp.118-123.

(48) See Article (2) of the Angle-French 1839, The Status Revised, 3rd ed., Vol. 4, pp.651,652; Article 2 of the North Sea Fisheries Convention, The Status Revised,

Contd...

a. Hague Conference of 1930

In any case, the problem of bays was given exceptional consideration at the Hague Conference held for the codification of International law in 1930. The ten-mile bay baseline rule was framed by the preparatory Committee in a basis of discussion, as follows:

> "In the case of bays, the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles."(49)

The above text clearly reveals, as the Committee noted, that the aforementioned definition missed the mark in not showing precisely what was meant by the term "bay".(50)

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(48) contd...
3rd ed., Vol. 10, p.867. However, both of the Conventions were denounced, since the parties have adopted the European Fisheries Convention of March 9, 1964. Article 6 of the latter Convention provides that: "Any straight baseline or bay closing line which a contracting party may draw, shall be in accordance with the rules of general international law and in particular with the provisions of the Convention on the "TSCZ" opened for signature at Geneva on 29th April 1958." Miscellaneous No. 11, 1964, Cmnd. 2355.

(49) League of Nations, Basis of Discussion, p.31; LN Doc. C.230 M.117. 1930, V, p.11.

(50) In this connection, it was commented: "it is agreed that the baseline constituted by the sinuosities of the coast should not be maintained for every bay. The suggested exception, however, contemplates, not a mere curvature of the shoreline, but an indentation presenting the characteristic features of a bay, showing in particular a well-marked entrance and a certain proportion (which it will be for the conference to fix) between the breadth of such entrance, and the depth of the indentation". See League of Nations, Basis of Discussion, p.31; Swarztrauber, op.cit., Ref. (5) at 12, p.224.

Several proposals were made to state what was meant by the term "bay", with rules for incorporating certain bays into inland waters. However, it appears to suppose that the failure of the conference to reach an agreement on rules for measuring marginal sea, was the reason for the rejection of these proposals.(51)

b. The Anglo-Norwegian Fisheries Case(52)

The ICJ had occasion to consider the rules of international law governing the drawing of baselines in the case of bays. In the Anglo-Norwegian Fisheries Case(53) the world court pointed out that "although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit".(54) The Court thus rejected in the above case the view that the ten-mile rule was generally applicable. In the words of the Court: "Consequently, the ten-mile

(51) The German Delegation, for example, proposed to measure the maximum depths of a bay in proportion to its breadth from headland to headland. The British Delegation proposed taking into account the ratio between average depth and breadth by measuring the area. Subsequently, the British and German Delegations withheld their amendments and voted for the American proposal. The American proposal avoided "the definition of such words as 'bay' and 'estuary' in a geographical sense". It simply undertook "to determine when an indentation of the coast is sufficiently great to regard the waters within the indentation as national waters, which are to be separated from territorial waters by a straight line drawn across the entrance". See Boggs, S. Whittemore, "Delimitation of the Territorial Sea", AJIL, Vol.24, 1930, p.550.

(52) ICJ Reports, 1951,p.116.

(53) Ibid.

(54) Ibid.

rule has not acquired the authority of a general rule of international law".(55) The Court decided that "the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply to the Norwegian coast".(56)

c. The ILC

Next the ILC undertook to lay down the conditions that must be satisfied for indentations or curves to be regarded as bays. Although it is useful, it is also inconvenient to cover all the formulas adopted by the ILC. Additionally, despite the obvious differences in those formulas, nevertheless basic similarities can be found.(57) Encouraged by the above reasons, it is intended to quote only the pertinent provision that was set forth in the final draft which ran as follows:

> "1. For the purpose of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle drawn on the mouth of that indentation. If a bay has more than one mouth, this semicircle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall

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(55) Ibid.

(56) Ibid.

(57) See for details YBILC, 1952, Vol. II, pp.25, 34; YBILC, 1953, Vol. II, pp.57, 67; YBILC, 1954, Vol. II, p.4; YBILC, 1955, Vol. II, p.36.

be included as if they were part of the water area of the bay.

2. The waters within a bay, the coasts of which belong to a single State, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water line.

3. Where the mouth of a bay exceeds fifteen miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn, that line shall be chosen which encloses the maximum water area within the bay.

4. The foregoing provisions shall not apply to so-called 'historic' bays, or in any cases where the straight baseline system provided for in article 5 is applied."(53)

d. The Geneva Conference on the Law of the Sea of 1958 and the Geneva Convention on the 'TSCZ'

Attention must now be drawn to the Geneva Conference of 1958 on the law of the sea. It was suggested at the Conference that the "bay" could be regarded as internal waters if the length of the line drawn across its mouth did not exceed the double width of the permissible territorial sea. This proposal was defeated with the adoption of the Soviet delegate's proposal for a 24-mile rule on the grounds that such a rule would put all States on an equal footing concerning bays regardless of the width of their respective territorial seas.(59) Thereupon, the

(58) Report of the ILC covering the work of its eighth Session 1956, U.N. Gen. Ass. Off. Rec. 11th Sess. Supp. No. 9(A/3159), pp.15-16, YBILC, 1956, Vol.II, pp.268-269.

(59) UNCLOSI,Official Records, Vol. III, p.32.

conference made just one amendment to the ILC's draft by increasing the fifteen-mile bay baseline to twenty-four miles, and approved the rest of the article in purport. Article 7(1-4) of the Convention on the TSCZ runs as follows:

> "1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For the purpose of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
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> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."(60)

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(60) UNCLOS I, Official Records, Vol.II, p.133. The definition of a bay provided for in article 7 is criticized on the grounds that the specification for

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Moreover, as a logical extension of the provision included in Article 7(4), paragraph 5 of the same Article stipulates that:

> "5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."(61)

Clearly, the latter text is applicable in cases in where the entrance of a bay exceeds twenty four miles. In these cases, the straight baseline shall be established at the point nearest to the entrance where the distance between facing coasts does not exceed twenty four miles so as to confer upon all the waters from the baseline landwards, the status of interior waters.

Conclusion

The conclusion to be drawn from the foregoing is that apart from the historic bays which have been excluded from the general rules of the regime of bays according to Article 6(7) of the Convention of 1958 on the "TSCZ", the convention is applicable to all bays belonging to a single State,(62) provided that the straight baseline rule is

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(60) contd...
the ratio which the bay must be, is difficult to reconcile with the real configuration of most of the bays throughout the world. For further details see, Strohl, Mitchell P., "The International Law of Bays", 1963, p.56.

(61) UNCLOS I, Official Records, Vol. II, p.133.

(62) It is worth indicating that there exists no development in the conventional international law to be applied in a bay bordered by two or more States. See Strohl, ibid., pp.55, 369-398.

not employed to delimit the territorial sea of the State concerned. In addition, the provision not only defines the bay but also stipulates that the degree of penetration has to be closely intimate with the land and not a mere curvature of the coast.(63)

Exactly the same picture emerges from the UNCLOS III. Article 10 of the ICNT on bay closing lines is apparently identical to the language of Article 7 of the 1958 Geneva Convention on the TSCZ.(64)

II. Historic Bays

Reference should be made at the outset to the fact that the legal status of historic bays, such as Chesapeake, Delaware and Fonseca,(65) is an exception to the general rules of law applicable to bays. It is perhaps appropriate to state that the term "historic bays" is designed to refer to claims made by certain States who "have considered for a long time certain large bays penetrating their coasts, ipso facto, constituent parts of interior waters, and that these claims have been either explicitly or tacitly recognized by other States".(66) Historic waters are also defined as "waters over which the coastal State, contrary to the generally applicable rules

(63) It might be useful to point out that the straight baseline rule provided for in Article 4 is not the same as that of the straight baseline rule applicable to bays according to Article 7 of the Convention. The latter is a type of normal baseline. See Jennings, R.Y., "General Course on Principles of International Law" Hague Recueil, Vol. 121, 1967, II, p.378.

(64) See the text of the Article UN Doc. A/CONF. 62/WP. 10/Add. 1, p.33.

(65) Bishop, op.cit., Ref. (2), at 8, p.303.

(66) Smith, op.cit., Ref. (10), at 14, p.14.

of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States".(67)

There is further the fact that although, the special regime of historic bays has been recognized, disputes, as far as their exceptional nature and the requirements for their formation are concerned, have always existed. It is to be noted that the origin of the exceptional character of historic bays, is, for example, in dispute. Some writers are of the opinion that such claims are based on prescription. According to Jessup, claims to such large belts of water are validated by international practice and usage. Opposition to this rests on the contention that historic bays are merely illustrative of habit of maritime States. Hyde rejects the idea of prescription because claims over historic bays are generally and initially neither adverse to other States nor considered wrongful by other states.

The above is not the only controversial matter. Rather, the various factors which, in their entirety contribute towards the establishment of the coastal State's right over historic bays, are also debatable.(68) The constitution of an historic bay in general may be summed up as follows:

1. The State's authority over the claimed maritime area has to be exercised effectively and continuously.

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(67) Knight, op.cit., Ref. (1), at 8 , p.210.

(68) See ibid., pp.210-216.

2. The inseparability of the bay from the coastal State by reason of its undisputed economic and strategic importance to the coastal State concerned, is the second factor.
3. The non-existence of international maritime lanes in the bay.
4. The basis which leaves much room for dispute in the question of historic bays, is that the territorial sovereign should have exercised sovereignty over the bay for a sufficiently long period of time.(69)

However, the ILC reserved the concept of historic bays in its draft and that was approved by the Geneva Conference of 1958 which embodied the notion in article 7(6) which runs as follows:

> "The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in Article (4) is applied".(70)

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(69) This factor is opposed on the grounds that newly independent states would ipso facto never be able to claim historic bays. See Knight, ibid., pp. 210-216.

(70) UNCLOS I,Official Records,Vol.II, p.50. Moreover, the Conference adopted a resolution in which the U.N. Gen. Ass. was requested "to arrange for the study of the juridical regime of historic waters, including historic bays and for the communication of results of such study to all states members of the U.N.". Consequently, the ILC, was charged by the resolution of the General Assembly to study the question of the juridical regime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate. U.N. Gen. Ass., Official Records, 19th Sess., 1959, Sixth Committee, p.2141. For the text of the draft resolution, see U.N. Doc. A/4333 para 11. See also Resolution 1453 (XIV), adopted at the 847th Plenary Meeting, December 7th, 1959.

Again, the matter in question has been considered in the UNCLOS III. In this connection, Article 10(6) incorporated in the ICNT runs as follows:

> "6. The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in article 7 is applied."(71)

Evaluation

The Geneva Convention specifically provided that its other provisions "shall not apply to the so-called historic bays". Precisely the same position seems likely to emerge from the UNCLOS III. Although the foregoing provides some evidence of the international community's recognition of the concept of historic bays, this does not prevent the suggestion that the concept seems to suffer from ambiguity and uncertainty. Neither the Geneva Convention, nor the ICNT, however has defined what is meant by the term "historic bays". It appears important to find a close definition of this term in order to avoid any extension of its application. By now it seems evident, at least in the writer's view, that unless there are some limitations on the coastal States' authority to claim zones of water as historic bays, extensive segments of the sea could be so considered. Specific requirements would seem to be of great import in this area.

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(71) U.N. Doc. A/CONF. 62/WP. 10/Add. 1, 6th Session, p.23.

III. Harbours and Ports

It has been recognized that ports integer form integral parts of the public domain, dominium plenum, of the state concerned.(72) Here it is necessary to go back to the Hague Conference for the Codification of International Law of 1930. Having considered the question of ports, the Hague Conference produced a provision according to which "the outermost permanent harbour works shall be regarded as forming part of the coast".(73)

The problem in question was discussed by the Geneva Conference of 1958 on the Law of the Sea. For our purpose, it may be enough to observe that Article 8 of the Geneva Convention(74) which is pertinent, runs as follows:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."(75)

Therefore, it is evident that the farthest portions of a perpetual harbour works according to the above text, are to be treated as if they were part of the land territory of the State concerned.

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(72) Whiteman, op.cit., Ref. 5, at 9, p.260. It is also distinguished between ports and harbours, as the former are man-made while the latter are considered to be formed by nature. Ibid.

(73) Report of the Second Committee, Conference for the Codification of International Law, the Hague, 1930, LN Doc. C. 230M, 117, 1930, V, p.12.

(74) For further details about the history of this article, see Whiteman, op.cit., Ref. (5), at 9, pp.262-263.

(75) Brownlie, op.cit., Ref. (31), at 20, p.81.

Once again, the UNCLOS III considered the question and produced an almost similar text. Article 11 of the ICNT provides that:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works".(76)

IV. Mouths of Rivers

Undoubtedly, rivers are interior waters. Thus, it would be fair to say that a line must be drawn across their mouths so as to isolate them from territorial sea, which in turn marks the change in the legal status that exists between internal and territorial sea.(77) In seeking to discern present-day law in this respect, it must be recognized that entirely different principles have been used in closing off rivers. It is thought that rules concerning bays are applicable mutatis mutandis in the case of river estuaries. According to another opinion, a straight line should be drawn across mouths of rivers in all cases. Finally, the geographic configuration of the river's mouth and the possible existence of an estuary, have to be taken into consideration, according to a third view.(78) It may be remarked that the last view involves the difficulty of defining what the estuary

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(76) U.N. DOC. A/CONF. 62/WP, 10/Add.1, p.24.
(77) Hodgson and Smith, op.cit., Ref.(38),at 22, p.235.
(78) Whiteman, op.cit., Ref. (5), at 9, p.336.

is. Correct as this may be, it is no reason for denying that this view was suggested by the Second Committee of the 1930 Hague Conference for the Progressive Codification of International Law. However this principle was not approved by the Hague Conference itself. Having taken a different view, the Conference instead adopted a provision according to which the waters of a river could be considered as constituting inland water up to a line following the general direction of the coast drawn across the mouth of the river only when it flows directly into the sea; that is irrespective of its width. If the river flows into an estuary, then the rules applicable to bays were to be applied to the estuary.(79)

Similarly, the final draft of the ILC, namely of 1956, contained like criteria,(80) and Article 13 of the Geneva Convention which is pertinent, provides that:

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."(81)

Before leaving the discussion on mouths of rivers, attention should be focused on the UNCLOS III which has considered this question. Article 9 incorporated in the

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(79) Report of the Second Committee, LN Doc. C.230.M.117, 1930, V, p.14.

(80) Article 13 of the draft ran as follows:
"1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn inter fauces terrarum across the mouth of the river.
"2. If the river flows into an estuary the coasts of which belong to a single State, Article 7 'Bays" shall apply," Report of the ILC covering the work of its 8th Sess., U.N. Gen. Ass. Official Records, 11th Sess., Supp. No. 9(A/3159), p.18; YBILC, 1956, Vol. II, pp.253, 271-272.

(81) Brownlie, op.cit., Ref. (31) at 20, p.82. See for the history of this article, Whiteman, op.cit., Ref. (5) at 9, pp.339-342.

ICNT is almost identical to the language of Article 13 of the Geneva Convention.(82)

V. Roadsteads

Although roadsteads used for the loading and unloading of ships, are usually situated outside the territorial sea, they have been considered as forming parts of either internal waters or territorial seas of coastal sovereigns.(83)

Dealing with this question was one of the tasks facing the preparatory ommittee of the Hague Conference of 1930. The text prepared by the above committee in this respect provides that:

> "In front of roadsteads which serve for the loading and unloading of ships and of which the limits have been fixed for this purpose, territorial waters are measured from the exterior boundary of the roadsteads. It rests with the coastal State to indicate what roadsteads are in fact so employed and what are the boundaries of such roadsteads from which the territorial waters are measured."

Having submitted a proposal to the Second Committee of the Conference, the U.K. suggested amending the above text. In the light of the U.K. motion the Committee adopted the following provision:

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(82) Apart from the requirement of publicity U.N. Doc. A/CONF. 62/WP. 8/Part II, pp.6-7, very little has been said about this article as to where the precise mouth of the river may be. See Hodgson and Smith, op.cit., Ref. (38), at 22, p.237.

(83) Whiteman, op.cit., Ref. (5), at 9, pp.264-265.

> "Roadsteads used for the loading, unloading and anchoring of vessels, the limits of which have been fixed for that purpose by the coastal State, are included in the territorial sea of that State, although they may be situated partly outside the general belt of territorial sea. The coastal State must indicate the roadsteads actually so employed and the limits thereof."(84)

The Geneva Convention regulates the question of roadsteads. Article 9 of the Convention on the TSCZ provides that:

> "Roadsteads which are normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries to which due publicity must be given."(85)

Similar rules seem likely to emerge from the UNCLOS III. Article 12 of the ICNT is almost identical to the corresponding Article of the Geneva Convention.(86)

It appears, therefore, that the waters of the roadsteads have been considered territorial sea although they might be situated beyond the limit of the territorial sea for the purpose of enabling coastal States to exercise

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(84) League of Nations Basis of Discussion No. 11, II Territorial Waters, Conference for the Codification of International Law, The Hague, 1930, C.74, M.39, 1929, V, p.47. Report of the 2nd Committee, Conference for the Codification of International Law, The Hague, 1930, C.230, M.117, 1930, VI, p.13.

(85) U.N. Doc. A/CONF. 13/L.52, UNCLOS I, Official Records Vol. II, Plenary Meetings, pp.132,133. For details about the history of the article. See Whiteman, op. cit. Ref. (5) at 9, pp.268-270.

(86) See the text of the Article U.N. Doc. A/CONF. 62/WP.10/Add.1, p.24.

special rights of control over those roadsteads.

VI. Low-Tide Elevations

Low-tide elevation is a term used to refer to shoals, reefs and drying rocks, which are covered at high-tides and dry only at low-tide.(87) It has been defined as "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide."(88)

In this connection, it may be observed that low-tide elevations create another difficulty as regards drawing baselines. Usually, however, they do not affect the location of baselines apart from two exceptional cases: firstly, according to Article 4(3), namely where light-houses or similar installations are built on them.(89) Secondly, low-tide elevations affect the drawing of base-lines when they are wholly or partially situated within the breadth of the territorial sea.(90) The low-water line in the latter case may be used as a baseline for the purpose of measuring the limit of the territorial sea.(91) Therefore, elevations situated at a distance exceeding the extent of territorial sea from the mainland or island, have no territorial sea of their own.(92)

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(87) Whiteman, op.cit., Ref.(5), at 9, p.304.

(88) Knight, op.cit., Ref.(1), at 8, p.232.

(89) See the text of the Article. Brownlie, op.cit., Ref. (31), at 20, p.80.

(90) According to Article 11 of the Geneva Convention on the "TSCZ", ibid., p.82.

(91) Whiteman, op.cit., Ref.(5), at 9, p.304.

(92) ICJ Reports, 1951, p.128.

Thus, it appears that the above rules have been well established as principles of international law. Accordingly, identical Articles to 4 and 11 of the Geneva Convention have been produced by the UNCLOS III.(93)

Section Three

Islands

Not only are there the problems of straight and artificial baselines, but even more complicated difficulties arise with regard to islands.(94) Both principles of international law and practice would appear to suggest that they constitute another exception in the establishment of baselines permitting deviation from the general rule of shoreline. For the moment it is important to note that it is recognized that islands in general do affect the drawing of baselines as, like mainland areas, they possess their own territorial sea.(95)

However, the question of islands has attracted the attention of those concerned with this area of the law of the sea. This may be shown in that, from the very beginning, this question has been considered by the Second Committee, of the Hague Conference for the Codification of International Law of 1930. The Committee

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(93) See Article 12 of the ICNT, A/CONF. 62/WP. 10/Add.1 p.24.

(94) Seven per cent of the land area of the earth approximately is encompassed by oceanic islands. Almost every coastal State possesses islands and many countries are totally insular in geography. See Knight, op.cit., Ref. (1), at 8, p.147.

(95) Brownlie, op.cit., Ref.(5), at 9, p.202

evolved in its report the following text:

> "Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark."(96)

An even better illustration of the serious consideration given to the problem of islands is to be found in the fact that the ILC also took upon itself the drafting of an appropriate provision pertinent to the subject. It incorporated in its final draft Article 10 which provides that:

> "Every island has its own territorial sea. An island is an area of land, surrounded by water which in normal circumstances is permanently above high-water mark."(97)

All this is not the only evidence of the care specific to the question of islands. It may be added that the Geneva Conference discussed the question and approved this text with only one amendment. Article 10 of the Geneva Convention runs as follows:

> "1. An island is a naturally-formed area of land, surrounded by water, which is above water at high tide.
> "2. The territorial sea of an island is measured in accordance with the provisions of these Articles."(98)

A careful reading of the above Article shows that all islands, irrecpective of their size, population,

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(96) L.N. Doc. C230. M. 117, 1930, V, p.13.

(97) Report of the ILC covering the work of its eighth session, 23 April-4 July 1956, U.N. Gen. Ass. Official Records, 11th Sess. Supp. No. 9 (A/3159) pp.16-17; YBILC, 1956, Vol. II, pp.253-270.

(98) U.N. Doc. A/CONF. 13/L 52; II UNCLS, Plenary Meetings, pp.132-133; Brownlie, op.cit., Ref. (31), at 20, pp.81, 82.

locational requirement in relation to the mainland, namely whether situated in high seas or territorial sea, or any other particular geographical or special condition, have their own belts of territorial sea.(99) Only the following conditions must be satisfied:

1. The island must be natural and not artificial.(100)
2. Apart from abnormal circumstances, it must also be permanently above sea level.(101)

An observation with regard to the question of newly emergent islands may be interposed. Here, two types of emergent islands may be distinguished. If an island arises within the limit of the territorial sea of a certain State it undoubtedly belongs to the State concerned and the general principles already outlined are applicable to the case. On the other hand, if the island emerges on the high sea, it obviously belongs to no one unless occupied effectively by any State, which in turn notifies other States.(102)

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(99) Ibid. See also Brown, E.D. "Rockall and the Limits of National Jurisdiction of the U.K.", Part 1, Marine Policy, 1978 p.204; Bishop, op.cit., Ref. (2), at 8, p.301.

(100) This question is disputable. See Knight, op.cit., Ref. (1), at 8, p.156. It is logical to provide the naturality of the island for baseline purposes, otherwise coastal States would have a wide range of liberty to extend their territorial seas by building structures upon the adjacent waters of which they would be permitted to measure their territorial seas from.

(101) This condition is subject to controversy. See Knight, op.cit. Ref.(1) at 8, p.156; Whiteman, op.cit., Ref.(5) at 9, pp.274-303.

(102) Colombos, op.cit. Ref. (4) at 9, p.120. In the Anglo-Norwegian Fisheries Case the U.K. recognised that the islands forming part of the "skjaergaard" ought to be treated as part of Norway's coastline. ICJ, Reports, 1951, pp.120-123.

Rules Emerging from UNCLOS III

The UNCLOS III discussed the question of islands and the ICNT isolated a provision for this purpose. Article 121 (i) of the ICNT follows almost the language of Article 10 of the 1958 Geneva Convention.(103) But, in one respect at least it can be criticized as it contains a new text raising a further complication in connection with this already difficult issue.(104) Paragraph 3 contains the essence of the problem. It provides that:

> "3. Rocks which cannot sustain human habitation or economic life of their own shall have no economic zone or continental shelf."(105)

Clearly, language of this kind leaves much room for dispute. One must enquire, firstly, what constitutes a "rock"?(106) And secondly, what is meant by "cannot sustain human habitation or economic life of their own?"(107)

Comment

The above discussion appears to confirm the conclusion that islands are all treated under the Geneva Conventions

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(103) See the text of the Article U.N. Doc. A/CONF. 62/WP 10/Add. 1, p.68.

(104) Brown, op.cit., Ref. (99), at 44, p.205.

(105) U.N. Doc. A/CONF. 62/WP. 10/Add. 1, p.69.

(106) Brown, op.cit., Ref. (99), at 44, p.205.

(107) For further details see, Brown, ibid., p.206; Hodgson and Smith, op.cit., Ref. (38) at 22, pp. 230-232.

of 1958 in the same way.(108) Whilst the provision produced by the UNCLOS III is clearly more appropriate in excluding certain rocks from generating their own area of continental shelf, it does nothing to solve the problem as a whole. It is essential for the purpose of avoiding any potential confusion and uncertainty, or at least to minimize them, that the term rock should be defined and some phrase should be added in order to clear up the point of habitation.(109)

It may also be suggested that generalizing the system of conferring upon all islands equally the right to possess their own continental shelf, is an unequitable principle. One might just as well suggest that several factors would have to be taken into account before deciding whether it is equitable to accord a baseline to any given island. The configuration of the shore, its resources, the propinquity or the remoteness from the shore, the livelihood of the littoral population and so forth are inevitable considerations to be taken into account before making a decision in this respect.(110) Such a proposal was suggested during the eighth Session of the

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(108) Brown, ibid., p.205; Fahrney II, Richard L. "Status of an Island's Continental Shelf Jurisdiction: A Case Study of the Falkland Islands" J. Marit. Law Com. Vol. 10, No. 4, 1979, p.552.

(109) Brown, ibid., pp.205, 206.

(110) Decision of the Anglo-French Continental Shelf Case, Paragraphs 187, 188, 197, 198; see below Ref.(20), at 198;UNCLOS III Official Records, Vol. IV, 1975, p.15. See also the "Draft Article on Delimitation of Areas of Continental Shelf Between Neighbouring States"; ibid. Vol. V, 1975, pp.220-221; Brown, op.cit., Ref. (99), at 44, Part II, p.298.

UNCLOS III. It is proposed to amend Article 121 of the ICNT (Regime of Islands) in such a way as to include all the relevant circumstances to be considered in attributing continental shelves to islands.(111)

Groups of Islands; Archipelagos

Coasts sometimes consist of groups of islands which are found either dispersed or so close(112) both to each other and to the mainland as to form part of archipelagos.(113) Archipelago is defined as "a formation of two or more islands, islets or rocks, which geographically may be considered as a whole".(114) It is defined also as"a group of islands, including parts of islands, interconnecting waters, and other natural features which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic, and political entity, or which historically have been regarded as such".(115)

As it is not intended to examine each of the widely varying geographical characteristics of archipelagos, it

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(111) C.2/Informal Meeting/21, 28 April 1978; See the comment of Professor Brown about this proposal. Brown, ibid.

(112) Knight, op.cit., Ref. (1) at 8 , p.147.

(113) Deciding whether or not a group of islands constitutes part of archipelagos depends chiefly on geographical factors and exceptionally on historical perspective. See Colombos, op.cit., Ref. (4) at 9, pp.120, 121.

(114) For further details, see Knight, op.cit., Ref. (1) at 8 , pp.183-186.

(115) Stevenson, John R. and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Sessions", AJIL, Vol. 69, 1975, p.21.

will suffice to observe however, that if a group of isolated islands or even one island, creates a difficulty as shown above, this fact is even more evident in the question of archipelagos. The reason for this would be simply that it is generally recognized that each island, with certain merits, possesses its own territorial sea according to the general rules applicable to islands, whilst the archipelagos is still a matter of controversy.(116) To demonstrate this, it may be stated that in tracing the steps pertinent to the question one might easily conclude that archipelagos were treated in the very beginning separately, as each one possessed its own territorial sea. Then, it came to be recognized that the limit for the territorial sea should be measured from the centre of the group.(117) Afterwards, a new trend arose in favour of drawing baselines joining the group of islands(118) if they were close enough to each other.(119)

Apart from the outlined trends referred to, the Preparatory Committee for the Hague Conference of 1930 suggested a text according to which "a group of islands

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(116) Whiteman, op.cit., Ref. (5) at 9 , p.286.

(117) Ibid., p.286.

(118) Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law-1", BYBIL, Vol. 31, 1954, pp.371-417.

(119) The forces lying behind this trend are that since such a group of islands sometimes forms a unit, thus it becomes important to determine a unified belt of territorial sea with all waters around the seaward side of the group of islands as a whole. See Knight, op.cit., Ref. (1), at 8, , p.156.

which belongs to a single State and at the circumference of the group are not separated from one another by more than twice the breadth of territorial waters, the belt of territorial waters shall be measured from the outermost islands of the group. Waters included within the group shall also be territorial waters.

The same rule shall apply as regards islands which lie at a distance from the mainland not greater than twice the breadth of territorial waters."(120)

However, in spite of this, no rule was produced by the Hague Conference, thus subsequent State practice had been modified even by drawing any lines between the islands of a group.(121)

There is further the fact that the ILC failed to produce a draft article regulating the question of archipelago. Instead, it only pointed out in a comment in Article 10 that the straight baseline system might be applicable.(122)

Also the Geneva Convention has not made any particular provision as to the matter.(123) The problem thus remained unsolved.(124)

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(120) League of Nations, Basis of Discussion No. 13, C.74. M39, 1929, V, p.51.

(121) Fitzmaurice, op.cit., Ref. (118), at 48, pp.371-417.

(122) Brownlie, op.cit., Ref. (5), at 9, p.203.

(123) Bishop, op.cit., Ref. (2), at 8, p.302.

(124) Although both Indonesia and the Philippines employ a straight baseline system, they have declared that the baselines for their territorial sea are determined by drawing straight lines across the outermost points of their outermost islands. See the Philippines Claim, YBILC, 1956, Vol. II, pp.69-70; Indonesian Claim and the U.K. Protest cited in Lauterpacht, E. "The Contemporary Practice of the United Kingdom in the Field of International Law - Survey and Comment", VI, ICLQ, Vol. 7, 1958, p.538.

It may be added that, in spite of the importance of the issue, it would seem that no agreement on the subject has so far been reached.(125) It thus becomes of some importance to consider the matter at the UNCLOS III. Problems of principle emerged throughout the conference as to the concept of archipelago States. The debate centred on whether or not a coastal State could unilaterally declare itself as an archipelago State, or whether it would first have to meet certain requirements.(126)

Fiji, Indonesia, Mauritius and the Philippines have proposed that archipelago States should be allowed to enclose all "archipelago waters" lying within their outermost islands on which only innocent passage would be permitted.(127)

On the other hand, the U.K., in an attempt to find a solution, proposed to limit the application of the principle of archipelago waters. In brief she suggested mainly that the baselines connecting the outermost points of the outermost islands of the archipelago State must not exceed 24 nautical miles and that the ratio of the

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(125) Since the Geneva Conference did not accept the concept of archipelago, States have been reluctant to accept it because of the concern for transit through waters in areas where the concept of archipelago might be applied, as well as the fear that the principle would be extended by other States beyond recognition. See Oxman, Bernard H.,' The United Nations Conference on the Law of the Sea: The 1977 New York Session', AJIL, Vol. 72, 1978,p.65.

(126) Ganz, David L., "The United Nations and the Law of Sea", ICLQ, Vol. 26, 1977, pp.23-24.

(127) Fiji, Indonesia, Mauritius and the Philippines: Draft Articles on Archipelagos, 28 Report, 111, 102 (1973); cited in ILM, Vol. 12, 1973, p.1263.

zone of the sea to the area of land territory must not be more than five to one. Also, according to the U.K.'s proposal, the regime applicable to international straits, namely free transit, would govern archipelago waters used before ratification of the convention for international navigation.(128)

Consequently, agreement was reached during the 4th Session of the UNCLOS III on a definition of archipelago States. This concept in terms of the ICNT is designed to cover a group of islands that "form an intrinsic geographical economic and political entity or which historically have been regarded as such."(129)

Comment

It is worth noting that the UNCLOS III offers a new opportunity to resolve the issue. This appears to show signs of an important shift in principle to bring about universal recognition of the status of certain States as archipelago. Although the outcome is still awaiting a final decision by the Conference, it is more likely however that, if it is desired to include the archipelago notion in the treaty, two main points should be taken into account. Firstly, the precise limits of the concept must be adequately explained in order to avoid any undesirable attempt to extend the notion. Among the criteria

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(128) U.K. Draft Articles on the Rights and Duties of Archipelago States, 28 Report III 99 (1973) cited in ILM, Vol. 12, 1973, p.1259.

(129) See the full text of Article 46 of the ICNT, U.N. Doc. A/CONF. 62/WP. 10/Add.1, p.37.

suggested are land to water ratios and precise maximum lengths for archipelago lines. Secondly, the respective rights and duties of archipelago States as well as those of the international community have to be specifically determined. Anything other than free transit through and over what would be parts of archipelago waters is contrary not only to the universally recognized concept of freedom of the high seas,[130] but also to the principles of the current century, namely rapid and easy communication between nations.

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(130) Stevenson and Oxman, op.cit., Ref. (115), at 47, pp.21-22.

CHAPTER TWO

SEAWARD EXTENSION OF MARINE BOUNDARIES

It is necessary at the outset to recall that it is firmly recognized that coastal States are entitled to exercise limited rights over parts of the sea and the seabed adjacent to their coasts as shown earlier.(1) To say the foregoing is not to argue that the seaward extension of marine boundaries is presently uniform. Although States claim jurisdiction and recognize that of others over belts of the sea, they never agree as to the extent of these offshore areas. More important, claims of coastal jurisdiction in Latin American States have changed drastically. A number of States in one form or another have claimed jurisdiction over large parts of the adjacent sea and the seabed.(2)

However, as to the question of delimitation of marine boundaries, the purpose of this chapter is to examine the principles of law governing the delimitation of the outer limit of the territorial sea and continental shelf. The first section of the chapter discusses the breadth of the territorial sea. The second section considers the outer limit of the continental shelf.

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(1) See above, pp. 8 et seq.

(2) See Zacklin, Ralph, "Latin America and the Development of the Law of the Sea: An Overview, In Zacklin, Ralph ed., "The Changing Law of the Sea; Western Hemisphere Perspectives" 1974, pp.59-73; Hjertonsson, Karin, "The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea", 1973, pp.7, 19-38.

Section One

The Breadth of the Territorial Sea

The term "territorial sea" is designed to refer to that belt of the sea adjacent to the State coastline which extends from a line running parallel to the shore to a specified distance from it.(3) This is usually measured from the low-water mark, or under certain conditions from other locations.(4)

O'Connell defines it as "that area of water adjacent to the coast over which international law permits the littoral State to exercise plenary authority, subject only to a general right of innocent passage on the part of foreign shipping".(5)

It may also simply be described as "that belt of the sea situated between internal waters and high seas".(6)

After this very brief clarification, in order to understand the doctrine of the territorial sea, we must now turn firstly to the question of who is competent to decide what is a lawful width for a State's territorial sea. Secondly, what, according to the principles of international law, is the present lawful width?

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(3) The extent of the territorial sea is disputed. It is usually measured in marine miles. The marine mile is the "admiralty"or "nautical" mile as adopted by the British Hydrographic Office. It is equivalent to 1853 metres. Colombos, op.cit., Ref.(4) at 9 , p.88.

(4) Ibid.

(5) O'Connell, D.P. "International Law" 2nd ed., Vol. 1, 1970, p.455.

(6) Al-Ghoneimy, Dr. M.T., "The International Law of the Sea in the New Directions", Cairo, 1975, p.129.

Subsection One

Who is Competent to Determine the Lawful Width for a State's Territorial Sea?

Before taking up the question under consideration, it might be convenient at this point to note very briefly that there has never been a consensus of opinion as to the body entitled to determine the width of the territorial sea. For instance, the extent of the territorial sea, according to one view, cannot be determined merely according to the will of the coastal States as expressed in their municipal law. It follows therefore that it must be established by international law rules. On the other hand, an opposing view takes up a position in support of the opinion that each State is free to determine unilaterally a lawful width for itself, irrespective of the interests of other States.(7)

These two contradicting views are the subject of the following discussion.

I. Unilateral Determination by the State Concerned

One possible way around this question is that States could determine an authoritative width of territorial sea for themselves. In so doing, it is contended that each coastal State is exercising its sovereign powers. That is to say each state is free to fix its limits of territorial sea. Consequently, each State is entitled

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(7) Whiteman, op.cit., Ref. (5) at 9, p.137; see also The Individual Opinion of Judge Alvarez in the Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.150.

exclusively to determine whatever breadth it regards as being indispensible to it. Thus, the State takes into account its real needs as it sees them.(8)

At this point it must be mentioned briefly(9) that this view was advanced vigorously by the Soviet Union and the States politically associated with it, as well as being commonly supported by several South American States. The reason they gave for adopting this view is that coastal States ought to be the sole arbiters of their territorial seas.(10)

However, due to an extensive expansion of the territorial sea by Chile, Ecuador and Peru, it became very urgent for American States generally that this issue be decided. A special conference of the American States therefore, was held in Mexico City in 1956 to consider the "System of Territorial Waters and Related Questions".(11) After having been adjourned, the conference adopted a declaration,(12) in accordance with which each State was entitled to establish its territorial sea within reasonable limits, taking into account its real needs. The

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(8) Whiteman, op.cit., Ref. (5), at 9, p.75.

(9) U.N. Doc. A/C.N. 4/S.R.166/P.3.

(10) McDougal and Burke, op.cit., Ref. (1) at 11, p.486; Pan American Union, "Final Act of the Third Meeting of the Inter-American Council of Jurists, 1956, pp.50-59.

(11) McDougal, Myres S. and William T. Burke, "The Community Interest in a Narrow Territorial Sea; Inclusive Versus Exclusive Competence Over Oceans" Cornell Law Quart., 1970, Vol. 45, p.207.

(12) This declaration was adopted with one dissenting vote, "the U.S.", and several abstentions. The U.S. declared that the adopted declaration was contrary to international law. Pan American Union, op.cit., Ref. (10) above , pp.50-59; ibid., p.208.

influencing factors according to the declaration were economic needs, security and defence interests as well as the related aspects such as geographical, geological and biological considerations.(13)

Turning back to the record of the ILC,(14) it would be pertinent to add that several members of the ILC proposed, when this matter was discussed, that each State was qualified to determine the breadth of its territorial sea at whatever distance was considered vital to secure its economic and strategic needs.(15) The member from the Soviet Union, among others,(16) asserted this consistently throughout the Commission's deliberation. Another member of the Commission, at its fourth Session, also subscribed to this view. Professor Scelle stated that the only advisable rule was that which took into consideration the fact that the territorial sea was the area without which at any given time a State felt its existence could not be maintained and it could not effectively defend itself.(17)

It may be added that at the 1958 Geneva Conference on the Law of the Sea, the Representative of the Soviet Union once again argued strongly that it was a "sovereign right" of each coastal State to determine exclusively the width of its territorial sea. In an attempt to strengthen his argument he maintained that not only "international

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(13) Pan American Union, ibid., p.36.
(14) See above p. 55, 56.
(15) Whiteman, op.cit., Ref. (5) at 9, p.75.
(16) See similar views below p.60
(17) U.N. Doc. A/CN. 4/SR. 166, 14, 11.

practice" but also "national legislation" showed a tendency to favour this opinion.(18) The same view was held by the Czechoslovakian representative at the Conference. He stated that:

> "Each State was competent to fix the breadth of its own territorial sea in the exercise of its sovereign powers, taking into account its genuine needs."(19)

Hungary also took up a similar position.(20)

II. The International Determination

Now it remains to consider the opposing point of view, which is that of the majority of States. A completely different view, and perhaps more reasonable one, rests its case on the contention that the breadth of the territorial sea is an important question of international law which affects the international community as a whole. It must thus be decided by a general community consensus. Accordingly, whatever breadth may be ultimately determined, it is binding on individual States.

This argument in fact is based on the premise that if the right of each coastal State to fix the width of its territorial sea unilaterally were recognized, it would in this respect render international law ineffective. Other reasons have been given as a basis for this view. It has been alleged that unilateral determination is

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(18) In effect, all States in the Soviet bloc, apart from Poland, took up the same position. U.N. Doc. A/CN. 4/SR. 166.168, 11.

(19) UNCLOS I, Official Records, Vol. III, p.67.

(20) Ibid., p.63.

contrary to the basic principles of international law. Obviously, in authorizing each State to fix its territorial sea limit, other States are simply required to accept such a determination. Such exclusive delimitation surely determines not only the scope and content of domestic exclusive interests, but also both the inclusive and exclusive interests of other States.(21) Consequently, if unilateral determination was generally accepted, it would lead to a complete loss of community authority. In addition, a State could easily justify its claimed width as being legal by reference to its own egoistical interests, no matter whether they are genuine or not, and irrespective of how much that width would affect other States' interests. However, having outlined the basis of this view, it may be noted that on the few occasions this matter was dealt with there has been almost an opinion to the effect that the width of the territorial sea must be internationally determined. Replies received from States by the Preparatory Committee for the 1930 Conference, for example, made no reference to even a slight desirability for unlimited authority to fix the breadth of the territorial sea.(22) At this conference, apart from Spain, States generally accepted the concept of an internationally established limit for the width of the territorial sea.(23)

The Inter-American Specialized Conference on "Conservation of National Resources: The Continental Shelf and

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(21) See U.N. Doc. A/CN. 4/SR. 166/p.7.

(22) See McDougal and Burke, op.cit., Ref.(11) at 56, p.206.

(23) Ibid.

Marine Waters" was held in March, 1956 at Ciudad Trujillo. The issue concerning which body was authorized to determine the width of territorial sea was one of the matters put before the Conference. The final resolution adopted by the Conference emphasized that "there exists a diversity of positions among the States represented at this Conference with respect to the breadth of the territorial sea".(24) Thus, there was no consensus on this issue among the American States.(25)

When the problem in question was considered by the ILC, it was proposed by Mr. Zourek, of Czechoslovakia that each coastal State was free to fix the breadth of its territorial sea according to its own needs. That was the principle he had formulated in paragraph (1) of his proposal, which he hoped would be accepted as a constructive solution to the problem.(26) Mr. Zourek's proposal was:

> 1. Every coastal State, in the exercise of its sovereign powers, has the right to fix the breadth of its territorial sea.
>
> 2. Since the power of the coastal State to fix the limits of the territorial sea is limited by the principle of the freedom of the high seas, in order to conform with international law, the breadth of the territorial sea must not infringe that principle.
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> 3. In all cases where its delimitation of the territorial sea is justified by the real

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(24) Inter-American Juridical Year Book, 1955-1957, p.261.

(25) This resolution differed considerably from that which had been adopted in Mexico City the month before. See above pp. 56 et seq.

(26) YBILC, 1956, Vol. 1, p.163.

> needs of the coastal State, the breadth of the territorial sea is in conformity with international law. This applies, in particular, to these States which have fixed the breadth of their territorial sea at between three and twelve miles."(27)

This provision was rejected by eight votes to three with three abstentions.(28)

A similar proposal was submitted to the Geneva Conference by Peru. However, the Peruvian delegate, while intending to realise a general agreement among the States upon exclusive coastal competence, remarked that several proposals had been put forward for specific limits on the territorial sea. The delegation declared, thus, that it was "absurd" to require the concurrence of other States. Therefore, Peru ultimately withdrew her proposal.(29)

Yet another similar proposal was suggested at the Geneva Conference by the Soviet Union delegate. It read as follows:

> "Each State shall determine the breadth of its territorial sea in accordance with established practice within the limits, as a rule, of three to twelve miles, having regard to historical and geographical conditions, economic interests, the interests of the security of the coastal state and the interests of international navigation."(30)

It was observed that the crucial phrase in the Soviet's suggested article was "as a rule". The Soviet delegate,

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(27) YBILC, 1956, Vol. I, p.162.

(28) Ibid., p.181.

(29) UNCLOS I, Official Records, Vol.III, pp.166, 176.

(30) U.N. Doc. A/CONF. 13/C. 1/L.80.

in an effort to justify the good faith of that phrase, declared that it was "inserted ... in order to allow the possibility of making exceptions in special circumstances".(31) Therefore it was clear that the article was designed, notwithstanding the reference to three and twelve miles, to sanction each coastal State exclusively to determine the breadth of its territorial sea. Moreover, the broad scope and extent of the general criteria such as "historical and geographical conditions", "economic interests" and so forth are self-explanatory. In any case, the Soviet proposal was rejected.(32)

III. Evaluation

To some extent there is understandably a conflict between wider international community interests and narrow, national self interests. Nevertheless, this in itself is unjustified in allowing the coastal State to fix unilaterally the breadth of its territorial sea.(33) It may be observed that granting individual States the right to determine the width of their territorial seas might well serve in the interests of one State or one group of States, but would disregard international community interests.

Moreover, this overestimation of exclusive national interests is not fully justified for the following reasons:- Firstly, it overestimates the interdependence of individual States' interests, ignoring the most comprehensive long-term

(31) UNCLOS I, Official Records, Vol.III,p.108.

(32) UNCLOS I, Official Records, Vol.III,p.169.

(33) McDougal and Burke, op.cit., Ref. (11), at 56, pp.252-253.

interests of all States.

Secondly, it does not take into account the possible solutions involving harmonization of conflicting interests by which all would gain and none would lose.

Thirdly, it disregards the close association between the exclusive interests of individual States and the common interests of the international community. It is quite clear that the utmost gains are produced not from exclusive use, however benevolent, but from shared exploitation of the seas with reciprocal cooperation between States.(34)

It may be argued that due to the failure of the international conferences to agree upon an explicit limit for the territorial sea, States are still completely free to adopt whatever width they please. This argument may be contended, at least in the writer's view, as it confuses between two wholly separate points. The question of who has the power to fix the breadth of the territorial sea is not related to determining the definite limit of the territorial sea. "This is evident because the notion of complete freedom is commonly, put forward as a separate claim to authority on this problem and, just as commonly, rejected even though no prescription as to specific width is otherwise adopted".(35)

Also, the more obvious reason for rejecting this tendency is that accepting the view that conferring upon each State the power to decide the width of its territorial sea might lead to international disputes. It seems reasonable to suppose that a potential dispute between

(34) Ibid., pp.204-205.
(35) Ibid., p.205.

two adjacent or opposite States making an overlapping claim to the same area of the sea as constituting their territorial seas, is the only consequence which would be produced if one believed in the unrestricted competence of the coastal State to determine unilaterally its own territorial sea. Accordingly, authorizing coastal States to determine their territorial sea exclusively could become complete, exclusive monopolization of the common resources of the seas by the most powerful States, On the other hand, if conflicts are to be solved by means other than force, such as military or economic pressures, one must find a method of reconciliation. This is undoubtedly what is sought by efforts made to achieve consensus on the limits of the territorial sea.(36)

It may be added that the claim that individual States are exclusively free to set up whatever limit of territorial sea they desire, would if generally accepted affect other States' interests. Accordingly, such a claim is inconsistent with the main principles of international law which recognize the sovereignty of each State over its land territory and territorial sea. This is because in claiming to have the competence to unilaterally determine the breadth of their territorial seas, States are attempting to fix not only the tether and content of their rights in waters adjacent to their coasts, but also the rights of other States.(37) By unilaterally extending their territorial sea belts, States make a hostile inroad to the

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(36) Ibid., pp.204-205.

(37) Ibid., p.204.

inclusive rights of other States. In turn, those other States may claim competence solely to determine the limits of their territorial sea zones which, as was mentioned earlier, might overlap with others. Certainly, problematic conflicts are the unique and expected results of such contradictory interests.

Another observation in this connection must be made. It is not the unilateral claim, but the recognition by the international community, which produces the expectations of uniformity in decision which is commonly called international law.

Finally, it is evident from international practice that the notion of exclusive and unreviewable competence to determine the width of the territorial sea, is rejected. With few exceptions, the members of the ILC either contended that some specific limit was established in international law or that international law did not grant coastal States the right of exclusive determination.(38) The rejection of Mr.Zourek's proviso, which ended the effort to obtain approval for exclusive competence in the final recommendation on this issue, constituted an unequivocal determination that coastal competence was definitely limited by international law.(39) This view might find clear support in the Anglo-Norwegian Fisheries Case(40) in which the World Court stated that:

> "... the delimitation of sea areas(41) has always an international aspect; it cannot

(38) Ibid., pp.211, 212.
(39) Ibid., p.209.
(40) ICJ Report, 1951, pp.116-132.
(41) The term 'sea areas' mentioned in the Court's Judgment seems comprehensive enough to be regarded as relevant to claims for fixing the breadth of states' territorial seas.

be depended merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon unilateral law."(42)

Subsection Two

The Breadth of the Territorial Sea

The next question to be considered is that of the breadth of the territorial sea. There can be no doubt that this is one of the most complex issues in the law of the sea. This complexity arises for the following reasons:

1. The lack of a conventional, universal specific limit for the territorial sea.
2. The lack of advanced and developed techniques and principles, for the delimitation of the territorial or any other adjacent maritime zone.(43)
3. The relative weakness of international custom regulating this question

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(42) Ibid. However, the Court's judgment has been criticised as it is worded ambiguously. It is argued that, having said there is an "international aspect", the judgment has left the matter unclarified. Professor R.Y. Jennings quite rightly requested firstly, whether the said term "international aspect" means that every third State has a legally opposable interest in the delimitation of territorial sea, or is it only States whose interests might be affected or damaged. Secondly, if the third State has an opposable right, how would it be protected in the absence of compulsory jurisdiction before the ICJ or any other international tribunal? And thirdly, if one State objected, while others accepted or approved, what would be the position? See Jennings, R.Y., op.cit., Ref.(63), at 32, pp.378, 379.

(43) Boggs, op.cit., Ref. (13),at 14, pp.240-241.

4. Finally, the inextricable confusion in most books on the subject between the problem of the extent of the territorial sea, and the controversies over the proper method of drawing baselines. It is only in recent years that the essential distinction between the question of the baseline, and the question of the extent of the zone, has come to be generally agreed upon, and recognition of this distinction may be welcomed as the first step towards a consistent solution to the problem as a whole.(44)

However this subsection will be devoted firstly to the historical background of the delimitation of the extent of the territorial sea,(45) secondly to the role of international organizations in unifying the extent of the territorial sea, and thirdly to the present breadth of the territorial sea. Finally, there will be an evaluation of the issue.

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(44) Smith, op.cit., Ref. (10), at 14, p.22.

(45) It may be argued that it would be pointless to engage in an analysis or historical account of state practice, discussion and controversies that have for centuries revolved around the question. It is true that such surveys have been carried out by numerous writers. However, it is equally true that it is worth shedding some light on the historical background of this issue. This might be justified for the purpose of understanding the forces lying behind current claims and trends in this respect.

I. The Historical Perspective of the Extent of the Territorial Sea

It is worth remembering that the legal status of the sea has been the subject of long and arduous discussion. Several theories have been advanced, based upon the two opposite principles of the "closed sea" and the "free sea".(46) Meanwhile, the doctrine of mare nostrum, or sea belonging to a single nation, was also advocated. Various kings and princes began to claim sovereignty over waters adjacent to their coasts. Venice, for instance, demanded the payment of a levy, beginning in the year 1269, from all vessels sailing in the Adriatic.

In 1432, Denmark claimed the exclusive right to fish in the Icelandic Sea. In 1609, King James of England claimed privileges in the North Sea.(47) He prevented fishing in the seas of England, Scotland and Ireland without his licence.(48)

Consequently, writers also began to argue about the question of sovereignty over the territorial sea. Bartolus

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(46) See Swarztrauber, op.cit., Ref. (5) at 12, pp.10 et seq. It had been laid down by Roman Law that the sea was communis omnium naturali jure. This is the concept of "free sea", common to all mankind. Therefore it was not susceptible to possession, and its resources were open to all men. This view had been incorporated into the Justinian Code promulgated in 529. Hence, according to the Roman Law, there was no extension of State jurisdiction from the coastline seaward. See Fenn, Percy Thomas Jr., "Justinian and the Freedom of the Sea", AJIL, 1925, Vol. 19, pp.716-727.

(47) Swarztrauber, op.cit., Ref. (5), at 12, p.11.

(48) Oudendijk, J.K., "Status and Extent of Adjacent Waters; A Historical Orientation", 1970, p.15.

de Sassoferrato (1314-1357) held that the jurisdiction of the coastal State extended to a distance one hundred miles seaward, which was equivalent to two days journey in his time.(49)

Baldus de Ubaldus (1327-1400), another Italian jurist, who was a pupil of Bartolus, proposed a limit of 60 miles, a distance which was supposed to equal one day's travel.(50)

Afterwards, jurists continued to advocate the right of a coastal State over a belt of the sea around its coast. Thomas Digges in 1569,(51) followed by Robert Gallis in 1622,(52) asserted the jurisdiction of a governor over the sea around his coast.

In 1635, John Selden produced his work Mare Clausum, partly to enhance Charles I's claim for possession over wide areas of ocean, and partly to oppose Hugo Grotius' Scholary work entitled Mare Liberum which had been written in 1609 to support the Dutch view of the infeasibility of possession of the sea.

However, towards the end of the seventeenth century both the Mare Clausum and Mare Liberum concepts lost their identities by being absorbed into the concept of possession of a right of national jurisdiction over limited belts for restricted purposes of a protective

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(49) Knight, op.cit., Ref. (1), at 8, p.56.

(50) Ibid., p.56.

(51) Gillis, R.J., "Seventeenth Century and Eighteenth Century Bases for the Exercise of Protective Jurisdiction in the Marginal Sea Area" LL.M. Thesis, Edinburgh University, 1975, p.85.

(52) Ibid., p.86.

nature.(53)

Grotius wrote again on the subject of jurisdiction over the seas. In 1623 and 1624 he published a great work on the "Law of War and Peace" in which he advocated restricted jurisdiction of the coastal State over an area the extent of which could be controlled from the land.(54)

Another jurist Samuel Pufendorf put forward the same view. In the 1688 edition of De Jure Naturae et Gentium, Pufendorf recognized that a coastal zone of sea was subject, as regards state practice, to the exclusive jurisdiction of littoral sovereigns.(55)

Other writers of the seventeenth and eighteenth centruies such as Cornelius Van Bynkershoek,(56) Christan Wolff,(57) and Valin,(58) unanimously recognized the right of the littoral State to enjoy a form of jurisdiction or sovereignty over a belt of water adjacent to its coast. Several treaties, as well as numerous laws and Acts issued, acknowledged this.(59)

By this time however, the principle of the territorial sea had evolved, but there was no agreement as to the

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(53) Ibid., pp.83, 84.

(54) Swarztrauber, op.cit., Ref.(5), at 12, p.20.

(55) Pufendorf stipulated four conditions to be met before any State could claim jurisdiction over the adjacent waters to its coast. For further details see Gillis, op.cit., Ref. (51), at 69, pp.99,100.

(56) He stipulated certain conditions for recognizing the right of a coastal State over waters adjacent to its coast. Ibid., p.101.

(57) He stated that the exclusive jurisdiction of the littoral State stretched as far as it could protect, Ibid., p.103.

(58) Ibid., pp.104-106.

(59) Ibid., pp.110-121.

definite limit of coastal sea to be considered within exclusive control of the littoral State. Various unsuccessful attempts were made to establish a general rule which might be applied in all cases.(60) It was advocated that such a distance depended on the range of a cannon, whilst another suggestion was that the limit should be determined by the "line of sight". Also, the limit was made relative to the Scandinavian League and so forth.(61)

These issues will be our concern in the following discussion.

a. The Cannon Shot Rule

The cannon shot principle which evolved during the seventeenth and eighteenth centuries simply stated that the maritime dominion of a State ended where its power of maintaining continuous possession by force of arms ended.(62)

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(60) Knight, op.cit., Ref. (1) at 8, p.56.

(61) See Fulton, Thomas Wemyss, "The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute". Edinburgh and London: W. Blackwood and Son, 1911, p.156; Walker, Wyndham L., "Territorial Waters: Cannon Shot Rule" BYBIL, 1945, Vol. 22, P.222.

(62) The first to advance the cannon shot view were the Dutch. On May 6, 1610 a Dutch delegation visited England complaining about the British Proclamation issued a year earlier. According to that Proclamation "Strangers" were forbidden to fish in a belt of water considered as British Seas. The Dutch delegation protested against the British claim. The protest submitted took the form of a note which contained the following: "For that it is by law of nations, no Prince can challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another". See Fulton, ibid., p.156; Walker, ibid., p.222; Knight, op.cit., Ref. (1) at 8, p.59.

This rule was a practical one.(63) There was never any difficulty in determining the extent of the territorial sea belonging to a state. One needed only to fire a cannon placed on the shore and measure the distance(64) where the shot fell.(65)

In a work published in 1703, the Dutch Jurist Cornelius Van Bynkershoek, claimed that the sovereignty of states ought to be extended to the point at which the power of arms placed on the shore ended.(66)

This rule prevailed during the seventeenth and eighteenth centuries. It was adopted in the treaties concluded between Great Britain and Algiers on May 14, 1762 and with France on September 26, 1786, in addition to several other agreements.(67) The rule was also promulgated by renowned writers for example Samuel Pufendorf, Christian Wolff, Emmerich de Vattel, as well as Cornelius Van Bynkershoek.(68)

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(63) Fulton justified this rule by stating that the sea should salute the land and the range of the arms determine the limit within which the salute ought to be rendered. See Colombos, op.cit., Ref. (4) at 9, p.92; Fulton, ibid.,pp.577 et seq.

(64) The range of guns at the time was approximately one marine league. See Colombos, ibid., p.92.

(65) Obviously this rule produced no uniform breadth for territorial sea. This is because the range of cannon was usually affected by several factors such as height, position and calibre of the cannon itself. See Swarztrauber, op.cit., Ref. (5) at 12, p.34.

(66) Colombos, C.J.,"Territorial Waters", Trans. Grotius Soc., 1924, Vol. 9, pp.96, 98, Colombos, op.cit., Ref. (4), at 9 , p.92; Brownlie, op.cit., Ref. (5), at 9 , p.184.

(67) Colombos, op.cit., Ref. (4) at 9 , p.95.

(68) For further details see Swarztrauber, op.cit., Ref. (5), at 12, pp.27-33; Walker, op.cit., Ref. (61) at 71, pp.215 et seq.

One main criticism of the cannon shot rule was its variability. The cannon shot range is liable to periodic changes as the science of ordnance improves. The distance covered by a cannon shot has increased over the centuries, and this has rendered the rule untenable. Had the cannot shot rule been accepted, some of the territorial sea belts would be subject to two or more different jurisdictions. The progress of ballistics on the one hand, and the necessity for a more effective defence on the other, made this concept obsolete and of merely historical interest.(69)

b. The Line-of-Sight Doctrine

The cannon shot rule, as it has already been outlined, was prevalent in the North Central European mainland. Meanwhile, another measure was being utilized by the peripheral maritime States of Spain, England and Scandinavia. This rule depended on the range of vision on a fair day. It was incorporated into several laws and treaties enacted and convened by a number of States.(70)

The first country to practice the line-of-sight rule was Spain. In a proclamation issued in October 1565, King Philip II of Spain asserted that "No one can come to our coasts, harbours, roadsteads or rivers, or within sight of our land...".(71)

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(69) Colombos, op.cit., Ref. (66), at 72, p.96; Swarztrauber, op.cit., Ref. (5), at 12, pp.34, 35.

(70) This principle was adopted by Scotland as well as England. See Knight, op.cit., Ref. (1), at 8, p.57.

(71) Crocker, Henry G. ed., "The Extent of the Marginal Sea: A Collection of Official Documents and Views of Representative Publicists", U.S. Department of State, Washington, 1919, p.622.

Many treaties and ordinances of the sixteenth and seventeenth centuries adopted the limit of "the range of visual horizon".(72)

In the wars following the French Revolution, the U.S. defended this rule in order to assert her neutrality. Thomas Jefferson, Secretary of State of the U.S., stated in 1793 that the breadth of the territorial sea was subject to differing claims. He said:

> "The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league ... This distance 'of three geographical miles from the shore' can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little or less, than is claimed by any of them on their own coasts."(73)

The "line of sight" concept had support in legal literature as well as state practice. The earliest writer to advocate the line of sight limit was Cornelius Van Bynkershoek. He later rejected the concept in favour of the cannon shot rule. Rayneval, Godey and Grotius, also made reference to the "line of sight" concept.(74)

Supporters of this concept claimed that the cannon shot rule had been inadequate, since it had not provided

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(72) Colombos, op.cit., Ref. (4), at 9, p.92.

(73) Moore, J.B., "A Digest of International Law, Vol. 1, 1906, pp.702-703.

(74) Swarztrauber, op.cit., Ref. (5), at 12, pp.38-40; Knight, op.cit., Ref. (1), at 8, p.58.

States with sufficient protection for their fishing and fiscal interests. They justified this rule on the basis that it responded to those needs.

The criterion for determining the limit of territorial sea by the range of vision is open to obvious criticism. Even though it was supposed to be ascertained on a fair day, the distance one could see varied. The exact limit of vision was affected by such factors as the height of the eye, the position of the observer, the keenness of his vision, the season, as well as the size and colour of the object to be seen,(75) and perhaps by other circumstances.

c. The Marine League

The extending of the territorial sea to a limit of a marine league was originally claimed by the Scandinavians. It appeared for the first time in international practice in 1743 when the Governor of Finmarken(76) gave leave to Russian fishermen to approach within one league of the maritime sphere of his province on payment of dues.(77) Once again, it was introduced in 1745. A Royal Rescript of June 18, 1745 was issued for the purpose of preserving Danish neutrality.(78) After the separation of Denmark and Norway the Finmarken Governor's action, which survived

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(75) The criticism was faced by the sponsors of the rule was that States could adopt as a limit the mean extreme range of human eyesight, translated into precise figures. See Swarztrauber, ibid., pp.40-43; Crocker, op.cit., Ref. (71) at 73, pp.394-395.

(76) The northernmost part of Norway.

(77) Kent, H.S.K., "The Historical Origins of the Three-Mile Limit", AJIL, 1954, Vol. 48, p.544.

(78) Knight, op.cit., Ref. (1), at 8, p.67.

as a part of Norwegian law, was confirmed by a Royal Ordinance issued on February 10, 1747.(79)

Sweden also issued in 1756, 1758, 1778 and 1779, Orders and Decrees by which she adopted a one league-mile limit of territorial sea. The last decree of 1779, which was issued by Prince Carl the Younger, asserted for instance that the Swedish jurisdiction over a maritime belt was one "German Mile" wide within which hostilities would not be tolerated.(80)

The one league extent was thus evolved in the Scandinavian countries from the late sixteenth century to the early nineteenth century partly for fishing purposes and partly for reasons of neutrality.(81) Moreover, other States, such as France, England, Scotland, Spain, the U.S. and Germany had, by the nineteenth century, incorporated to some extent the term "marine league" into the acts marking out their respective maritime boundaries.(82)

Several unsuccessful attempts were made to persuade the Scandinavian States to abandon the rule of one league. Most of them adhered to it as it enjoyed legal supremacy over any other claim.(83) Hence, the Scandinavian's Decrees appear to be the beginning of specific limits of

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(79) Kent, ibid., p.544.
(80) Swarztrauber, op.cit., Ref. (5), at 12, pp.48-49.
(81) Kent, ibid., p.552.
(82) Swarztrauber, op.cit., Ref. (5) at 12, pp.47-48.
(8) Ibid., p.49.

states' jurisdiction over belts of sea adjoining their coasts.(84)

d. The Three-Mile Limit

In the late eighteenth century, a new measure for the breadth of the territorial sea was developed. Statesmen and writers started to conceive of a definite hypothetical cannon shot range, namely a belt of adjacent water over which a cannon shot could range if placed so as to obtain a uniform standard of territorial sea zone.

The first writer to conceive of three miles as a maximum width for territorial sea was Ferdinando Galiani.(85) The basis for his convictions is disputed. It is said that he borrowed the idea from the French.(86) Another view sees it as being an effort to achieve a compromise between the two predominant limits in use at the time, namely that of his own State, "The Kingdom of the Two Sicilies" criterion, and that of the Scandinavians. Galiani's Government was upholding the cannon shot rule which was approximately two miles at the time, while the Scandinavians were claiming a league of four miles. Galiani chose to reach a compromise measure of three miles. At any rate, whatever the basis of Galiani's criterion, he has been considered the first advocate of the "three-mile

(84) Knight, op.cit., Ref. (1), at 8, p.68.

(85) Galiani (1728-1787) was originally known as an economist. His passion, in international law was probably occasioned on account of his diplomatic service. He had served in Paris from 1759 to 1769 as a secretary of the "Neopolitan Embassy" (Kingdom of the Two Sicilies). See Swarztrauber, op.cit., Ref. (5), at 12, pp.54-56.

(86) The reason being that, the cannon-shot-three-mile equation was formed by them. Swarztrauber, ibid., pp.51-54.

limit" rule.(87)

On the other hand, the U.S. has been regarded as the first state to incorporate the three-mile rule in her domestic legislation.(88) Having fixed her territorial sea according to that rule, the U.S. sent notes on November 8, 1793 to both the British and the French Governments declaring such action "provisionally".(89) Seven months later, the rule was incorporated in the law of the land enacted by Congress.

Moreover, many treaties concluded, and a series of Domestic Acts issued during the nineteenth century adopted, the rule of the three-mile limit. The courts, moreover, have taken a positive role throughout this century towards strengthening the three-mile rule. They have recognized in several cases that the territorial sea is three miles wide. Academics also approved of the three-mile rule.

To say the above is not to deny that, although the "three-mile limit" was born in the nineteenth century, contrary claims continued to be made throughout this century. It may be referred in this regard to the Scandinavian countries, who (apart from Denmark)(90) continued to adhere to the four mile rule. Spain, supported by Portugal, took many steps to put the six-mile limit into effect. Mexico alone claimed a nine-mile belt

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(87) Swarztrauber, ibid., pp.54-56.

(88) Ibid., pp.56-60.

(89) Although she was not in a hurry to fix her territorial sea, the U.S. did so under pressure. For further details, see Swarztrauber, ibid., pp.56-57.

(90) Denmark had given up the four mile claim by signing the 1882 North Sea Fisheries Convention. See Swarztrauber, ibid., pp.56-92.

of territorial sea.(91) Furthermore, at the turn of the present century, the USSR claimed a broader territorial sea, in fact twelve miles. She had claimed a twelve mile limit since the time of Imperial Russia, and she embodied that limit in a comprehensive statute on territorial jurisdiction in 1927.(92)

Thus, in spite of the fact that the three-mile limit rule had become a well articulated rule of international law,(93) other claims were steadily being practised in competition.

e. Multifarious Standards

It would not be irrelevant, before proceeding further, to allude to the fact that other criteria in addition to the three-mile standard, were concurrently in operation. Some of these measures might seem rather strange. The Franco-Moroccan Treaty of Peace and Commerce of May 28, 1767, for instance, established a 30-mile belt of territorial sea around when Moroccan vessels were concerned.(94)

Another view accepted the limit of territorial sea as being the extent to which those who sail in that part of the sea could be constrained from the coast as if they were on land.(95)

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(91) Ibid., pp.56-92.

(92) Oda, Shigeru,'International Law of the Resources of the Sea', Hague Recueil, 1959, II, Vol. 127, p.376.

(93) Daintith and Others, op.cit., Ref.(4) at 9, p. A201.

(94) Crocker, op.cit., Ref. (71) at 73, p.521.

(95) Walker, op.cit., Ref. (61), at 71, p.210; Kent, op. cit., Ref. (77) at 75, p.537.

Other theories have included the distance which could be covered by two days navigation,(96) the distance of a stone's throw,(97) the length of a race course and the maximum range of audibility of the human voice.(98)

II. Role of International Organizations in Unifying the Extent of the Territorial Sea

a. Role of the League of Nations

In the last century and early in this one, several efforts have been made to end the controversial difficulties concerning the territorial sea, and in particular, the question of its breadth.

Under the auspices of the League of Nations, a large conference met to codify certain aspects of international law. The width of the territorial sea was among three topics selected for codification by the Conference of 1930.

However, States' comments, on the questionnaire circulated by the preparatory committee, as well as their delegations' attitudes at the Conference itself, showed a wide diversity of opinion.(99) Four types of position were shown. Firstly, the great maritime States adhered to three or four miles; secondly, other nations supported the limit of six miles; thirdly, some States suggested that in addition to the three or six mile territorial sea, there should be a recognition of the conferring upon coastal States of a limited authority beyond that area;

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(96) Colombos, op.cit., Ref. (4) at 9, p.92.
(97) Crocker, op.cit., Ref. (71), at 73, p.394.
(98) Ibid., p.394.
(99) Oda, op.cit., Ref. (92), at 79, p.376.

and fourthly, the proposal of the Soviet Union for a twelve mile territorial sea.(100)

States wishing wider territorial sea extensions invoked various reasons for them, for example security interests and fisheries, while these adhering to a narrower limit emphasised the freedom of the sea.

However, despite the minutely worked out preparation for codification of the regime of the territorial sea, and despite the fact that only a small proportion of the tates attending the Conference claimed more than one league of territorial sea at the time,(101) the Conference failed to unify the extent of the area over which coastal States were competent to exercise jurisdiction.(102) Although the majority of the delegations did prefer the three mile breadth, it would have been difficult to reach an agreement on that limit since proponents of this width were not in agreement themselves as to the exercise of special authority in contiguous zones. While some States demonstrated their readiness to recognize the rights of coastal States to exercise jurisdiction in a three-mile belt plus a contiguous zone, others refused pertinaciously to acknowledge the validity of any claims beyond three

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(100) McDougal and Burke, op.cit., Ref. (11) at 56, pp.232-233.

(101) No voting took place at the conference. The position of the attending States was as follows: nineteen States claimed 3 miles; four supported 4 miles; twelve advanced six miles and two abstained. See League of Nations, Final Act, Conference for the Codification of International Law, The Hague, March-April, 1930, pp.253-257.

(102) See Daintith and Others, op.cit., Ref. (4), at 9, p.A201; Oda, op.cit., Ref. (92) at 79, p.376.

miles.(103)

At any rate, the Conference passed a resolution recommending a new Conference on this subject and due to the adjournment, the problem of the maximum permissible breadth of territorial sea remained unsolved.(104)

b. Role of the United Nations

The ILC

Undoubtedly the sea, while it has always been of interest to man, is a source of friction and conflict. In the post-war period, many States intended to expand their

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(103) See Act of the Conference for the Codification of International Law, Plenary Meeting, Annex 10, 123-124, League of Nations Pub. No. C 351.M.145. 1930, V; See also, Whiteman, op.cit., Ref. (5), at 9, p. 15. It may be observed that the British position, for example, firmly supported the "territorial sea belt of three miles without the exercise, as of right, of any powers by the coastal State in the contiguous zone ....". See for further details, Swarztrauber, op.cit., Ref. (5) at 12, p.137; League of Nations Final Act, op.cit., Ref. (101), at 81, pp.169-181, 254.

(104) Oda, op.cit., Ref. (92) at 79, p.376. Numerous opinions have been advanced to explain the failure of the Conference. Professor Jesse S. Reeves (1872-1942) ascribed the failure to two factors. The unwillingness of the participant States to compromise was in his view, one of the two reasons. He added, "this failure may be ascribed in the second place to what is believed to have been an erroneous view of the work and aim of the Commission. Following the instructions of the Conference, the Commission did not undertake to agree upon statements of existing international law, and so to limit itself, but it proceeded into the field of international law-making". See Reeves, Jesse S., "The Codification of the Law of Territorial Waters", AJIL, 1930, Vol. 24, p.488. Another ground was given to explain the conference's failure. The Chairman of the U.S. delegation attributed that failure to the extensivity of the program of the conference. He added: "The time alloted for its work was one month.. It is not desirable that international conferences should be conducted under such pressure". See Miller, Hunter, "The Hague Codification Conference" AJIL, 1930, Vol. 24, p.693.

territorial seas. Some claims simply took the shape of municipal legislations to widen the previous limits of territorial seas. Other States claimed rights exclusively for the purpose of fishing without any alteration in the extension of their territorial seas.

However, it had always been recognized that the extent of the territorial sea should be agreed upon to avoid a source of international conflict. Therefore, the U.N. in pursuit of its obligation according to Article 13(1.a) of its Charter,(105) established the ILC by a resolution adopted by the General Assembly at its 123rd Plenary meeting on 21 November, 1947 and entrusted to it the undertaking of the progressive development of international law and its codification giving the regime of the territorial sea priority on its agenda. Fifteen members of the Commission were chosen by the General Assembly during its third session in 1948.(106) The Commission met for its first session in April 1949 and continued its work up until 1958. It laid down the foundations for the two U.N. Conferences on the Law of the Sea that followed.(107)

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(105) This Article provides that: "1. The General Assembly shall initiate and make recommendations for the purpose of: (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification". See Brownlie, op.cit., Ref. (31) at 20, p.7.

(106) The members were from Panama, Brazil, U.K., Mexico, Netherlands, China, U.S., Syria, U.S.S.R., India, Sweden, France, Greece, Colombia and Czechoslovakia. The first chairman of the Commission was Manley O. Hudson from the U.S., YBILC, 1949, p.278.

(107) In recognition of the services of the Commission, the first Conference paid to it a "tribute of gratitude, respect and admiration - for its excellent preparatory work". See UNCLOS I, Official Records, Vol. II, U.N. Doc. A/CONF. 13/L.48.

Several proposals were made in the various sessions with respect to specific limits. These proposals were:

1. Some members of the Commission suggested conferring upon each coastal State (deriving from its sovereignty), the right to fix the limit of its territorial sea. Accordingly, whatever breadth of territorial sea was claimed, it was compatible with international law provided that it was justified by the real needs of the claimant State.
2. Another party in the Commission was of the opinion that the Commission should have recognized the fact that, although international practice was not uniform in the matter of the extent of the territorial sea, it did not recognize any extension beyond 12 miles. Each State therefore, was legally entitled to establish its territorial sea belt up to a limit of twelve miles.
3. A third view which emerged, called upon the Commission to admit that every coastal State was exclusively entitled to determine its territorial sea up to a limit of twelve miles. If, within those limits, the breadth was not fixed by long usage, it should not surpass what was indispensible for its justifiable interests, taking into account other States' interests in maintaining the freedom of the high sea, as well as, the maximum standard of the breadth generally applied in the region. In the case of a dispute, the question should be referred to the ICJ at the request of either of the parties concerned.
4. According to another opinion, each coastal State was

entitled to determine its territorial sea zone in the light of its own economic and strategic needs within the limits of three and twelve miles, subject to recognition by States maintaining narrower belts.

5. The limit for the territorial sea according to the fifth proposal would be three miles. Wider limits, if based on customary law, should be recognized. On the other hand, any State might fix its territorial sea at a distance greater than three miles, but not enforce it against States that had not adopted or recognized an equal or greater breadth. In no case could the width of the territorial sea surpass twelve miles.(108)

However, none of the aforesaid proposals succeeded in gaining the acceptance of the Commission. Thus, although the Commission was unable to advance any concrete proposal concerning the extent for the territorial sea,(109) it nevertheless firmly recommended in its final draft that claims beyond twelve miles were not permissible.(110)

Finally, the Commission set down its report including its final draft on the subject which was used as the basis of discussion at the Geneva Conference of 1958 on the Law of the Sea. Article 3 of the draft ran as follows:

> "1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

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(108) Daintith and others, op.cit., Ref. (4) at 9, pp.A203-A205; Whiteman, op.cit., Ref. (5) at 9, p.75.

(109) ILC Summary Records, (U.N. Doc. No. A/CN. 4/SR. 309/10) 1955.

(110) YBIL, 1956, Vol. II, p.256.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, notes on the one hand that many states have fixed a breadth greater than three miles, and on the other that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference."(111)

Moreover, having forwarded the report to the General Assembly of the U.N., the Commission suggested that the General Assembly "summon an international Conference of Plenipotentiaries to examine the law of the sea".(112)

The Geneva Conference of 1958 on the Law of the Sea

Having acted upon the report of the ILC, the General Assembly suggested an international conference to consider the Commission's draft. A large Conference on the law of the sea was convened in Geneva from February 24 to April 27, 1958. This Conference was called to "examine the law of the sea taking into account not only the legal but also technical, economic, biological and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments

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(111) YBILC, 1956, Vol. II, p.256.

(112) McDougal and Burke, op.cit., Ref.(15) at 15, p.543.

as it may deem appropriate.(113)

Prior to the Conference, 21 States out of 86 represented, asserted three miles as the extent for the territorial sea. Three of four Scandinavian countries claimed four miles and Cambodia claimed five miles. Twelve States asserted six miles. Mexico claimed nine miles and Albania ten. By that time, nineteen States claimed twelve miles or more.(114)

However, it was clear from the outset of the conference that the big maritime powers intended not to recognize claims greater than three miles or one league of territorial sea. They claimed that the said limit was the only fundamental principle of international law, and if any other extent was to be accepted it would be done so only for the purpose of reaching a general agreement.(115) On the other hand, most of the Soviet bloc, Arab League, Asian, African and Latin American States did not admit that

(113) U.N. Gen. Ass., Official Records, 11th Sess. Supp. No. 17(A/3572) 1956; Res. 1105(XI), February 21, 1957, UNCLOS I, Official Records, Vol. II, p.11; See also Johnson, D.H.N., "The Geneva Conference on the Law of the Sea", YBWA, 1959, Vol. 13, pp.68-69.

(114) For further details see Bishop, op.cit., Ref. (2), at 8 , pp.298-299.

(115) The U.K. delegate for example held the following view: "One of the matters which would be discussed by the Conference was whether the limit should remain three miles. But for such a discussion to have any meaning at all, its starting point could only be the three-mile rule which was not only the traditional rule observed by a very great number of States over a very long period, but was also the only one which had commanded any general measure of agreement, practical application and recognition .....". UNCLOS I, Official Records, I-Committee, p.8. Similar views were held by the delegates of the U.S., the Netherlands, Japan and Germany. Ibid. pp. 12, 25, 26, 45. Furthermore, the delegations of Greece and Spain demonstrated their readiness to retrench their territorial seas limit from six to three miles. Ibid., pp.22, 30.

there had been any fundamental rule such as the three-mile limit either in practice or in theory. In their view, claiming twelve miles would never alter any existing major rule.(116)

As it appeared that there was no opportunity to resolve the most inordinately vital and controversial question facing the Conference namely that of the permissible limit for the territorial sea appertaining to a coastal State, various proposals were advanced to reconcile the two extremes of 3 and 12 miles.(117) None of the compromise proposals put forward before the Conference succeeded in securing the necessary majority to allow its inclusion in the convention. The Conference therefore broke up and the controversial problem of reaching agreement upon the limit of territorial sea was left unsolved. The tedious debates served only to accentuate the many conflicting points of view. The Conference adopted a solution recommending the convening of another international conference for further consideration of the questions left unresolved.(118)

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(116) The Soviet point of view regarding this matter was stated as follows.
"International law allowed the breadth of the territorial sea to be fixed within a limit of twelve miles ... History refuted the assertion that the three-mile limit was the only universally accepted rule in theory and practice...". Ibid., p. 31. Similar views were repeated by the delegates of Saudi Arabia, Mexico and the Philippines. See ibid. pp. 135, 165, 170 respectively.

(117) See for instance, the joint Mexican and Indian proposal. U.N. Doc. A/CONF. 13/C. 1/L.

(118) See UNCLOS I, Official Records, Vol. II, p.145.

The 1960 Conference on the Law of the Sea

It was evident that the preservation of peace and the maintaining of order on the seas could not be upheld unless an agreement on the limit of the territorial sea could be carried through. Therefore, the request of the 1958 Conference to convene a new international conference was acted upon by the General Assembly of the U.N. at its 13th Session in 1958. The Second Conference which was held in 1960 in Geneva, was specifically called to reconsider the question of the width of the territorial sea.(119)

The same views that had been laid before the previous Conference were reasserted at this Conference. The big maritime powers repeatedly stressed that the only internationally permissible extent of territorial sea was that of three miles.(120) Also, the Soviet and Arab blocs, and almost all of the Asian and African States, denied the existence of three-mile limit rule.(121) A twelve mile extension, was once again suggested at this Conference.(122)

(119) The Second Conference on the law of the sea met in Geneva from March 17 to April 27, 1960. It was attended by the representatives of 87 States. This Conference was called to take up several problems which had not been decided at the first Conference in 1958. U.N. Doc. A/CONF.13/L.56; UNCLOS II, Plenary Meetings (A/CONF.13/38) p.145. Res. 1307 (XIII) was adopted by the Gen. Ass. December 10, 1958. See U.N. Doc. A/Res. 1307 (XIII) 1958; UNYB, 1958, pp.381-383; See also Jessup, Philip C., "The Law of the Sea Around Us", AJIL, 1961, Vol. 55, p.104.

(120) See for example the statement of the French delegate, UNCLOS II, Official Records, p.117.

(121) See for instance the view expressed by the Saudi Arabian delegate. UNCLOS II, Official Records, pp. 38, 119, 145.

(122) See the U.S.S.R. Proposal. U.N. Doc. A/CONF. 19/C. 1/L.1.

Two other proposals were submitted, one by Mexico alone[123] and the other by Mexico in addition to sixteen other countries including Iraq and Iran.[124] Both proposals were withdrawn and the same sixteen countries, together with Venezuela, then submitted a joint proposal according to which each coastal State would be entitled to fix the breadth of its territorial sea up to a limit of twelve miles.[125]

However, these proposals failed to get the necessary majority vote. Therefore, a number of countries including Iraq suggested the adoption of the following resolution:

> "The Second United Nations Conference on the Law of the Sea, considering that there still exists wide disagreement on the question of the breadth of the territorial sea,
>
> 1. Requests the Secretary of the U.N. to include in the provisional agenda of the twentieth session of the General Assembly an item regarding the advisability of convening, at an appropriate date, another U.N. conference to examine further the question of the breadth of the territorial sea;
>
> 2. Requests all States participant in this Conference which had declared their independence prior to 24 October 1945 to abstain from extending the present breadth of their territorial sea, pending the consideration of this question by the General Assembly at the aforesaid session;

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(123) The Mexican Proposal was substantially the same as the U.S.S.R. Proposal. See U.N. Doc. A/CONF. 19/C 1/L. 2.

(124) U.N. Doc. A/CONF. 19/C. 1/L.6.

(125) U.N. Doc. A/CONF. 19/C. 1/L. 2/Rev. 1.

3. Recognizes that, without prejudice to the question of the breadth of the territorial and pending the consideration of this question by the General Assembly, any State is entitled to exercise in the sea adjacent to its coast up to a limit of twelve nautical miles measured from the applicable baseline the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea."(126)

As it was expected that the Conference would be adjourned without making a decision on the subject, the U.S. and Canada submitted a revised unsuccessful joint proposal.(127) Had one of the States which were opposed to this proposal abstained from the voting, it would have received the necessary majority. Thus, the States represented at the Conference did not reach an agreement, and the question remained undecided.(128)

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(126) U.N. Doc. A/CONF. 19/C. 1/L. 9.

(127) It may be appropriate to produce in part the proposal which was defeated because of a single vote:
"1. A State is entitled to fix the breadth of its territorial sea up to a maximum of six nautical miles measured from the applicable baseline.
2. A State is entitled to establish a fishing zone contiguous to its territorial sea extending to a maximum limit of twelve nautical miles from the baseline from which the breadth of its territorial sea is measured, in which it shall have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea.
3. Any State whose vessels have made a practice of fishing in the outer six miles of the fishing zone established by the coastal State, in accordance with paragraph 2 above, for the period of five years immediately preceding 1 January 1958, may continue to do so for a period of ten years from 31 October 1960...".
See U.N. Doc. A/CONF. 19/C. 1/L. 10.

(128) Oda, op.cit., Ref. (92), at 79, p.380.

Rules Emerging from the Third Conference on the Law of the Sea.

Undoubtedly, economic, scientific, security and political interests of States are overwhelmingly affected by rules of the Law of the Sea. Dissatisfaction with the existing rules regulating the legal regime of matters concerning the law of the sea, the hiatus in most of the provisions of the Geneva Conventions of 1958 and the overwhelming acknowledgement that achieving an explicit convention as to the law of the sea would remove a potential source of controversy between States, all pressed the U.N. to convene a new Conference to codify a new comprehensive convention on the subject.(129)

In December 1970, the U.N. therefore adopted a resolution(130) calling for the convening of a third Conference on the Law of the Sea.(131)

However, it does not seem necessary for present purposes to examine each and every proposal or provision, nor to state in detail the legal position which each State put forward before the Conference as would respond ideally to its own interests.(132) Rather, it will be attempted here to make brief mention to the main attitudes taken before the Conference as to the breadth of the territorial sea.

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(129) Alexander, Lewis M. and others, "The Costs of Failure at the Third Law of the Sea Conference", J. Marit. Law Com. 1977, Vol. 9, No. 1, p.2.

(130) Resolution 2750 (XXV)C, M December 1970, U.N. Monthly Chronicle, January 1971 p.37; ILM, Vol.10, 1971, p.224.

(131) Hereinafter will be referred to as "UNCLOS III".

(132) Having been held in Caracas, the Conference had before it the results of the work of the U.N. Sea Bed Committee, proposals made by States on one or more

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Accordingly, it may be noted that, at the very early sessions of the Conference three major trends surfaced in this regard. Amongst views put forward, the first favoured formula (A) which would permit each coastal State to establish a belt of territorial sea up to 12 miles. Formula (B) which would allow coastal States to extend their territorial sea up to 200 miles, represented another trend put before the Conference. The third tendency was to call for recognition of a 12 mile limit coupled with a 200 mile economic zone over which a coastal State would have sovereignty.(133)

However, it was clear from the outset of the Conference that there was widespread agreement on a 12 mile maximum limit for the territorial sea.(134)

Clearly, certain prerequisite conditions had to be brought about before a number of States would accept the twelve mile limit. That is to say, other issues surely had first to be satisfactorily resolved. International guarantees for unimpeded transit through and over international straits used for international navigation,(135)

(132) contd...
issues and a number of studies prepared by the U.N. Secretariat at the Committee's request. See Martinez, Arthur D., "The Third United Nations Conference on the Law of the Sea: Prospects, Expectations, and Realities", J. Marit. Law, Com. 1975, Vol. 7 No. 1, pp.268-269. Stevenson and Oxman, op.cit., Ref. (115) at 47, p.3.

(133) Ganz, op.cit., Ref. (126) at 50, pp.18-20.

(134) Apart from few alternatives intended not to approve that limit such as, for instance, the proposals submitted by Brazil, Uruguay, Ecuador, Panama and Peru. Even the U.K. as well as Greece, the U.S. and others approved the twelve mile limit after a long opposition. For further details see Stevenson, John R., and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference", AJIL, 1974, Vol. 68,p.9, Knight, op.cit., Ref. (1) at 8, pp.332-337.

(135) Stevenson and Oxman, ibid.,pp.9 et seq.

and an additional zone of 188-mile (e.z.) had to be given.[136] True as this may be, nevertheless, these facts do not affect the validity of the aforegoing conclusion. Whatever may have been the reason for preparing to accept the 12 mile limit, this acceptance would remain sufficient to reflect the wide support of delegations in favour of a twelve-mile limit for territorial sea. A more detailed look at the texts of the subsequent sessions of the conference would strengthen the validity of this observation.[137] It may be said that there was virtually no reference to any other limit in open debate.[138] Additional support for the preceding observation may be found in the Informal Composite Negotiating Text,[139] the latest version of the draft articles based on the negotiations of the UNCLOS III.[140] According to the provision of the "ICNT"

(136) Stevenson and Oxman, op.cit., Ref. (134) at 93, pp.9-12; and op.cit., Ref. (115), at 47, pp.13,14.

(137) Alexander and others, op.cit., Ref. (129) at 92, p.3. The Informal Composite Negotiating Text, Part II bears an Introductory Note that states: "It should therefore, be quite clear that the ICNT will serve as a procedural device and only provide a basis for negotiation. It must not in any case be regarded as affecting either the status of proposals already made by the delegations to submit amendments or new proposals". See U.N. Doc. A/CONF. 62/W.P.8/ Part II May 7, 1975, p.1; See also Stevenson, John R. and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", AJIL, 1975, Vol. 69, pp.771-773.

(138) See above, p.93.

(139) Hereinafter will be referred to as "ICNT".

(140) U.N. Doc. A/CONF. 62/WP. 10, 15 July 1977. This composite text replaces the earlier Revised Single Negotiating Text (RSNT). See UNCLOS III, Official Records, Vol. V, 1976, pp.125-185. It may be noted that the articles in the ICNT are numbered in one sequence, in contrast to those of the (RSNT) in which the articles in each of the four parts were separately numbered.

pertinent to the subject, the permissible breadth of the territorial sea is fixed at 12 nautical miles. Article (3) of the ICNT provides that:

> "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the present convention."(141)

III. The Current Extent of the Territorial Sea

To understand the present internationally admitted extent of the territorial sea, one must first acknowledge that the conflicting views as to the subject, as discussed above, are one of the recurring and fundamental problems in the law of the sea. The complexity is due chiefly to the fact that claims to establish a particular breadth for the territorial sea over which jurisdictional claims are to be exercised, are today notable for their extreme variety and contrasting consequences. It is further confusing that of all the conferences held for this purpose, none succeeded in fixing a lawful breadth for the territorial sea.(142)

Indeed, as a matter of state practice, the breadth is not presently uniform. Although most States assert jurisdiction, and recognize that of others, over a breadth of territorial sea of no more than twelve miles, some now

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(141) A/CONF. 62/WP. 10/Add 1, p.21.

(142) Reeves, Jesse S., op.cit., Ref. (104), at 82, pp.486-499; See also UNCLOS I, Official Records, Vol. II (Plenary Meetings), Vol. III, I Committee (TS & CZ); See also, UNCLOS II, Official Records, Hudson, Manley O., "The First Conference for the Codification of International Law", AJIL, 1930, Vol. 24, pp.447-466.

claim a territorial sea extending out to a 200-mile limit. Furthermore, there is great variation even among the claims for twelve miles or less. This uncertainty is due to the dissimilarity in the interests of the various States.(143) Undoubtedly, States carrying out a great deal of seaborne trade, having great oceanic fleets, and a strong navy, have vital interests in the oceans. Their interests, both military and economic, are also of vital importance. Thus, they seek free movement for their fleets, submarines and aircraft, without any sort of interference, since in this way they are able to benefit fully from the principle of freedom of the seas. Obviously, they advocate a narrow territorial sea.(144) Opposing this trend is the view of States with a feeble navy, fishing only in adjacent waters, and engaging largely in their own coastal trade. These States are evidently concerned with keeping other countries' vessels as far as possible out of the waters adjacent to their shores. Having taken advantage of their unique proximity to the sea, they usually tend to respect a wider belt of territorial sea.(145)

Reasons in support of wider and narrower territorial sea are our concern in the following pages.

a. Reasons in Support of a Narrower Territorial Sea

The main argument advanced by the great maritime powers is that the seas, unlike land masses, submit to

(143) Daintith and others, op.cit., Ref.(4), at 9, p.A201; Colombos, op.cit., Ref. (4) at 9, p.87.

(144) Bowett, op.cit., Ref. (3), at 1, pp.7-9; Akehurst Michael, "A Modern Introduction to International Law", 1975, p.213.

(145) Bishop, op.cit., Ref. (2) at 8, p.297.

common use, for miscellaneous purposes by numerous claimants. Accordingly, they should be preserved for the fullest, rational and abundant use of all, without interference or impediment. The following reasons outlined are held to support this view:

1. Freedom of Navigation

The concept of freedom of the sea is repeatedly asserted by States who seek to protect claims to the more inclusive uses of the sea. Great maritime States with much ocean-going shipping and large merchant fleets, apparently wish to range as freely as possible over the oceans without interference. They understandably therefore oppose any extension of coastal States' jurisdiction over belts of waters adjacent to their coasts, since freedom of navigation, which is in their interest, is only secured on the high seas.(146) This notion was advanced by the U.S. and the U.K. delegations at the 1958 Conference.(147) It was stated by the U.S. delegate in justification, that had the permissible limit for territorial sea been extended, merchant ships would have had to make longer and more costly runs in order to skirt the extended territorial seas. Consequently, this would be a burden on States dependent on seaborne trade.(148) This line was reiterated in the 1960 Conference.(149)

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(146) Oda, op.cit., Ref. (92), at 79, p.384.

(147) See the Proposal submitted by the U.K. U.N. Doc. A/CONF. 13/C 1/L. 134.

(148) See the U.S. delegate's view, UNCLOS I, Official Records I Committee, p.26.

(149) UNCLOS II, Official Records, p.45.

2. Safety of Shipping

This was held to support the view of narrowing territorial sea. The U.S. delegation at the 1958 Conference on the Law of the Sea, for instance, stated that:

> "Many landmarks still used for visual piloting by small craft were not visible at a range of twelve miles; only 20% of the world's lighthouses had a range exceeding that distance; radar navigation was of only marginal utility beyond twelve miles; and many vessels 'which frequently did not wish to enter the territorial sea' did not carry sufficient cable or appropriate equipment to anchor at the depths normally found outside the twelve-mile limit."(150)

Once again, at the second Geneva Conference on the Law of the Sea in 1960, this approach was adopted by the U.S. delegate.(151) It was emphasized at the second conference that any extension of coastal States jurisdiction over belts of oceans would endanger seamen, as it would isolate them from navigation aids. Many shipping routes, according to the U.K. delegate, not only facilitate navigation but offer the advantage of protection from harm in cases of emergency.(152)

3. Fishery Interests

Perhaps not surprisingly, States' attitudes as to the limit for the territorial sea are usually affected largely by fisheries interests. It may be added that the

(150) UNCLOS I, Official Records - I Committee, p.26.

(151) See the U.S. delegate's statement, UNCLOS II, Official Records, p.45.

(152) UNCLOS II, Official Records, p.56.

controversies over fisheries divide countries, whether they are otherwise friendly or not. That is to say, not only does disagreement rage between the Soviet Bloc and the western countries, but also between military allies. Professor Bingham wrote in this respect:

> "Indeed, there is no phase of the history of international affairs which evidences more strikingly the part which selfish national interests play in the development of the doctrines of international law than the history of fishery claims and their effects on legal opinions concerning the law of jurisdiction over sea areas."(153)

Therefore, the question of fishery interests was repeatedly canvassed at the Geneva Conference. Clearly, States with advanced fishing practice were very much concerned to secure the enjoyment of fishing in off-shore areas of other States. Hence, they feared extending territorial sea limits as this would harm their fishing interests.(154) Furthermore, they deny that extending territorial sea areas would serve the fishery interests of coastal States. In their view, no uniform breadth of territorial sea, whatever it might be, could encompass

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(153) Bingham, Joseph Walter "Report on the International Law of Pacific Coast Fisheries", 1938, p.1; Oda, Shigeru, "The Territorial Sea and Natural Resources, ICLQ, 1955, vol. 4, pp.415-425.

(154) See for example, the statement of the U.K. delegate in the Geneva Conference. UNCLOS I, Official Records-I Committee, pp.104-105. The French delegate at the same onference stated that the extension of the width of the territorial sea to six miles would mean a loss of 14% of their annual catch for the 55,000 Frenchmen engaged in such activities. See UNCLOS I, Official Records, I Committee, p.111; See, too,the Statement of the Italian delegate in the UNCLOS II, Official Records, p.64.

the range within which fish move during their life-span. Consequently, no unilateral conservation or exploitation would make sense.(155)

4. National Defence and Security Interests

A frequent argument concerned the intrusion of enemy craft close to States' shores, endangering their defences. Such an argument assumes that a wide territorial sea is in the interests of national security.(156) As to this contention, States who support a narrower territorial sea refuted this plea on the grounds that it is not fully justified. They took the position that in the light of current state of ordnance, no extent of territorial sea whatever could preserve national security.(157) The U.S. delegation to the 1958 Geneva Conference,(158) while having admitted the importance of national security, justified the narrow territorial sea from an entirely different angle. It stated that extending territorial seas would,if accepted, burden neutral States, which would be unable to protect greater areas of territorial sea against warships of belligerents.(159)

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(155) McDougal and Burke, op.cit., Ref. (1), at 11, pp.259-260.

(156) See below pp. 102-103.

(157) McDougal and Burke, ibid., pp.482-485; Whiteman, op. cit., Ref. (5), at 9, p.187.

(158) UNCLOS I, Official Records, I Committee, p.26; See Dean, Arthur H; "Freedom of the Seas" For. Aff., 1958-59, Vol. 37, pp.83-93.

(159) The real concern of the U.S. as to this point, was clarified by Mr. Arthur Dean, Chairman of the U.S. delegation at both the 1958 and 1960 Conferences. In an article published after the Geneva Convention of 1958, he reflects on the danger of Russian submarines as follows: "An extension of the territorial sea of neutral nations would dramatically

5. Responsibility of Coastal States

It is also argued, in support of a narrower territorial sea, that coastal States not only acquire privileges from the regime of territorial sea, but also are bound by an obligation to keep order and peace therein.

Therefore, as mentioned above, it was contended that a twelve mile territorial sea would impose an additional burden on neutral States in times of war.(160) The U.K. delegation to the UNCLOS II pointed out in addition, that it was not only difficult, but also costly, to control a wide territorial sea belt. Moreover, modern warfare makes it difficult to fix precisely the position of ships at sea. Therefore, the probability of incidents would be increased, which in turn would be conducive to endangering the safety of coastal States.(161)

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(159) contd.
increase the striking power of enemy submarines. If the territorial sea were extended to twelve miles, an enemy submarine, particularly one with atomic power which might operate for long periods without surfacing, could operate possibly undetected under waters in a neutral State's territorial sea. But our surface ships could not operate on the surface of these waters within the territorial sea without risking charges of violating such State's neutrality. An extension of the territorial sea to twelve miles might thus make an enemy fleet of submarines, capable of discharging missiles from near the coast, practically inviolable while operating under water in the territorial seas of neutral nations. Of course any such increase in the effectiveness of underwater power is to the benefit of the Soviet Union, which today has some 475 submarines, many of them long-range types." See Dean, Arthur H., "The Geneva Conference on the Law of the Sea: What was Accomplished." AJIL, 1958, Vol. 52, pp.610-611.

(160) Dean, op.cit., Ref. (1), at 8, p.755.

(161) UNCLOS II, Official Records, p.56. See similar views of the U.S., UNCLOS I, Official Records - I Committee, p.26, of Canada, UNCLOS II, Official Records, p.50; of Pakistan, ibid., p.86; of Liberia, ibid., p.88, and of Iran, ibid., p.104.

b. Reasons in Support of Wider Territorial Sea

In turning now to the arguments of those States who advocate the exclusive interests of coastal States, it should be noted that they, on the contrary, concentrate on security considerations, and protecting the economic interests. They justify their claims chiefly in terms of the following:

1. Freedom of Navigation

This claim, in support of a narrower territorial sea, is refuted on the grounds that the right of "innocent passage" would be conceded to foreign merchant shipping.(162) Thus a wider territorial sea would not adversely affect the freedom of navigation.(163)

2. Safety of Shipping

The difficulty referred to by the U.S. delegation, of safety of shipping,(164) was answered by other delegations. The argument was not unique to the twelve mile width, they said, it appeared also to have equal validity concerning the six mile limit.(165)

3. National Defence and Security Considerations

This was also referred to in support of the policy for a wider extension of the territorial sea. The Soviet

(162) Oda, op.cit., Ref. (92) at 79, p.384.

(163) E.g. the U.S.S.R. UNCLOS II, Official Records, pp. 39 and 146; India, ibid., p.77; Tunisia, ibid. p.111.

(164) See above p. 98.

(165) See the Saudi Arabian Delegate Statement, UNCLOS II, Official Records, p.119. The same tenor was supported by the Iranian delegate, ibid., p.104.

Union, or rather the entire Soviet Bloc and other states, claimed that the three-mile width was insufficient for security. Thus, they argued that a broader belt was necessary in order to maintain the security of coastal States.(166) Those States, in particular, fear the possible approach of enemy warships to their coastlines.(167)

4. Fishery Interests

It has been argued that fishing in the territorial sea is to be exclusively reserved for the coastal State.(168) Hence, each coastal State which depends economically on fisheries,(169) undoubtedly wishes to widen its territorial sea as much as possible. This in turn excludes foreign fishermen from exploiting its coastal off-shore belt.(170) In other words, the desire to control and profit exclusively from fish and other resources of the sea, makes it important to widen the territorial sea, in order to preserve these resources from foreign exploitation.(171)

After this clarification, however, to one seeking to discern present day legitimate extent, it is pertinent to ask what the present permissible breadth for territorial sea is? Since an agreed international limit does not

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(166) Oda, op.cit., Ref. (92) at 79, p.384; Whiteman, op. cit., Ref. (5) at 9 , p.87.

(167) Such views are those of the Indian and the Iranian delegates to the 1960 Conference, See UNCLOS II, Official Records, pp.77, 104 respectively.

(168) McDougal and Burke, op.cit., Ref. (1) at 11, p.453.

(169) Such as Iceland, Ecuador and Korea, See Swartztrauber, op.cit., Ref. (5) at 12, pp.180-183.

(170) Jennings, op.cit., Ref. (63), at 32, p.382.

(171) Bishop, op.cit., Ref. (2), at 8 , p.300.

exist, the answer remains in dispute. It was suggested that there is no law governing this question between the three-mile and twelve-mile limits. A holder of this view is Professor Johnston who states that:

> "The customary 3-mile rule relating to the breadth of the territorial sea has certainly not survived the 1958 and 1960 Geneva Conferences on the Law of the Sea, if general consent is the basis of custom, despite the fact that neither conference could agree on a suitable substitute. Consensually, the result of these findings is no-law, not a reversion to the old customary rule."(172)

It must be added that States' attitudes concerning this question, are many and varied. It is repeatedly asserted by the great maritime powers that the only international rule is that of three miles. They also state that they consider themselves relieved from the obligation to accept any compromise proposal suggested.(173)

The attitude of countries from the Soviet bloc, Afro-Asian group, and Latin America, is that the failure of the international conferences to agree upon a specific limit, is evidence tantamount to a full denial of the three mile rule.(174) However, the current position as to the breadth of the territorial sea is full of uncertainty. In the absence of a conventional rule, nations claimed various widths.(175)

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(172) Johnston,D.M., "The International Law of Fisheries", 1965, p.118.

(173) UNCLOS I, Official Records - I Committee, pp.105, 171, 183, 186; See also UNCLOS II, Official Records, pp.32-35.

(174) UNCLOS I, Official Records, Plenary Meetings, p.37.

(175) See the table cited in Knight, op.cit., Ref. (1) at 8 , p.329.

To say this is not to detract from the validity of the presently existing rule, which is our concern in the following stage.

IV. Conclusion and Evaluation

Clearly, the concepts of the freedom of the sea and territorial sea go back about three hundred years, to the time when two Dutch jurists Cornelius Bynkershoek and Hugo Grotius stated the opinion that a ruler could not exercise jurisdiction over a belt of sea, wider than was capable of being defended from the land.

During the nineteenth century, the most generally accepted limit for territorial sea was measured by the "cannon-shot range". Meanwhile, the view was held that the zone of sea over which States enjoyed sovereignty, was three miles. However, the "cannon-shot" and the "three-mile" rule were considered to be equivalent.

Not only jurists disagreed about the extent of the territorial sea, but several States also made claims about varying limits. By 1900, in addition to claims for the traditional three-mile width, there were some claims for an extension to six miles, and even more. Some States claimed a four-mile territorial sea. In addition to this, a small minority of powers advocated that the appropriate limit for the territorial sea should not be uniform. Accordingly, this limit could be varied in the light of each States' interests. Thus in conclusion no firm agreement was reached as to the breadth of the territorial

sea either in theory or practice.(176)

In the midst of such uncertainty, the 1930 Hague Conference was convened. Despite the preparation for the Conference,(177) it failed to draft a uniform rule concerning the breadth of the territorial sea. It may be useful to point out that this failure is attributed to the widely divergent views held by the States concerned. The big maritime powers insisted on the adoption of the three mile rule whilst other States favoured either extensions of this or the three mile breadth plus additional contiguous zones.

Both the 1958 and 1960 Conferences on the Law of the Sea, held under the auspices of the U.N., met with the same lack of success. States proposed numerous limits, ranging from the traditional three miles to 200 miles. The economic, political and security interests, as well as the geographical, historical and economic circumstances of each State were so vitally important at the time, that States were slow to make concessions for the sake of reaching a solution. The major maritime powers again sought to keep the width of the territorial sea as narrow as possible in order that their vessels could enjoy maximum freedom of operation at sea. It is important to remember that there was another line of thought concerning honouring the twelve mile limit since it would be

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(176) For further details concerning the varying views, see Fawcett, J.E.S., "General Course on Public Internation Law", Hague Recueil, 1971, I, Vol. 132, pp.447-450; McDougal and Burke, op.cit., Ref. (11), at 56, p.232.

(177) Conference for the Codification of International Law, Basis of Discussion, L.N. Pub. No. C.74 M39129 v.

more appropriate. Additionally, the trend towards a more extensive territorial sea belt was greater than it had been when the Hague Conference was held. Therefore, no agreement on the question was reached.

It is possible to infer from the above that the issue of territorial sea breadth is an obstinate problem. International law as yet has not reached the necessary consensus of opinion to establish a conventional, indisputable rule. In these circumstances one has to find whether or not any customary rule is in existence.

The vital point in solving this problem, it is submitted, consists of striking some equitable balance between the valid exclusive interests of individual States and the vital inclusive interests of the international community at large. That is to say that establishing more extensive widths to gain increased protection and expansion for the exclusive claims of coastal States, on the grounds that the coastal States' interests require a broader extent of sovereignty, is not justified. Such a view ignores not only the exclusive interests of non-coastal States, but also the inclusive interests of the international community which in turn serves, in the long term, the exclusive interests of the individual States. It also fails to recognize that these ostensibly contradictory interests are not incompatible or that the long-term interest of the individual States will not be well served if all States make exorbitant claims.(178)

(178) Alvarado Garaicoa, Teodoro, "The Continental Shelf and the Extension of Territorial Waters", Mia Law Q, Vol.10, Part 4, 1956, p.490.

On the other hand, concentration on the interests of the international community, by insisting upon a three mile zone, on the grounds that this is the only width responsive to the overall good, is not fully justified.(179) Such a narrow belt of territorial sea only serves the interests of a number of States, namely, those which have large oceanic fishing fleets and strong navies. Obviously international law protects not only the inclusive interests of the international community but the exclusive interests of individual States as well. Thus, such a view weakens, if it does not completely ignore, half of the function of the law of the sea.(180) Consequently, if expanding the limit of the territorial sea ensures the exclusive interests of individual States on waters adjacent to their coastlines, then concentration on narrowing territorial sea limits equally secures the exclusive interests of a number of States which are able to benefit fully from the principle of the freedom of the seas, not only on waters adjacent to their own coasts but also adjacent to the shores of other States. This deprives the latter from utilizing these waters notwithstanding the fact that their right to do so is more easily justified.

The facts which have been adduced make it clear that the attainment of an ideal width lies in preserving both exclusive and inclusive interests asserted by claimant States. Not only should the degree of economic development, naval strength and other circumstances unique

(179) Colombos, op.cit., Ref. (4) at 9 , pp.82-83.

(180) McDougal and Burke, op.cit., Ref. (15), at 15, p.546.

to each State be taken into account,[181] but also the principles of international law and the interests of the international community. One might just as well suggest that neither of the two extreme attitudes, namely, the traditional three mile limit and the trend towards extravagant, extensive widths, serve adequately the two sets of conflicting interests. That is to say, a more satisfactory solution might be found in achieving a balance which would protect effectively both the legitimate exclusive needs of underdeveloped nations in belts of water adjacent to their shores, thus permitting a State to take advantage of its unique position and the equally important inclusive interests of all states in the free passage through these waters. The fullest possible and most peaceful use of the sea is in the interest of all States, both individually and collectively. Opposing values must be reconciled when conflict arises, in order to obtain maximum efficiency from the sea for the benefit of all States.[182] In order to serve these mutual interests, the maritime powers will have to accept that there must be some means of limiting the distance that they can extend their territorial sea.

It might be contended that the three mile limit has been accepted for centuries, therefore it is the only

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(181) This view is held by those States who claim that each coastal State should have the right to determine exclusively the width of its territorial sea to whatever extent its needs demand. See the statements of the representatives of Bulgaria, Romania, Czechoslovakia and the U.S.S.R. at the UNCLOS II, U.N. Doc. A/CONF. 19/8, pp.24,27,65, 105 and 146 respectively.

(182) McDougal and Burke, op.cit., Ref. (1) at 11, p.52.

established customary rule, and remains valid for all States since it has not been replaced by any other rule.(183)

For this argument, it may be stated that this claim has indeed become an oft debated topic in the literature of the law of the sea. Whilst it is correct to say that the three-mile limit had been strongly supported by powers very influential in the international law-making process, this is no reason for ignoring that it has never been universally honoured, as will be discussed later. Additionally, an increasing number of claims for a twelve mile zone have been made. This has been achieved by legislative action in the Socialist States, some of the Latin American States and the Asian and African countries.(184) There appears to be widespread support for accepting twelve miles as the maximum breadth of the territorial sea.(185) This limit would seem to be the legitimate limit for the following reasons:

1. The three-mile limit rule as a standard width to which each State should extend sovereignty over its adjacent waters, is not universally accepted as an international law ruling today. It may be true that it has been observed by States who have had great influence in the international law-making process, but one has to admit that it has never been generally recognized. Claims for wider limits were made and practised, concurrently with

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(183) See the statements of the representatives of the U.K., France, Japan, the U.S. and the German Federal Republic at the UNCLOS I, U.N. Doc. A/CONF. 13/39, pp.8, 19, 25 and 26 respectively.

(184) Knight, op.cit., Ref. (1) at 8 , pp.319-330.

(185) Knight, op.cit., Ref. (1) at 8 , pp.319-330.

the three-mile limit.(186) The four-mile rule for instance, has been adopted in practice by the Scandinavian countries without serious opposition.(187) Spain also, since the eighteenth century, has had the limit of her territorial sea fixed at six miles,(188) and greater widths have indeed been claimed: twelve miles, for example, by Russia since 1910.(189)

Along this line Professor Yepes has asserted that:

> "... it can be concluded that the three-mile rule as a maximum territorial sea limit, does not have today juridical existence as a principle of contemporary international law. The rule constitutes one of the ido fori which modern criticism and world needs have knocked down from its pedestal."(190)

Similarly, in the "Principles of Mexico" adopted by the Inter-American Council at its Third Meeting in Mexico City in January and February of 1956 this was made very clear. The first of these principles stated that:

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(186) Sweden adopted the four-mile limit in the eighteenth century. See above pp. 75-77.

(187) The U.K. recognized that the Norwegian claim for four-miles was acceptable in view of Norway's persistent policy throughout the long period, and the increasing disposition to acquiesce to it. ICJ Reports, 1951,pp.128 et seq.

(188) Spain fixed her territorial sea at six miles on December 17, 1760. She also averred that on May 1, 1775; May 3, 1830 and June 20, 1852. See Swarztrauber, op.cit., Ref. (5), at 12, pp.90-91.

(189) Brownlie, op.cit., Ref. (5) at 9, pp.175-178.

(190) Cited in Szekely Sanchez, Alberto, "A Study of the Contribution of the Latin-American States to the Development of the International Law of the Sea Since 1945" Thesis submitted to the University College of London, Ph.D., 1975, p.149; Cheng, Tao, "Communist China and the Law of the Sea", AJIL, Vol. 63, 1969, pp.53-56.

> "... the three-mile extension to delimit the territorial sea is insufficient and does not constitute a general rule of international law. For this reason it is justified to widen the maritime zone traditionally called territorial sea."(191)

Finally, there can be no better quotation than a passage from Mr. Swarztrauber's conclusion in this respect:

> "Certainly, the three-mile limit existed as a rule of international law by the mid-1920's. True, it may well be that it had been a law for the many dictated by the few. The great maritime powers had been in a position to manipulate adherence or at least compliance, with the three-mile rule. Doubtlessly there were several, perhaps many, States that did not necessarily agree with the rule which they obeyed, for in 1930, when given a gentlemen's chance to be heard, the lesser countries spoke out against the rule. Professor Bingham was saying that there never had been general agreement and in this latter sense he was probably right."(192)

2. Further evidence of the validity of the breadth of 12-miles as an accepted limit for the territorial sea may be found in the record of the ILC. Article 3 of the Commission's draft indicated clearly that the extent of twelve miles for territorial sea was in accordance with international law.(193) Often resorted to is the state-

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(191) Ibid.

(192) Swarztrauber, op.cit., Ref. (5), at 12, p.151.

(193) It is worth quoting in part Article 3 which read as follows: "1 - The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea. 2 - The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles ...". See YBILC, 1956, Vol. II, p.256.

ment of the Commission's rapporteur at the UNCLOS I in which he repudiated that the Commission had meant to admit the legality of the twelve mile extent or any other specific limit as a standard breadth. This argument appears to assume that this remained a non liquet issue for the diplomats to deal with.(194) For this contention to be answered, it is submitted that it does not lessen the fact that the twelve-mile width is an accepted extent. The full implications of this statement can only be interpreted as showing that a twelve-mile limit is not inconsistent with international law. Here then is evidence to show that international law does not record any existing rule on this point other than to repudiate the legitimacy of claims for breadths greater than twelve miles. This goes to show that the Commission was unable to recognize not only the twelve-mile limit, but also any other limit. If such a conclusion is correct, and there seems to be nothing to contradict this, why did the Commission not settle for a breadth between three miles and another limit narrower or greater than twelve miles? The only plausible inference can be that any distance up to twelve miles has been recognized as permissible.

Another clause in the ILC's draft may be invoked as an indication to support the view that the commission did not mean to allow coastal States to extend their territorial seas unilaterally to the maximum of twelve miles. One might infer, it may be contended,from Article 66,according to which the contiguous zone could not be extended beyond

(194) U.N. Doc. A/CONF. 13/39.

twelve miles, that the territorial sea consequently, could not be so a fortiori, otherwise Article 66 would become spurious.

The ground given for this view is also not fully justified, as some States might tend to claim contiguous zones rather than territorial seas, since the latter allows not only rights, but imposes duties as well.(195) It is pointed out by Sir Arnold McNair in the Anglo-Norwegian Fisheries Case that:

> "a. To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters... International law imposes upon a maritime State certain obligations, and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory."(196)

3. One tendency in recent years has been to claim more than a twelve mile territorial sea, for example the Latin-American 200-mile claim.(197) Therefore, it would be advisable to codify the limit of twelve miles to arrest

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(195) A State may either adopt a 12-mile extent merely of territorial sea and dispense with a contiguous zone, or accept 6 miles and have 6 miles contiguous zone. Any such course would be consistent with international law. See Fitzmaurice, op.cit., Ref. (118), at 48, pp.374-375; see also the Individual Opinion of Judge Alvarez, ICJ Reports, 1951, p.150.

(196) ICJ Reports, ibid., Dissenting Opinion of Sir Arnold McNair, p.160; Individual Opinion of Judge Alvarez, p.150.

(197) See Zacklin, op.cit., Ref. (2), at 53, pp.47-68.

such tendencies.(198)

4. Even clearer proof in support of the twelve-mile ruling for the territorial sea is to be found in Article 7(4,5) of the CTSCZ. This Article provides that:

> "4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> 5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."(199)

As a matter of reasonable inference, the adoption of the 24-mile rule for bays has strengthened the claim for twelve miles to be a rule for the width of the territorial sea; that is to say, twenty four miles being twice the twelve mile territorial sea. There is no better quotation in this respect than what has been concluded by Professor O'Connell,

> "Although the Convention contains no rule about the extent of the territorial sea, it limits the contiguous zone to twelve miles from the coast, and provides for a twenty-four mile closing line for bays, which figure was arrived at apparently

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(198) This is one of the reasons why the U.S. wishes to have the 3-mile limit territorial sea replaced by the 12-miles in the UNCLOS III. See Martinez, op. cit., Ref. (132), at 93, p.256.

(199) U.N. Doc. A/CONF. 13/L.52.

> by doubling the figure of twelve. There may, therefore, be an implication in the convention favouring a twelve-mile limit."(200)

5. The three-mile rule, according to the view of the majority of writers, stemmed from the cannon shot rule.(201) If this argument is accepted, and since the cannon shot distance has become obsolete because of the development of international ballistic missiles, the former rule, namely the three mile rule, has in turn become obsolete.

6. It is often argued that the three mile rule best accommodates the true interests of international community, as well as the long term interests of individual States.

To this it can be replied that such a limit obviously serves the interests of States which have the capital, fleets and technological capability to profit from it. However, the interests of relatively poor, underdeveloped nations are of a totally different nature. The rule thus does not serve both equally. In analyzing the function of international law, Judge Ammoun, in his separate opinion in the North Sea Continental Shelf Cases pointed out that states' interests must receive protection on a footing of equality.(202) More important is, if this rule was accepted it would lead to the application of the law of the

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(200) O'Connell, D.P. "International Law for Students", 1971, p.200.

(201) See Swarztrauber, op.cit., Ref. (5), at 12, pp.51-63; Knight, op.cit., Ref. (1), at 8 , pp.69-70; Merrills, J.G. "Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases" Mod. Law Rev., Vol. 41, 1978, p.48.

(202) ICJ Reports, 1969, p.112.

jungle, by which the most wealthy and developed countries would go on thriving, prospering and profiting while the rest would still suffer and lose out on progress.

7. It is also contended that any extension of the limit of the territorial sea necessarily enforces restrictions on the freedom of the sea.(203) Accordingly, had the claims to extend territorial seas to twelve miles been recognized, seamen would face additional difficulties in ascertaining whether or not a vessel was within the territorial sea. At the same time, a number of international straits of vital importance for navigation would be converted into internal waters.(204)

It must be admitted that any extension of the territorial sea would affect to some degree the freedom of navigation. However, it is equally true that any contraction, however, slight, would enhance the principle of the freedom of the sea. If this conclusion is correct, and it is thought definitely to be, then a question arises. Why has the doctrine of territorial sea not been totally rejected and substituted by conferring certain limited rights upon the coastal State? It is easy to answer this question on the grounds that the doctrine of the territorial sea is fully indispensible regardless of the magnitude of its effect on the freedom of the sea. The generally recognized principle, not only in municipal legislation, but also in international law, is that if two sets of interests conflict, the most important one has to be given

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(203) McDougal and Burke, op.cit., Ref. (15), at 15, pp.539-589.

(204) Knight, op.cit., Ref. (1), at 8 , p.308.

precedence. The acceptance of the fact that any State having a sea-coast has conventionally, as well as customarily, the right to exercise exclusive powers over a specific width of the sea, is of enormous international value. This is irrespective of the effect on the freedom of the sea.(205) These powers were initially developed in response to the essential needs of a coastal State, those of self-preservation, security, defence, commerce and so forth.(206) That is to say, at the heart of the doctrine of the territorial sea lies the premise that it is both reasonable and practical for the coastal State to have special rights in the territorial sea adjacent to its coast.(207) It would follow that these vital interests themselves, justify, if not require, the extension of the territorial sea to a specific limit. It may equally be suggested that an additional nine miles would not constitute a serious impediment.(208)

Having explained the grounds for the legitimacy of the twelve mile limit of territorial sea, two important points remain which should not be overlooked. Firstly, the legitimacy of tending towards zones wider than twelve miles,(209) and secondly the compatibility of the twelve

(205) O'Connell, D.P., "Mid-Ocean Archipelagos in International Law", BYBIL, Vol. 45, 1971, pp.29-30.

(206) Knight, op.cit., Ref. (1) at 8 , p.308.

(207) See ICJ Reports, 1951, p.133, p.150, p. 160.

(208) The Colombian Representative at the Hague Conference stated that "Any State having a sea-coast has rights - natural or acquired - to exercise over a specific breadth of sea an exclusive power termed sovereignty.... This soveriegnty or local maritime jurisdiction is based on grounds which are accepted without dispute.... and are connected with the existence of the State, its essential needs, its self-preservation, security, defence, commerce and general development. Usually, the vital interests

Contd....

mile rule with international law.

It is true that the twelve-mile limit is not the most extensive width that has been claimed to date. Admittedly, certain Latin American countries have claimed greater maritime zones. Yet, this trend is not sufficient in itself to be legitimised for the following reasons:

1. The judgment of the ICJ in the Anglo-Norwegian Fisheries Case is cited to argue for a territorial sea wider than twelve miles. It is contended that the court made allowance for States to determine the limit of their territorial seas.(209) It is true that there was a suggestion in the Fisheries Case, that each State should be entitled to determine the limit of territorial sea which suits its own particular needs by a unilateral act.(210) However, such a suggestion does not stand in isolation inasmuch as coastal States are entitled to do so only in conformity with international law.(211)

2. Recognition of territorial sea extending beyond twelve miles would be somewhat detrimental to the interests

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(208) contd.
of the State are concerned, though what those interests are can be determined only by the State itself... the natural and acquired rights which coastal States possess over the sea are not always equal and vary according to the needs and vital interests and particular circumstances of each State". Cited in Szekely Sanchez, op.cit., Ref. (190), at 111, pp.19-20; See also Garcia-Amador, F.V., "The Latin American Contribution to the Development of the Law of the Sea", AJIL, Vol. 68, 1974, pp.38-39; Nelson, L.D.M. "The Patrimonial Sea", ICLQ, Vol. 22, 1973, pp.673-680.

(209) Szekely Sanchez, ibid., pp.149, 151.

(210) ICJ Reports, 1951, pp.130-133.

(211) ICJ Reports, 1951, pp.132-137.

of land-locked states.(212)

3. Finally and most significantly, any extension of the territorial sea beyond twelve miles is not recognized by international law. The aforecited limit has been, with few exceptions, universally accepted.(213) Underlying this view are the practice of States, the opinions of jurists,(214) and proposals presented at the international conferences.(215) It offers a "ready made" solution. A great number of States have already adopted this limit. Even States well known to be accustomed to the three-mile width, have abandoned their previous attitudes in favour of the twelve-mile extent.(216) Deciding on a twelve mile limit would bring an end to claims in excess of that width. Also to be taken into account is the growing support for a 200-mile limit and so the twelve-mile limit seems to be the only advisable solution.

To say this is not to argue against the objection that no agreement to establish a specific limit has been reached at any of the international conferences.(217) Of

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(212) See the statements made at the U.N. Sea-bed Committee by the representatives of U.S.S.R., U.N. Doc. A/AC.138/SC. 11/SR 52, p.59, Bulgaria, ibid. 57, p.112, Czechoslovakia, ibid., 56, pp.92-93.

(213) See in this sense Butte, Woodfin L., "The Law of the Sea - Breakers Ahead", Int. Lawyer, Vol. 6, No. 2, 1972, p.256.

(214) See for example Fawcet, op.cit., Ref. (176), at 106, pp.447-450; Martinez, op.cit., Ref. (132) at 93, pp.253-260.

(215) See for instance U.N. Doc. A/AC. 138/SC. 11/L. 7/Add. 1; U.N. Doc. A/AC. 138/SC. 11/L. 51; U.N. Doc. A/AC. 138/SC. 11/L. 52; U.N. Doc. A/AC. 138/SC. 11/L. 21; A/AC. 138/SC. 11/L.37.

(216) See above pp. 92-95

(217) Although a consensus on the 12-mile extent has come close to being achieved in the UNCLOS III, see above pp.92-95.

course, in the non existence of a conventional rule, one must search to discover whether or not there is any customary rule governing the situation. First, it is worth recalling that it is inaccurate to imply that the only customary rule has been the three-mile limit. Nor is it justified to deduce, in the light of the preceding argument, the incompatibility of the 12-mile rule with international law. The three-mile limit rule has never been accepted as an international law ruling as has been stated earlier.(218) In addition, although the question of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogicality, the predominant view seems to depend on Article 38 Section 1(b) of the Statute of the International Court of Justice.(219) The aforesaid Article runs as follows:

> "International custom, as evidence of a general practice accepted as law;"(220)

Despite the fact that the phrasing of the above article is criticised on the grounds of ambiguity,(221) dual prerequisites for the existence of a customary rule can be derived from it. The first element is the so called material "practice" and the second is the psychological

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(218) See above pp. 110 et seq.

(219) Briggs, Herbert W., "The Colombian-Peruvian Asylum Case and Proof of Customary International Law", AJIL, Vol. 45, 1951, pp.728-730; See also the Asylum Case, ICJ Reports, 1950, pp.266-277.

(220) Brownlie, op.cit., Ref. (31) at 20, p.276.

(221) See Alexander and others, op.cit., Ref. (129), at 92 , pp.10, 11.

"opinio juris".(222)

As far as the first element is concerned, having decided the essential prerequisites for the formation of a customary international rule, one must examine whether the same rule is practised in any given situation.

Obviously, the present practice of States indicates a shift towards recognition of the twelve-mile rule.(223) The U.S., Canada and Australia for example, now advocate a 12-mile limit where formerly they only claimed three miles.(224) The overwhelming majority of the Eastern European coastal countries claim a 12-mile territorial sea.(225) China in 1958 proclaimed a twelve mile territorial sea.(226) The present practice of the developing countries of Asia and Africa as well as Latin American States is to claim at least twelve miles.(227)

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(222) See Fitzmaurice, Sir Gerald, "The Law and Procedure of the International Court of Justice 1951-1954: General Principles, and Sources of Law", BYBIL, Vol. 30, 1953, pp.1-70; MacGibbon, I.C.,"Customary International Law and Acquiescence", BYBIL, Vol. 33, 1957, pp.115-125; Briggs, ibid., pp.728-730.

(223) See Brown, E.D. "Maritime Zones: A Survey of Claims" in New Directions in the Law of the Sea", Vol. III, 1973, p.161.

(224) Since 1966 a 12-mile exclusive fishery zone has been claimed by the U.S. See Act of 14 October 1966; ST/LEG/SER.B/15, 1970, pp.701, 702. The position of the U.S. on the territorial sea is to accept the 12-mile limit coupled with free passage through international straits. See Butte, op.cit., Ref. (213), at 120, p.250. See above p. (93). Canada extended her territorial sea to 12 miles according to Article 1 of the Act of 26 June 1970, Reprinted in 9 ILM, 1970, p.553; Australian Act No. 116 of 1967; 17 November 1967, see ST/LEG/SER.B/15 p.571.

(225) See for instance, the Regulations of 5 August 1960 of the Soviet Union; ST/LEG/SER.B/15 p.211. Bulgaria claims 12 miles of territorial sea, see Decree of 10 October 1951, ibid. B/6 p.80 and Romanian claim in ibid, B/6 p.238.

(226) Cheng, op.cit., Ref. (190), at 111, p.53.

(227) Fawcett, op.cit., Ref. (176), at 106, p.450.

Japan has shown her readiness to accept a twelve-mile zone.(228) In the interests of general agreement, even Western European States have shown signs of readiness to reconsider their positions as regards recognition of the 12-mile territorial sea. France, for instance, extended her territorial sea from six to twelve miles in December 1971.(229) Therefore, it cannot be doubted that the 12-mile rule has now been admitted into the corpus of the general rules of international law.

The element of opinio juris has created numerous difficulties in both theory and practice.(230) This concept is generally employed in two different senses. Firstly, it is used occasionally to distinguish customary international law rules, creating rights and obligations from rules of international morality. Secondly, it is applied to ascertain whether any particular action executed by a certain State or group of States is accepted by others as a binding legal rule.

It is certain that the first sense of opinio juris is to be seen in the case of the extent of the territorial sea. Undoubtedly, claims for a 12-mile limit of

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(228) Hjertonsson, op.cit., Ref. (2), at 53, pp.109,110.

(229) See Article 1 of the Law of December 24, 1971, reproduced in ILM, Vol. II, 1972, p.153. Although other Western European States claim territorial sea between three to six miles they nevertheless have shown on occasions their readiness to accept the 12-mile. See above p.(120).

(230) Cheng, Bin, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law", Indian JIL, Vol. 5, 1965, p.45; Kelsen, Hans, "General Theory of Law and State", Cambridge: Harvard University Press, 1949, pp.114; and "Principles of International Law", New York, 1966, pp.450 et seq., MacGibbon, op.cit., Ref. (222), at 122, pp.115, 131.

territorial sea have the purpose of creating legal rights and obligations over certain parts of the seas.

It now remains to examine the opinio juris in the second sense, which is a sort of real or presumed assent or acquiescence.(231) It is to be observed that the opinio juris in the second sense does not serve the purpose of explaining the formation of customary rules. Should a new rule or action, in order to qualify as a customary rule, be consistent with existing rules concerning the same subject, then a new customary rule would of course never be brought into existence.(232)

However, in general, it is submitted, whether or not certain action is legally binding depends on the degree of acceptance of other States. The twelve-mile rule today, as has already been mentioned, is recognized by most states. The nature of the readiness to accept the twelve-mile limit, in that it is carried out in a spirit of compromise, does not detract from its value. It still reflects the interests of those States in regulating the situation in the light of the compromise. In effect, two factors influence the national decision maker either when

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(231) Fitzmaurice, op.cit., Ref. (222), at 122, pp.68-69; see also the Nationals of the United States of America in Morocco Case, ICJ Reports, 1952, p.176; The Dissenting Opinion of Judges Hackworth, Badawi, Levi, Carneiro and Sir Benegal Rau,pp.215-233.

(232) Numerous unsuccessful attempts have been made to solve this contradiction. Limitation of space forbids discussing the efforts made in this respect. For further details, see Kelsen, op.cit., Ref. (230) at 123, "The General Theory", pp.114-149; and "Principles of International Law",pp.450 et seq.; Ceng, op.cit., Ref. (230), at 123, p.45.

he puts forward a unilateral claim or when he has to decide whether to accept or to reject any other State's claim. As Mr. Lissitzyn states in his "International Law Today and Tomorrow":

> "The task of deciding whether to apply a norm to a new situation is performed not only by international decision-makers such as the judges of international courts, but also, and more frequently, by national governments as they appraise each other's actions and responses in the international arena. In this 'process of reciprocal claims and mutual tolerances', they are guided not only by their conceptions of the general interest of the world community, but also, and mainly, by the particular interests of their nations. Much of international law, thus, rests not on abstract formulations of the 'general interests' but on the congruence or reasonable accommodation of the interests of many nations producing a consensus which can be translated into legal terms."(233)

The above analysis indicates that the national decision-maker is thus influenced firstly by his nation's particular needs and secondly, by the desire to put into practice a stationary, international legal order which in turn serves those interests on the long term. Hence, he usually alters those national interests which are not of vital importance in achieving accommodation of the more vital national interests, by obtaining the recognition of other States. Consequently, the desire to achieve a compromise never allows the country concerned to forget

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(233) Lissitzyn, Oliver J., "International Law Today and Tomorrow", 1965, p.40.

its essential national interests.

Another outstanding issue to be discussed is the amount of time necessary for a norm to achieve the status of an international customary rule. According to the traditional view, in order for any action to qualify as a customary rule, one has to ascertain whether or not that action has been exercised for a considerable period of time.(234) In the Case of the Paquete Habana, the United States Supreme Court examined several centuries of state practice to decide whether or not any customary rule had been established exempting fishing vessels from capture as prizes of war.(235)

Of course, if the establishment of a customary rule is to be appreciated, the element of time must be considered. Correct as that may be, time has become less important in these days characterized by rapid change.(236) It is to be noted that a number of writers who indicate that custom may emerge in a short time,(237) cite the rules of law of sovereignty of airspace which have grown up very rapidly. Moreover, state practice subsequent to the Truman Proclamation on the continental shelf was so extensive that many writers have recognized that the

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(234) Waldock, Sir Humphrey,"General Course on Public International Law", Hague Recueil, Vol. 106, 1962 II, p.45; Fitzmaurice, Sir Gerald, op.cit., Ref. (222), at 122, pp.1-31.

(235) 175 US 677, (1899).

(236) It is said that the importance of the element of time is a bare minimum in a field where there does not exist, any pre-existing rules. McDougal, Myres S. and others, "Law and Public Order in Space", 1963, p.119.

(237) Cheng, op.cit., Ref. (230), at 123, pp.23 et seq.

concept of the continental shelf has achieved the status of customary law within five years.(238) Some writers therefore take the view that reliance upon custom is casual whilst others point to this as an example of the great flexibility in the creation of custom.(239) At any rate, whatever the view, one can easily infer that state practice may be converted to customary law today much more early than the several hundred years of practices in the past, examined in the Paquette Habana Case. This conclusion appears more reasonable if one takes into account Professor McDougal's point, that the law of the sea is growing in response to the unceasing demands ensuing from the uses of the sea. According to Professor McDougal:

> "From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding State and including both national and international officials, weigh and appraise these

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(238) Lauterpacht, H., "Sovereignty over Submarine Areas", BYBIL, Vol. 27, 1950, p.376.

(239) Hull, E.W., "The International Law of the Sea: A Case for a Customary Approach", Law of the Sea Institute, Occasional paper 30, University of Rhode Island, R.I., (April 1976).

> competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena."(240)

A further point requiring comment is that although the three mile limit had never acquired the authority of a general principle of international law, if it is presumed that it had, one question fails to be answered. When does a once generally established rule cease to have force? Does it lose its general validity only when another recognized rule becomes established, or does its binding character vanish at the moment it seems that the rule no longer has general support?

The simple answer to this question, it is submitted, is that this matter has never been discussed by an international tribunal, either in general or with respect to the laws of the sea. Nevertheless, it has occasionally been decided by national courts when considering questions of immunity and the jurisdiction of those courts.(241)

For instance, the Austrian Supreme Court, had to decide in a case before it on May 10, 1950,(242) whether there was any international, legally valid rule that States

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(240) McDougal, Myres S. "The Hydrogen Bomb Tests and the International Law of the Sea", AJIL, Vol. 49, 1955, pp.356, 357. This view has been widely supported. See MacGibbon, op.cit., Ref. (222), at 122, pp.115-125; Fitzmaurice, op.cit., Ref. (222) at 122, pp.67-70.

(241) See Hjertonsson, op.cit., Ref. (2) at 53, p.145.

(242) 1950 ILR, 41, pp.155-166.

could be sued in the courts of foreign States even in matters of private law, or whether they had total immunity.

Having examined the practice of courts of numerous States, the Austrian Supreme Court reached the conclusion that some States' courts recognized, in principle the old rule of immunity from jurisdiction, even where acta gestionis of private law are concerned.(243) Other national courts, however adopted the view of restrictive immunity. The latter made a distinction between the case in which a government acts in its capacity of ente politica and the case in which it acts in its capacity of ente civile. In the former, foreign States were not covered by this immunity whilst in the latter case they were covered.(244) The Austrian Supreme Court found that other national courts had again taken up an intermediate position.(245) It went on therefore to say that:

> "This survey shows that today it can no longer be said that jurisprudence generally recognises the principle of exemption of foreign States in so far as concerns claims of a private character, because the majority of courts of different civilized countries deny the immunity of a foreign State and more particularly because exceptions are made even in those countries which today still adhereto the traditional principle that no State is entitled to exercise jurisdiction over another State."(246)

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(243) Ibid., p.160.
(244) Ibid., pp.158-160.
(245) Ibid., p.160.
(246) Ibid., p.161.

Accordingly, the court held:

> "By international law foreign States are exempt from the jurisdiction of the 'Austrian' courts only in so far as concerns acts undertaken by them in the exercise of their sovereign powers."(247)

Although some States still adhered to the rule, it may be concluded from the foregoing judgment that the Court held that it had no general validity since other States had renounced it. This amounts, it is submitted, to stating that the old customary rule loses its binding force when it appears that it no longer has general support.

A similar result was reached by the Supreme Constitutional Court of the Federal Republic of Germany.(248) In this as in the preceding case, the German Court reached the conclusion that a rule of international law loses its binding status when it appears that it has lost its general support. In the words of the German Court:

> "1. Eine Regel des Cölkerrechts, nach der die inländische Gerichtsbarkeit für Klagen gegen einen ausländischen Staat in bezug auf seine nicht-hoheitliche Betätigung ausgeschlossen ist, ist nicht Bestandteil des Bundesrechts.
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> 2.a) MaBgebend für die Unterscheidung zwischen hoheitlicher und nicht-hoheitlicher Staatstätigkeit ist die Natur der

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(247) Ibid., p.166.

(248) Germany (Federal Republic), Bundesverfassungsgerichts Entscheidungen, Vol. 16, pp.27 et seq., (1964) Nr. 5 Beschluss des Zweiten Senats, Vom 30 April; See also Hjertonsson, op.cit., Ref. (2), at 53, p.147.

staatlichen Handlung.

b) Die Qualifikation als hoheitliche oder nicht-hoheitliche Staatstätigkeit ist grundsätzlich nach nationalem Recht vorzunehmen."(249)

Although the preceding two cases are dissimilar to the situation we are faced with, nonetheless the same result that was reached by these courts can be arrived at in relation to the breadth of the territorial sea. That is to say, as long as state practice shows that the traditional rule of 3-miles is no longer generally recognized, and since so many States, if not yet a majority, renounce the three-mile rule, then it no longer holds general validity.

International practice in this tenor not only arises in courts' decisions but in official statements as well. The State Department of the U.S., for example, advised the legality of the then pending U.S. legislation delimiting her exclusive fishing zone to an extent of twelve miles. Although 25 out of the 91 States concerned claimed less than a twelve-mile zone, the State Department was of the view that the twelve-mile extent was compatible with international law, as it was not contrary to the trends in the law at that moment.(250) Here, it may be of use to quote, in part, the State Department's letter to the Senate Committee in relation to this matter:

> "Since the 1960 Law of the Sea Conference there has been a trend toward the establishment of a twelve-mile fisheries rule in international

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(249) Germany (Federal Republic) ibid., pp.27, 28.

(250) Reproduced in ILM, Vol. 5, 1966, pp.616, 617.

> practice. Many States acting individually or in concert with other States have extended or are in the process of extending their fisheries limits to twelve miles. Such actions have no doubt been accelerated by the support for the proposal made at the Geneva Law of the Sea Conferences in 1958 and 1960, of a fisheries zone totalling 12 miles as part of a package designed to achieve international agreement on the territorial sea.
>
> In view of the recent developments in international practice, action by the United States at this time to establish in exclusive fisheries zone extending 9 miles beyond the territorial sea would not be contrary to international law."(251)

From the aforesaid presentation, one can reach the conclusion that recent state practice, and changing claims of States, provide evidence that the traditional rule of a three-mile limit is no longer valid. It lacks the support of general recognition, and therefore has been replaced by another rule regulating the matter, namely the twelve mile limit. Conclusive evidence of this proposition can be seen from the present UNCLOS III, at which consensus is close to being achieved concerning the twelve-mile limit. This would appear to reflect the hopes and beliefs of the international community as it advances today.

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(251) Ibid., p.616.

Section Two

The Outer Limit of the Continental Shelf

It is now generally recognized in international law that coastal States enjoy not only sovereignty over their land territories and territorial seas,(252) but also certain rights beyond this marginal belt.(253) Underlying this view is the belief that although the high seas are res communis, there is nothing to impede exploration and exploitation of particular parts of the submarine areas described as continental shelves. This exploration and exploitation, it is stipulated, must not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters. This appears to mean that the seabed and subsoil of certain parts of the high seas have been regarded as being suitable for appropriation for the benefit of coastal States as res nullius, provided this does not affect the basic principle, namely, the freedom of the seas.(254)

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(252) It may be noted that whilst a State enjoys sovereignty to full extent over its land territory, sovereignty over its territorial sea is limited by international law. For further details see Daintith and others, op. cit., Ref. (4), at 9, pp. E.101-E.106; Common Market, op.cit., Ref. (4), at 1, p.149; O'Connell, D.P., "The Federal Problem Concerning the Maritime Domain in Commonwealth Countries", J. Marit. Law Com., Vol. 1, No. 3, 1970, p.403; Brown, op.cit., Ref.(4),at 9, p.329; See also Articles 1, 2, 14, 15, 16, 17, 18, 19, 20 and 24 of the Convention of 1958 on the Continental Shelf.

(253) ICJ Reports, 1969, p.22, para 19; Friedmann, Wolfgang, "The North Sea Continental Shelf Cases. A Critique", AJIL, Vol. 64, 1970, p.232; Brown, ibid., p.329.

(254) Gutteridge, J.A., "The 1958 Geneva Convention on the Continental Shelf", BYBIL, Vol. 35, 1959, p.102.

However, it is worth noting that the term "continental shelf" means, in the geological sense, a submerged area which begins at the shoreline, slopes seaward and normally ends at anything up to a depth of 100 fathoms (200 metres), before the seafloor starts descending steeply towards the deep ocean basins.(255)

At this point, it must briefly be mentioned that many States have recently declared their jurisdiction over seabed areas beyond their territorial seas. One might also suggest that rarely has an apparent major change in the international law plane been more rapidly developed, than in the case of littoral States' rights over the sea bed areas adjacent to their coasts.(256)

As a result of States' claims and declarations, the U.N. found that it was time to regulate this area of the law. Therefore, having referred the subject to its subordinate body, the ILC, the U.N. recommended examining the matter thoroughly and formulating principles relative to this field.(257)

In short, the Geneva Convention of 1958 on the Continental Shelf certainly marked the first phase of the U.N. efforts in this respect. In any event, there appear to be a number of shortcomings in the Convention which create arguments and disputes. This in turn reveals a need for a new conference to review all aspects of the law of the sea.

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(255) Colombos, op.cit., Ref. (4), at 9, p.70.

(256) Lauterpacht, op.cit., Ref. (238), at 127, p.376. See also Schwarzenberger, Georg and E.D. Brown, "A Manual of International Law", 6th ed., 1976, pp. 106-108.

(257) Colombos, ibid., p.76.

However, the purpose of this part of the work is to focus on the law regulating the question of the outer limit of the continental shelf. The investigation of this subject falls under two main headings:

Subsection 1 - The Historical Perspective of the Continental Shelf,

Subsection 2 - The Outer Limit of the Continental Shelf.

Subsection One

The Historical Perspective of the Continental Shelf

It may be observed that international law was silent on the question of the continental shelf prior to the technological advance needed to exploit the sea bed. The term "continental shelf" - in the legal sense - therefore, has not been used for a long time.(258) Only recently has it been developed, through a number of statements concerned with coastal States' rights over the submarine areas appertaining to their shores. A series of reasons advanced by writers who substantiated the coastal States' rights, have shared to some extent in the creation of this doctrine. In addition, subsequent state practice has put into effect the theories developed by these writers.

Before proceeding further, it would be wise to deal with statements and opinions, and the practice of states, under two separate headings.

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(258) The term "continental shelf" appears to have first been used only in a geological and geographical sense in 1887. See Mouton, M.W., "The Continental Shelf", Hague Recueil, Vol. 85, 1954, I, pp.350-379.

1 - Opinions and Statements

Undoubtedly, maritime areas beyond the territorial sea have always been part of the high seas.(259) Generally speaking, such parts are not subject to the sovereignty of any state, res communis. This basic principle affects the superjacent waters of the high seas as well as their subsoil, which includes the continental shelf. This view is derived from the theory that the high seas are the common property of all people and capable of exclusive acquisition by none. On the other hand, it is also believed that the high seas are the property of no one, thus they are susceptible to any of the means of acquisition of territory.(260)

However, not only is the legal status of the high seas disputed, but also that of the sea bed and submarine areas beneath. As early as 1923-1924, for example, Sir Cecil Hurst was of the opinion that the seabed was capable of occupation and appropriation.(261) Oppenheim,

(259) Article 1 of the Geneva Convention of the high seas 1958 provides that: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a state". Brownlie, op.cit., Ref. (31), at 20 , p.89.

(260) See Young, R., "The Legal Status of Submarine Areas Beneath the High Seas" AJIL, Vol. 45, 1951, pp. 225-229.

(261) Hurst, Sir Cecil J.B., "Whose is the Bed of the Sea?" BYBIL, Vol. 4, 1923-1924, pp.34-43; Sir Cecil Hurst stated that: "where effective occupation has been long maintained of portions of the bed of the sea outside the three mile limit, these claims are valid and subsisting claims, entitled to recognition by other States". Ibid., However, it is useful to mention at this stage the views worded by Sir Cecil Hurst in 1948 when he pointed out that too much should not be read into his article published in 1923-1924 on the grounds that ownership of submarine banks or sedentary fisheries to which his earlier

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Lauterpacht and O'Connell were also of the view that the seabed is capable of being occupied.(262) This view is based on the grounds that submarine areas are, like land territories res nullius until claimed and occupied by a State. That is because the legal status of the seabed must be determined by recourse to other principles of customary law. These principles, it is contended, recognize that portions of the sea floor may legally be subjected to the exclusive control of a single State, through an actual and effective exercise of authority.(263)

Other writers make a distinction between the sea bed and subsoil, holding that the former is not subject to occupation and appropriation, whilst the latter is capable of appropriation and use.(264) The late Jude Lauterpacht, in his article on the subject of "Sovereignty over Submarine Areas" has taken the position that, on the basis of acquiescence and effective occupation, and subject to

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(261) contd...
article only referred, should be distinguished from the continental shelf. See Hurst, Sir Cecil J.B., "The Continental Shelf", Vol. 34, 1949, pp.153-169.

(262) Oppenheim, L. "International Law". Vol. 1, 6th ed., Ed. by H. Lauterpacht, 1947, pp. 576 et seq.; O'Connell, op.cit., Ref. (5), at 54, pp.516-517.

(263) Young, Richard, "The Legal Regime of the Deep Sea Floor", AJIL, Vol. 62, 1968, p.645.

(264) See also Waldock, C.H.M., "The Legal Basis of Claims to the Continental Shelf", Trans Grotius Soc., Vol. 36, 1951, p.115; Colombos, op.cit., Ref. (4), at 9, p.67. Contra.: Smith, H.A., "Great Britain and the Law of Nations", Vol. II, 1953, edited by Herbert Arthur Smith, 1975, pp.122-123.

non-interference with the freedom of the high seas, parts of the seabed could legitimately be appropriated.(265)

The view that submarine areas are incapable of acquisition rests on the contention that it is in the interests of commerce to keep them open and free for all. This view is criticized as it does not fully justify itself. According to Professor Young, there is no logical reason for subjecting submarine areas to the same legal regime as the water above.(266)

It may be noted that the submerged land was referred to without any intention to locate or to claim a "shelf" by Vattel in 1758, by Valin in 1760, and in 1803 by Rayneval. President Jefferson of the U.S. also mentioned this in 1805. Thomas Fulton in 1911 indicated that sedentary animals connected with the bottom belong more to the soil or bed of the sea, than to the sea itself. In 1916, it was emphasized by Storni and Suarez that adjacent States should have jurisdiction over the shelf, because of the importance of commercial fisheries.(267)

However, the legal sense of the term continental shelf was utilized for the first time in a Conference at the National Fishery Congress, Madrid, 1916. There, Odon de Buen, later the Director General of Fisheries in

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(265) Lauterpacht, op.cit., Ref. (238), at 127, p.376.

(266) Young, op.cit., Ref. (260), at 136, p.229. See also the contrary view suggested by Sir Cecil Hurst to the ILC, that since the high seas are the common property of the international community, the development of submarine areas beneath them should also be entrusted to the international community. For further details see U.N. Doc. A/CN. 4/SR, p.28.

(267) Auguste, op.cit., Ref. (4), at 1, pp.39-42.

Spain, urged the necessity for extending territorial seas to include "the whole of the continental shelf,(268) because that area was the most suitable place to increase the multifarious kinds of fishes."(269)

In 1918 also, the Argentinian scholar, Jose Leon Suarez, pointed to the continental shelf in his "El Mar Terretorial Y Las Industrias Maritima".(270)

Attention continued at this early period to be directed to the rights on the sea bed and subsoil.(271) This shows quite clearly that the right to the shelf gradually became accepted and acknowledged by most publicists In fact, this encouraged States to make greater use of the concept especially after scientific research disclosed the extent of the huge wealth of the seabed.

II - State Practice

The previous exposition of statements and opinions reveals basically that certain parts of the seabed and subsoil of the sea adjacent to the States offshore, have been recognized as exploitable by the adjacent States, for their own benefit. This is an exception to the main principle, namely, the freedom of the high seas.

In spite of this, an analysis of state practice will reveal that States' attitudes on this matter were still

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(268) Auguste, op.cit., Ref. (4), at 1 , p.42.

(269) Ibid., Young, Richard, "Recent Development with Respect to the Continental Shelf", AJIL, Vol. 42, 1948, pp.849 et seq.

(270) Auguste, ibid., pp.38-42.

(271) Ibid., pp. 44 et seq.

ambiguous until the period following the First World War.

However, for the sake of clarifying state practice, it will be dealt with in three periods,

1. The period prior to the Truman Proclamation of 1945.
2. The Truman Proclamation of the 28th September 1945.
3. State Practice after the Truman Proclamation.

a. State Practice Prior to the Truman Proclamation

It is reasonable to suppose that the legal concept of the continental shelf, in so far as the practice of states was concerned, arose for the first time in 1916. An instance which may be cited is that of the Russian Empire Note which was circulated to the powers on the 29th of September 1916.(272) The Russian Imperial Government employed the term "continental shelf" officially, when it declared that certain deserted islands(273) were an integral part of its empire.

In addition, the Note was reissued by the Soviet Union on the fourth of November 1924. According to that issue, Russia claimed that the said islands were part of the Northward extension of the continental platform of Siberia.(274) This Note, however, neither referred to the term "continental shelf" as it stands today, nor did

(272) It may be contended that the 1858 "Cornwall Submarine Mines Act" could be taken as the earliest State instrument dealing with the question of the continental shelf. To answer such an argument, it may be stated that this act had nothing to do with the Regime of the continental shelf. For further details, see Hurst, op.cit., Ref. (261), at 136, "Whose is the Bed of the Sea", pp. 34 et seq.

(273) The islands were; Bennett, Jeannette, Henrietta and Herald. See Auguste, op.cit., Ref.(4), at 1, p.58.

(274) Green, L.C., "The Continental Shelf", CLP, Vol. 4, 1951, p.58.

it mention an underwater plateau; neither did it submit any claim on the basis of the continental shelf doctrine.(275)

In 1925 Ceylon issued a Pearl Fisheries Ordinance which defined the pearl banks. Here again, no actual allusion to the continental shelf was made.(276)

This appears to indicate that so far, there had been no real reference to the doctrine of the continental shelf. However, many factors influenced the way in which States had to approach this subject. For example:

1. The growing world-wide need for new resources, particularly petroleum.
2. The experts' opinion that petroleum lay in great quantities beneath the continental shelf.
3. The exploitation of these areas has become possible due to the development of technological capabilities.(277)

The combination of these influences forced States to approach this subject on a legal basis, in order to justify the exercise of their rights over certain parts of the sea which constituted the continental shelf. A striking example of this approach may be found in the treaty of 1942 between the U.K. and Venezuela. By this treaty, the two powers defined their respective interests in the submarine areas adjacent to their coasts in the Gulf of Paria.(278) The treatment of these submarine areas was

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(275) U.N. Doc. A/CN.4/17, p.34.

(276) Green, ibid., pp.58,59.

(277) Buzan, Barry, "Seabed Politics", 1976, pp.34-37; Bowett, op.cit., Ref. (3), at 1, p.33.

(278) U.K.T.S., No. 10, 1942.

based on the grounds that the seabed lying beyond the limits of territorial sea was res nullius, over which sovereignty could be acquired by occupation.(279) It was agreed also not to assert any claim over submarine areas defined as the seabed and subsoil outside territorial waters lying on the other's side of the boundary. Each party also undertook to recognize any claim put forward by the other on its own side. By Article 6, the parties declared that the treaty in no way affected the status of the waters of the Gulf of Paria.

The U.K. followed up the treaty with the Submarine Areas of the Gulf of Paria (Annexation) Order, 1942, under which the seabed and subsoil situated beneath waters bounded as defined in the order, were annexed to and formed part of his Majesty's dominions, and attached to the colony of Trinidad and Tobago for administrative purposes.(280)

While it is correct to say that the treaty was purely bilateral and thus not binding on the non-contracting States, one may be entitled to assume that it was the earliest State document in which two States took a stand concerning the continental shelf. Moreover, it was the first instance indicating any installations which may be erected.

Two other observations in this connection appear necessary. Firstly, this treaty did not only state the

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(279) Vallat, F.A., "The Continental Shelf", BYBIL, Vol. 23, 1946, p.334.

(280) Mouton, op.cit., Ref.(258), at 135, p.368; Green, op.cit., Ref. (274), at 140, p.71; Statutory Rules and Orders, 1942, Vol. 1, p.919.

right of the coastal State to exploit the seabed and subsoil, but annexed that area itself to the contracting parties' territories. Secondly, it was the first State instrument so far, that allowed the division of submarine areas between adjacent States. This was combined with mutual recognition of rights of sovereignty or control, lawfully acquired by each of the two parties in its own sphere. Hence, this feature can be considered as surpassing the traditional international law rules, which had become inadequate or unsatisfactory in the light of modern requirements. The traditional rules had not accepted the legality of the agreed division of the seabed areas.

Only one final point calls for comment. It should be stated that the term "continental shelf" was not used in the U.K.-Venezuelan treaty; instead the "submarine areas of the Gulf of Paria" were referred to. The treaty defined them as the seabed and subsoil outside of the territorial sea of the high contracting parties on either side of certain lines, drawn as provided for in the following articles.(281)

b. The Truman Proclamation

It must be conceded that the starting point of state practice is undoubtedly the Truman Proclamation. Admittedly, matters took a new turn on the 28th of September 1945 when this well-known Proclamation was issued claiming the

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(281) Mouton, op.cit., Ref. (258), at 135, p.368.

submarine areas off the U.S. coasts.(282)

An examination of the history of the Truman Proclamation shows that it started in 1937, when President Franklin D. Roosevelt communicated to the Department of State that he was thinking of "an executive proclamation by the President". It was to refer to fisheries in the Pacific off Alaska, between the 3-mile limit and that point of the ocean bed where the water reached a depth of 100 fathoms. After careful consideration of the different aspects of the question by the American authorities, the text of the proposed proclamation was ready in January 1945. Before finally signing the proclamation, the Department of the Interior suggested the addition of a new sentence at the end of the draft, concerning the issues between the U.S. and other States.(283)

However, the proclamation which specifically recognizes the character of the waters above the continental shelf as high seas, recites the following as its underlying justifications:

1. Because "of the long range world-wide need for new sources of petroleum and other minerals .... efforts

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(282) See Brown, E.D. "The Continental Shelf and the Exclusive Economic Zone: The Problem of Delimitation at UNCLOS III", Maritime Policy and Management, Vol. 4, No. 6, 1977, p.377. It was said that the Truman Proclamation with regard to the continental shelf was described as one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny. See Borchard, op.cit., Ref. (7), at 2, p.53; Lauterpacht, op.cit., Ref. (238), at 127, p.377.

(283) Whiteman, op.cit., Ref. (5), at 9, pp.752-758. For the full text of the Proclamation see, Presidential Proclamation No. 2667, ST/LEG/SER.B/1, 1951, pp.38 et seq. For the Executive Order No. 9633, see ibid., p.41.

to discover and make available new supplies of these resources should be encouraged."

2. Such resources are believed to "underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable, or will become so at an early date."
3. ".... recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization."
4. ".... the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation, is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation from the shore."(284)

Before considering further state practice, it is significant to examine the nature of the proclamation since it is, as the ICJ considered it, of particular importance.(285) The following principles may be identified in this respect:

1. The continental shelf is regarded as an extension of the land mass of the State territory and thus it normally appertains to it.
2. Self-protection compels a coastal State to pay heed to activities off its shore.(286)

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(284) See Ref. (283) at 144.
(285) ICJ Reports, 1969, para. 86, p.47; see also paras. 47, 100, pp. 32 and 53 respectively.
(286) See Rao, P. Sreenivasa, "The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea", 1975, p.48.

3. The proclamation asserts the freedom of the high seas: it distinguishes between the waters above the continental shelf, and its sea bed and subsoil.

It appears that the Proclamation, by this distinction, clearly endeavoured to avoid any strictly territorial claim. It only asserted United States' jurisdiction and control of the natural resources of the continental shelf.

4. It provides that where the shelf extends to the shores of another State or where it is shared with an adjacent State, the boundary was to be determined by mutual agreement between the affected parties on equitable principles.(287)
5. It confined the continental shelf to areas beneath the high seas, but contiguous to the coasts of the U.S.
6. The "effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore".

For all the reasons above, the proclamation, as shown earlier, has been understandably considered to be the principle document creating the doctrine of the continental shelf. It has acquired its great importance also due to the fact that no nation has protested the claim. Indeed, it has been followed by similar claims by numerous other States.(288)

However, all that has been said is no reason for ignoring the following observations:

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(287) See Whiteman, op.cit., Ref. (5), at 9 , pp.658-662.
(288) Whiteman, op.cit., Ref. (5), at 9, p.762.

1. Although the proclamation used the term "jurisdiction and control" instead of "sovereignty", it is obvious that "jurisdiction and control" in the context of the proclamation implies nothing less, it is submitted, than sovereignty itself. It has been worded as follows: ".... the Government of the U.S. regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high sea but contiguous to the coasts of the U.S. as appertaining to the U.S., subject to its jurisdiction and control".

The utilization of the said term in this context shows that there are no different legal or practical consequences between asserting that something appertains to the United States, subject to her jurisdiction and control, and saying that the same thing is subject to the sovereignty of the U.S. In the Island of Palmas Case,(289) to which the U.S. was a party and accepted the award, Judge Huber stated that "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.... Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State".(290) Therefore, as noted above, it is easy to conclude confidently that "exclusive rights of control and

(289) 1928, Permanent Court of Arbitration, Reports of International Arbitral Awards, U.N., Millwood, New York, Vol. II, 1974, pp.838, 839.

(290) Ibid.

jurisdiction" over subsoil, would seem to be tantamount to saying "sovereignty".(291)

2. The jurisdiction and control rights, which the proclamation mentioned, are not only over the shelf and its subsoil, but also over its resources. So, apparently it did not distinguish the legal status of the land territory of the State from that of its continental shelf. Moreover, although the proclamation limited the U.S. jurisdiction to only the resources of the continental shelf itself, the U.S. eventually practised its jurisdiction over the shelf as a whole, and not only over its resources, and indeed does so to this day.(292)

3. The content and the scope of the term "continental shelf" was not defined in the proclamation.(293) It is true that the accompanying White House Press Release indicated that the term referred to submerged lands adjacent to the continent, covered by no more than 100 fathoms of water.(294) This is no reason for ignoring that the above press release was mentioned in a Bulletin,(295) which is obviously not binding and easily evaded at any time. It would have been better to have had the definition in the proclamation itself.

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(291) See Professor Brierly, U.N. Doc. A/CONF. 4/SR, 68, p.8; see also Hurst, op.cit., Ref. (261), at 136, pp. 161-162.

(292) This fact is shown in the United States construction of what were called "Texas Towers" for military purposes. See Auguste, op.cit., Ref. (4), at 1, p. 95.

(293) Stone, Oliver L., "United States' Legislation Relating to the Continental Shelf" ICLQ, Vol. 17, 1968, p.107.

(294) Young, op.cit., Ref.(269), at 139, pp.850-851.

(295) Whiteman, op.cit., Ref. (5), at 9, p.762.

c. State Practice After the Truman Proclamation

President Truman's 1945 Proclamation on the continental shelf was promptly followed by a host of proclamations issued by other nations.(296) Some of these proclamations, the terms of which were almost restrained in that they asserted jurisdiction over the subsoil and seabed of the continental shelf, and some even extended this assertion to the overlying waters thereof.

A good illustration is that of Mexico. Only one month after the Truman Proclamation, on 29 October, 1945, Mexico declared that the continental shelf adjacent to her coast was to be considered as being incorporated in the national territory.(297) Further similar declarations were issued in 1946, by Argentina on 11 October,(298) and Panama in March 1946.(299) Similar, though more far-reaching, were the declarations of Chile on June 23, 1947;(300) Peru on August 1, 1947;(301) Costa Rica on July 28, 1948;(302) Cuba in December 1946;(303) and Nicaragua on May 1, 1947.(304)

(296) Fahrney II, op.cit., Ref. (108), at 46 , p.543.

(297) ST/LEG/SER.B/1, p.13.

(298) Ibid., p.4.

(299) Ibid., p.15; or Political Constitution of the Republic of Panama, of March 1946, Article 3. Cited in Fitzgibbon, Russell H., "The Constitutions of the Americas", 1948, p.605.

(300) The test of the declaration cited in ST/LEG/SER.B/1, p.6; or in ILQ, Vol. 2, 1948, pp.135-137.

(301) ST/LEG/SER.B/1, p.16.

(302) Young, op.cit., Ref. (269), at 139, p.854.

(303) Ibid., p.855.

(304) Ibid., p.853.

Most of these decrees have differed from the U.S. Proclamation on which they purport to be based. They expressly proclaimed sovereignty over the continental shelf although as was noted earlier, there is rather a difference in the language without important difference in the consequences.(305) Chile, Peru and Costa Rica proclaimed their sovereignty over a belt of sea extending 200 miles from their national coasts.(306) Nicaragua has gone as far as to define her national territory in her constitution, as lying between the Atlantic and the Pacific Oceans, the Republics of Honduras and Costa Rica, and including the adjacent islands, the territorial sea, the continental shelf, and the aerial and atmospheric space.(307)

The U.K. issued a series of proclamations for its Carribean Colonies; the Bahamas (Petroleum Act 3 April 1945), Honduras (Oil Mining Regulations, 2 September 1949), and Jamaica (Alteration of Boundaries) 26 November 1948.(308)

On 21st December 1950, similar claims were made by an order issued with regard to the Falkland Islands.(309) The latter used the term "continental shelf" in its title, referring to the 100-fathom line.

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(305) See above, p.147.

(306) These decrees are summarised in Young, op.cit., Ref. (269), at 139, pp.849-855.

(307) Article 5 of the Political Constitution of 1 November 1950, ST/LEG/SER.B/1, p.15.

(308) ST/LEG/SER.B/1, pp.30-33.

(309) SI, Vol. 1, 1950, No. 2100, p.682.

In 1950, Pakistan also issued a similar declaration, on 9 March.(310)

Similar proclamations were made in 1949 by Saudi Arabia on 28 May,(311) Bahrain on 5 June,(312) Qatar on 8 June,(313) Abu Dhabi on 10 June,(314) Kuwait on 12 June,(315) Dubai on 14 June,(316) Sharjah on 16 June,(317) Ummal Qaiwain on 20 June,(318) Ajman on 20 June,(319) and Ras elkhaima on 17 June.(320)

These later proclamations related to the resources of the sea bed and subsoil generally. They have one common feature in that they all asserted, in varying terms, that they did not claim to affect the status of the waters above the sea bed and outside territorial sea. These proclamations and declarations are directed to the exploitation of oil, and each recognized that the boundary limits should be determined on equitable principles, by agreement with neighbouring States.(321)

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(310) The Gazette of Pakistan, Extraordinary, March 14, 1950.

(311) ST/LEG/SER.B/I, p.22.

(312) Ibid., pp.24, 25.

(313) Ibid., p.27.

(314) Ibid., p.23.

(315) Ibid., p.26.

(316) Ibid., pp.25, 26.

(317) Ibid., pp.28, 29.

(318) Ibid., p.29.

(319) Ibid., pp.23, 24.

(320) Ibid., pp.27, 28.

(321) Iraq of course, was no less interested in the continental shelf than any other State. Therefore, the Iraqi Government issued decrees and official releases, in which it asserted the Iraqi international rights in the areas of the continental shelf before the Iraqi coast. See Chapter (5) below. pp.388 et seq.

Conclusion

An examination of state practice, some facets of which have been alluded to, reveals that there are no certain basic principles agreed upon unanimously, concerning the claims to the continental shelf. The following observations can be made on state practice:

1. Many of the declarations and decrees followed the Truman Proclamation in pointing out the socio-economic considerations, self protection and social needs, to justify the State's right to the submarine area contiguous to its coast. These factors have in fact become part of international law.
2. Although some countries specified the extent of their continental shelves, they nevertheless claim different limits. To demonstrate this, it may be worth mentioning that Honduras, Ecuador, Australia, Portugal and the U.S. for example, utilized the test of the depth of 200 metres or 100 fathoms. Chile, Costa Rica, Mexico and Peru referred to a distance test of 200 nautical miles. Saudi Arabia, India and the U.K. reiterated the conception of adjacency to reveal the extent of their continental shelves. Argentine and Guatemala declared their continental shelves to be as far as their geological configurations extend beneath the high seas. Nicaragua, Panama and the Philippines did not claim any fixed limit.(322)
3. In some cases, the declarations or proclamations were constitutive forms of annexation asserting that the

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(322) Rao, op.cit., Ref. (286), at 145, pp.48, 49.

continental shelf formed part of their national territory.(323) In others, they were merely declaratory of the existing position, for example Australia and others have asserted ownership of the resources contained in the continental shelf.(324)

4. Apart from the South American decrees and declarations, the States' asserted that their rights did not affect the legal status of the waters above the sea-bed as high seas.
5. Also, it seems quite clear that there were three groups of declarations and decrees. Firstly, those where the term continental shelf is used without further delimitation, secondly those where the term continental shelf is mentioned, along with certain limitations or extensions, and thirdly, those where no continental shelf is mentioned.

However, from the above brief illustration of the historical perspective of the continental shelf, it appears that no other question in international law has received such thorough consideration. Moreover, although it has developed rapidly and been regulated by international convention (The Geneva Convention), it should still be remembered that many States are not party to this convention, and that the Convention deals inadequately with some of the questions involved.

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(323) As if the coastal state has complete sovereighty over the continental shelf.

(324) Gutteridge, op.cit., Ref. (254), at 133, pp. 110 et seq.

Subsection Two

The Outer Limit of the Continental Shelf

The history of the continental shelf, as noted in the previous subsection, shows quite conclusively that the continental shelf doctrine has gained acceptance in state practice;(325) the task now is to consider the outer limit of the continental shelf. It must be noted at the outset that geographical and marine sciences reveal that the shores of States stretch to different extents beneath the superjacent waters of the seas. That is to say, shores sometimes descend slowly, and at other times steeply, to the sea.(326) The gentle slant of the land mass of the territory constitutes a shelf, which terminates in the sea in a submerged state, and then descends steeply to the ocean bed. It is this "shelf" which geographers have termed the "continental shelf".

It may be added that the definition of the continental shelf has been based on different grounds. Some scientists have founded it on the geographical nature of the shelf, others have considered the biological facts of the living resources in the area as solid grounds, and the third group is of the opinion that the definition must be based on the levels of the descents.(327)

In this connection, it may be of use to cite the definition adopted by the Committee on the Nomenclature of Ocean Bottom Features in 1953:

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(325) See above pp. 139 et seq.

(326) See Miron, George, "The Outer Continental Shelf - Managing'or Mismanaging'its Resources" J. Marit. Law Com., Vol. 2, No. 2, 1971, p.267.

(327) Lauterpacht, op.cit., Ref.(238), at 127, pp.383-387.

"Continental shelf, shelf edge and borderland. The zone around the continent, extending from the low-water line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs, the term shelf edge is appropriate. Conventionally, its edge is taken at 100 fathoms, or 200 metres, but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low-water is highly irregular, and includes depths well in excess of those typical of continental shelves, the term continental borderland is appropriate.

Continental slope. The declivity from the outer edge of the continental shelf or continental borderland into great depths.

Continental terrace. The zone around the continents, extending from the low-water line, to the base of the continental slope.

Island shelf. The zone around an island or island group, extending from the low-water line to the depths at which there is a marked increase of slope to greater depths. Conventionally, its edge is taken at 100 fathoms, or 200 metres.

Island slope. The declivity from the outer edge of an island shelf into great depths."(328)

As to the legal definition, according to Professor Brown and other high authorities on the subject, the definition of the continental shelf is one of the most debated questions of the law of the sea.(329) That is to say, the definition of the continental shelf is an intri-

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(328) Cited in Brown, op.cit., Ref. (99), at 44, part II, pp. 281-282.

(329) Brown, E.D., "The Outer Limit of the Continental Shelf", Jur. Rev., 1968, p.111; and op.cit., Ref. (4) at 9 , p.377.

cate question not only for lawyers but also for physical scientists who are not wholly in agreement regarding it.(330) To say the foregoing is not to admit that the problem under consideration is a new one. On the contrary, it was first considered in the debate of the ILC in the 1950s.(331) Accordingly, it is proposed to deal first of all with the preparatory work of the drafting of Article 1 of the Geneva Convention on the Continental Shelf.(332) Then time will be devoted to the Geneva Conference as well as the text of Article 1 of the Convention, the proposals suggested by the organizations concerned and the rules emerging from the UNCLOS III. And finally, the need for a definite outer limit of the continental shelf will be discussed.

I. The Preparatory Work for the Drafting of Article (1) of the Geneva Convention on the Continental Shelf.

The drafting history of Article 1 shows that the ILC in the early stages considered that the legal concept of the continental shelf need not depend on the geographical sense. Therefore, it defined the continental shelf in its first draft articles only in terms of exploitability.(333) It provided that

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(330) Mouton, M.W. "The Continental Shelf", 1952, pp.6-45.

(331) Brown, ibid. "The Outer Limit of the Continental Shelf, p.117.

(332) The attention directed to the ILC's work is justified by the significant part which the Commission played in preparing the articles on the continental shelf. See Oxman, Bernard H., "The Preparation of Article 1 of the Convention on the Continental Shelf", J. Marit. Law Com., Vol. 3, No. 2, 1972, pp.246-247.

(333) Brown, ibid., p.113; Oda, op.cit., Ref. (92), at 79, pp.440 et seq., See also the Study prepared by the Secretariat of the United Nations for the Adhoc

Contd.....

> "As here used, the term continental shelf refers to the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil."(334)

This appears to mean that the ILC put aside the term continental shelf in the geographical sense and employed the term exploitability when defining the outer limit of the continental shelf. Indeed, this was done for the benefit of States which did not possess a continental shelf in the geographical sense.(335)

In 1953 in the light of governmental comments, the Commission abandoned its previous criterion. Operating within the belief that "precision must have priority over long-term stability and, stressing also the need to avoid the adoption of different limits by different States", the Commission considered the possibility of adopting a fixed limit in terms of the depth of the superjacent waters.(336) Thus, the pertinent Article of the 1953 draft defined the continental shelf as it referred to "the seabed and subsoil of the submarine areas contiguous

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(333) contd....
Committee to Study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limit of National Jurisdiction. U.N. Doc. A/AC. 135/19, 21 June, 1968, Paragraphs 13-18.

(334) YBILC, 1950, Vol. 1, pp.214-304; YBILC, 1951, Vol. II, p.141.

(335) For further details concerning the motives for avoiding the geographical sense of the continental shelf see, Mouton, op.cit., Ref. (258), at 135, pp.75-76.

(336) Brown, op.cit., Ref. (329), at 155, p.114.

to the coast but outside the area of the territorial sea, to a depth of 200 metres."(337)

Three years later, the Commission changed its attitude once more and considered in 1956 a combined criteria for a fixed depth and exploitability. The Commission in its argument for justifying the new criteria, raises the point that the Inter-American Specialised Conference on "Conservation of Natural Resources: Continental Shelf and Oceanic Waters" adopted the view, "unanimously held by the American States" that the jurisdiction of the coastal State should be extended beyond the limit of 200 metres to "where the depth of the superjacent waters admits the exploitation of the natural resources of the seabed and subsoil."(338) Regardless of the objection of a number of its members, the Commission inserted the criteria on the grounds that the exploitability test would contain the seeds of subsequent uncertainties and disputes. The text as considered was, however, wholly adopted by the majority of the members of the Commission on the basis that it would mitigate the

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(337) YBILC, 1953, Vol. I, pp.72-85. It would have been better if the Commission had employed the 100 fathom isobath instead of 200 metres, because the former is not only a convenient line for discussions as it is usually drawn on the sea-charts, but also the difference between it and the latter is about 17 metres. See Mouton, Ref. (258), at 135, p.418.

(338) Brown, E.D. "The Legal Regime of Hydrospace", 1971, pp.4,5. Article 67 of the draft defined the outer limit of the continental shelf as it is 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 (approximately 100 fathoms) or beyond that limit,to where the depth of the superjacent waters admit of the exploitation of the natural resources of the said areas". YBILC, 1956, Vol. II, pp.253-296.

element of arbitrariness in the 1953 draft by the principle of equality.(339)

Eventually, Article 67 of the 1956 draft was approved with the addition of a second paragraph concerning the islands, by the Fourth Committee of the United Nations Conference on the Law of the Sea.(340)

II. The Geneva Convention of 1958 on the Continental Shelf

Although it is true that not all coastal States are party to the Geneva Convention on the continental shelf, it is equally true that the problem of the outer limit of the continental shelf is chiefly that of the interpretation of Article 1 of the Geneva Convention.(341) Article 1 which was adopted by the Geneva Conference defines the outer limit of the continental shelf:

> "For the purpose of these Articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of

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(339) Brown, op.cit., Ref. (329), at 155, p.114; YBILC, 1956, Vol. II, pp. 296-297. See also Kish, John, "The Law of the International Space", 1973, pp. 18-19.

(340) The vote was 51 to 9 with 10 abstentions. See Brown, op.cit., Ref. (338), at 158, pp.11-15, and op.cit., Ref. (329), at 155, p.112. However, it may be observed that objections were expressed by delegates at the conference concerning incorporating the criterion of exploitability. Those proposals all failed to secure the prerequisite majority. See for example the Proposal of Argentina U.N. Doc. A/CONF. 13/C. 4/L.6 UNCLOS I, Official Records, Vol. VI, p.127; the French Proposal, U.N. Doc. A/CONF. 13/C. 4/L.8, ibid., p.129; the Rumanian Proposal, Doc. A/CONF. 13/C. 4/L.4, ibid., p.127. See also ibid., pp.4,19,21,23,34,46,129; see the Canadian Proposal Doc. A/CONF. 13/C. 4/L.30, ibid., pp.46, 135; the Yugoslav Proposal, Doc. A/CONF. 13/C. 4/L.12.

(341) See Brown, op.cit., Ref. (329), at 155, pp.112.

> 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."(342)

The clear terms of this provision reveal that the adopted definition combining two depth tests for determining the adjacent submarine zones over which a coastal State may exercise its continental shelf, claims:

I. The 200-metres depth test

II. The criterion of exploitability.

These two criteria will be discussed in the paragraphs which follow. However, more than this must be said. Any analysis of these two criteria must be prefaced by an examination of the word adjacent and whether it implies some limitation upon the seaward extension of the continental shelf.

a. Submarine Areas Adjacent to the Coast

The word "adjacent" mentioned in Article 1 is very often stressed to infer some limitation of the seaward extension of the continental shelf.(343) It is believed that the exploitability test should be interpreted only together with the concept of "adjacent areas".

To say this is not to claim that difficulties of interpretation have not arisen in connection with this word

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(342) Brownlie, op.cit., Ref. (31), at 20, p.107.

(343) Butte, op.cit., Ref. (213), at 120, p.239.

which appears in Article 1.(344) On the contrary, all the evidence which follows shows clearly that quite contradictory views have been expressed in this regard. In seeking to discern the meaning and the scope of the term "adjacent", it is useful to divide the argument into two attitudes:

The first, in brief, suggests that the word adjacent consists of all the submerged land mass. The grounds put forward to justify this view are that it is understood from the fact that the shelf area is the natural prolongation of continental landmass into and under the sea.(345) In the light of this, it is contended that every coastal State "could have all of its geological continental shelf".(346) If further evidence was needed to prove this, it may be found in the following:

a. The term "adjacent" found its own place in the draft articles of the ILC and then in the Geneva Convention in the light of the results raised by the 'Inter-American Specialized Conference on the Conservation of Natural Resources: The Continental Shelf and Marine Waters' held at Ciudad Trujillo in 1956. For present purposes it is enough to observe that the above conference interpreted the term"adjacency" in such a way as to include the entire geological extension of the continental mass

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(344) Brown, op.cit., Ref. (5), at 2, p.166.

(345) See Jennings, R.Y., "The Limits of Continental Shelf Jurisdiction, Some Possible Implications of the North Sea Judgment", ICLQ, Vol. 18, 1969, p.824; Finlay, L., "The Outer Limit of the Continental Shelf", AJIL, Vol. 64, 1970, p.42; ICJ Reports, 1969, p.29.

(346) Finlay, ibid., p.42.

seaward to where the submerged portion of that mass meets the abyssal ocean floor.(347)

b. The other point indicates that the same thing may be inferred from the Judgment of the ICJ in the North Sea Continental Shelf Cases. The Court stressed, it is contended, that "Submarine areas do not really appertain to the coastal State because - or not only because - they are near it", but because they are to be "deemed to be actually part of the territory over which the coastal State already has dominion,-in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."(348)

c. An even better piece of evidence, it is alleged, is to be found in Article (1) of the Convention itself. It is added that the term "continental shelf" implies the whole continental shelf and not merely a part of it. The absolute implication of the above term should not be overlooked when it is established, as in the case here, without particular restriction.

d. Another reason for what has been said lies in the fact that a number of States have granted licences in continental slope regions. It is to be noted that these acts did not provoke protests from other States, from which the recognition and acceptance of the international

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(347) Ibid., pp.43-45; for further details concerning the Ciudad Trujillo Conference see, Oxman, op.cit., Ref. (332), at 156, Part II, J. Marit. Law Com., Vol. 3, 1972, pp.445-454.

(348) ICJ Reports, 1969, para 43, p.31.

community can be inferred.(349)

However, in contrast to the above view, it is contended that the word "adjacent" has here the meaning of nearness and not contiguity. Obviously, whilst all submarine areas could be considered "contiguous", they could not be regarded as "adjacent" or "near".(350) It is true that the ILC took into account the consequences of the Cuidad Trujillo Conference. But what may not be readily believed is that the Commission approved and then adopted the recommendations of the Conference as a whole. It only adopted the exploitability test together with 200 metres depth in response to the explanation of Mr. M. Amador that technological advances would be rapid enough to make it possible to exploit resources of the seabed at a depth over 200 metres.

It is also of no importance that the basis was derived from the Judgment of the ICJ.(351) In that case, the court was concerned with contemplating the legal status of the rights of coastal States over their continental shelves, not in determining the outer limit of

(349) Andrassy, Juraj, "International and the Resources of the Sea", 1970, p.173; Brown, op.cit., Ref. (5), at 2, pp.179-181; Finlay, op.cit., Ref. (345), at 161, pp.42-61; Jennings, op.cit., Ref. 345, at 161, pp. 825 et seq.; Barry, op.cit., Ref. (5), at 2, p.228. Miron, op.cit., Ref. (326), at 154, pp.267-268.

(350) The word "contiguous" was used in the ILC's drafts of 1951 and 1953. The word "adjacent" was used for the first time in the 1956 draft. This is due according to Mr. Goldie, to the ambiguity of the former. See Goldie, L.F.E., "A Lexicographical Controversy - The Word 'Adjacent' in Article 1 of the Continental Shelf Convention", AJIL, Vol. 66, 1972, p.833.

(351) See above, p. 162.

the continental shelf. Therefore, that would have no real bearing on the point.

The allegation that the term "continental shelf" appears in Article (1) in a broad sense and must thus be interpreted as consisting of the whole geological extension of the shelf, is not, it is contended, fully justified. It is very difficult to adopt an interpretation of such a term without regard firstly to the preparatory work and the special circumstances in which it was drafted, and secondly to its scientific sense. Indeed, both these elements indicate clearly that the term "continental shelf", which finds its place in Article (1) of the Geneva Convention on the continental shelf, was designed to refer merely to the continental shelf, not the continental margin.(352)

Finally, reference has also been made to the argument that a number of States have already granted licences for the purpose of exploring and exploiting areas of the continental margin from which the consent of the international community is extracted. With respect to this, although States are conducting operations of exploitation in the continental margin, the unreasonableness arises from the inference that the acceptance of the international community must follow. Such licences for exploitation are not granted in the application of Article 1 but are beyond its limits and contrary to its meaning.

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(352) Luard, op.cit., Ref. (4), at 1; pp.38, 39; Andrassy, op.cit., Ref. (349) at 163, pp.3-15, 173-174; Mouton, op.cit., Ref. (330), at 156, pp. 12-32; Jennings, op.cit., Ref. (345), at 161, pp. 825-832.

Moreover, although States have not protested claims to the continental margin, this contention could not serve as a basis in this respect. Quoting and approving Professor O'Connell's opinion, Andrassy observed that "Normally, protests are lodged only when the interests of a State are directly affected".(353) In this respect, there can be no better quotation than the following two excerpts from Professor O'Connell's commentary on a similar case.

> "Protests have not been directed against the less exaggerated claims only because no State had sufficient economic interest in the matter to challenge what might be described as intention to commit wrong."(354)

Professor O'Connell goes on further to say

> "absence of protest is, therefore, of only relative value in determining whether or not a rule of law has evolved."(355)

Conclusion

In the light of the preceding argument, it may now be adduced that the word "adjacent", which appears in Article 1 of the Geneva Convention, leaves much room for argument. However, it is not intended to repeat all of what has been said above, it is sufficient to point out that provisions should be effective only in their natural and ordinary meaning. No doubt the concept of "adjacency"

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(353) Andrassy, ibid., p.174.

(354) O'Connell, D.P., "Sedentary Fisheries and the Australian Continental Shelf", AJIL, Vol. 49, 1955, p.194.

(355) Ibid.

is a relative matter.(356) In this connection it may be quoted from Professor Brown's commentary on the subject:-

> "... it would certainly be illegitimate to argue that because point 'x' in mid-Atlantic is 'not near to' the coast of any State, it cannot be within the continental shelf of any State."(357)

Professor Brown goes on to say:

> "Moreover, any argument which seeks to stress the element of 'nearness' has to contend with realities, such as, for example, the submarine areas off the east coast of Argentina, the north Russian Coast and the coast of Vietnam which are less than 200 metres in depth out to a distance of over 200 miles. Is this 'near' or 'far'? It could be answered that these areas fall under the first part of the definition 'to a depth of 200 metres' but this is unlikely to satisfy those states with deeper but still exploitable submarine areas at comparable distances from the coast."(358)

Accordingly, Professor Brown reaches the conclusion that, looking at the ordinary meaning of the language used in Article 1, it would seem that a coastal State may claim that its continental shelf extends as far as it has the capacity to exploit the submarine areas, provided that there is continuity of exploitability.(359) Whilst the records of the ILC furnish a little support for those who argue that the word adjacent imposes a real limitation

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(356) Goldie, op.cit., Ref. (350), at 163, p.833.

(357) Brown, op.cit., Ref. (338), at 158, p.5 and Ref. (329), at 155, pp.114, 115.

(358) Brown, ibid., p.6 and p.115 respectively.

(359) Brown, ibid., p.8 and p.115 respectively.

on the seaward extension of the continental shelf,(360) it does nothing, it is submitted, to solve the problem. The clear terms of this provision would however outweigh any inference which might be drawn from the records of the Commission. In any possible case, practice and the Convention show undoubtedly that the law today does not confine national jurisdiction to the continental shelf in the strict sense. In support of almost all of what has been stated, we may quote the words of the PCIJ in the case concerning Polish Postal Service in Danzig.(361) The Court pointed out that:

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context."(362)

b. The Criterion of Depth

It is worth observing that the test of depth in terms of 200 metres was originally proposed in the 1953 draft of the ILC. Then, it was advocated that it be coupled with the exploitability test in the 1956 draft which was approved by the Geneva Conference.

It is no doubt correct to say that this criterion seems to have considerable apparent advantages. Certainly, the 200-metre limit is approximately the depth of the outer edge where the continental shelf generally comes to an

(360) Brown, op.cit., Ref. (329), at 155, pp.117-143 and op.cit., Ref. (338), at 158, p.8; Andrassy, op.cit., Ref. (349), at 163, p.82.

(361) PCIJ, Series B, No. 11, p.39. (1925).

(362) Ibid.

end and the continental slope starts falling rapidly to a much greater depth. Thus, it coincides with the definition of the continental shelf in the geological sense.(363) Another advantage is that this test is not wholly arbitrary because it is tied up with the practical needs at one time,(364) and as far as they could be foreseen for a long time to come.

However, there is another aspect to the question. One must admit that the edge of the shelf in reality neither appears as a simple phenomenon as shown on maps, nor is it usually to be found around the 100 fathoms (200 metres) isobath. Indeed, it may be deeper or shallower than 200 metres. Moreover, the edge is not always a sharp one, but sometimes very rounded and thus could not be easily located.(365)

Accordingly, if the criterion for the 100 fathom line was applied on its own, it would remove from the definition considerable parts of the shelf. That is to say, the possibility of exclusive jurisdiction over other submarine areas of the continental shelf and insular terraces adjacent to a State territory which had a special configuration of its coastline, would be excluded. The above difficulty exists conspicuously in cases such as the North Sea, where the shelf stretches over that sea except for that of the Norwegian coast as there are

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(363) Colombos, op.cit., Ref. (4), at 9 , p.76.

(364) At the time when the Geneva Convention was concluded.

(365) Mouton, op.cit., Ref. (258), at 135, p.417.

submerged areas of a depth less than 200 metres situated in considerable proximity to the coast and separated by a narrow channel deeper than 200 metres.(366) A further complicated situation may arise where the depth of the superjacent waters (as in the Arabian Gulf(367)) is wholly less than the legal depth.(368) In this connection, there is also no logical reason to use the test of depth whatever that depth is.(369) More important is the fact that the average depth of the edge is not meant to be the depth at every point of the edge, but the depth of a "legal edge" for the purpose of enabling the coastal State to exercise its rights over certain areas of the seabed. This legal edge will in many places differ from the physical edge.(370) In addition, despite the fact that there is almost a consensus that the test of "200 metres" is tied to all present estimates of exploitability, there can be no doubt that exploitation at depths greater than 200 metres will in the future be economically feasible and indeed is already so.(371)

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(366) See U.N. Doc. A/CN.4/55 p.4; Jennings, op.cit., Ref. (63), at 32, pp.393 et seq.; Ely, Northcutt, "American Policy in the Development of Undersea Mineral Resources; Int. Lawyer, Vol. 2, No. 2, 1968, p.218.

(367) See below about the name of the Gulf, pp.299-310.

(368) Everywhere in the Arabian Gulf the depth is no more than 100 metres and the shelf has no edge. See YBILC, 1950, Vol. 1, p.214.

(369) Other depths were suggested in the debate of the ILC. See YBILC, 1950, Vol. 1, pp.214-239; Mouton, op.cit. Ref. (258), at 135, pp.417 et seq.

(370) Mouton, ibid.; YBILC, 1951, Vol. II, p.141.

(371) Whiteman, op.cit., Ref. (5), at 9, p.830.

A further worthwhile question is how this test applies if the edge slopes steeply down to the seabed?(372) Would the States concerned be deprived of their continental shelves, or would the test be neglected and their cases treated as exceptions?

Certainly, it is a matter of justice that such States should also be entitled to exploit these areas on an equal footing with those which possess a continental shelf in the geological sense.

For the above reasons, the conclusion may be reached that the test of a fixed depth might lead to unjust inequality among States by conferring upon States unequal areas.(373) Moreover, this criterion has the disadvantage of being both variable and unrealistic when technical developments make it possible to exploit the seabed and subsoil at depths greater than 200 metres. Finally, the above are only some of the observations which illustrate the ambiguity of the test and the numerous different problems concerning the seabed of the continental shelf and which the test is not capable of solving.

Logically speaking, the depth test had not sufficiently satisfied the members of the ILC for them to consider it the sole criterion for the delimitation of the outer limit of the continental shelf. Therefore, it was coupled with another test.(374)

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(372) As in the case of the coastal States with adjacent submarine areas which do not constitute a continental shelf such as Chile, Peru and Norway.

(373) Nawaz, M.K., "Alternative Criteria for Delimiting the Continental Shelf", Indian J.I.L., Vol. 13, No. 1, 1973, p.31.

(374) Namely the exploitability test.

c. The Criterion of Exploitability

The second criterion relating to the outer limit of the continental shelf, as provided for in Article 1 of the Geneva Convention on the continental shelf, is the exploitability. The coastal State is permitted to claim jurisdiction over submarine regions beyond the territorial sea and beyond the 200 metre isobath, up until where the depth of the superjacent waters allows the exploitation of the natural resources of the said areas.(375)

Certainly the adoption of the exploitability test together with the fixed depth criterion is designed to mitigate the inequalities of the geographical features and to achieve justice among States by giving them equal rights, whether or not they have a continental shelf. By virtue of the exploitability test, all States are entitled to exercise sovereign rights over the extent of sea adjacent to their coasts as long as its natural resources are exploitable. There is another motive behind adopting the exploitability test. The criterion is surely of the broadest import as it includes the shallow water areas which would technically not constitute continental shelf without special mention.(376)

The records of the ILC and the U.N. Conference on the Law of the Sea, show that it was designed to employ the exploitability test for a supplementary task to that of the 200 metre isobath test. This conferred upon the coastal State a right over continental shelf activities

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(375) Nawaz, op.cit., Ref. (373), at 170, p.32.
(376) Oxman, op.cit., Ref. (332), at 156, pp.269-270.

carried out on the continental slope as continuation of activities began, or connected with those performed, in the area between its territorial sea and the 200 metre line. The test, looked at from this angle, is intended to give a particular solution to immeasurable problems which might have arisen if the 200 metre clause had been accepted as the final test.(377)

Quite apart from the above advantages the definition given in Article 1 is an inadequate one, since it provides an outer limit which is neither reasonable, practical, or clear. Additionally, it obviously lacks the necessary precision,(378) and gives rise to disputes as well as uncertainty.(379) Furthermore, it leads to numerous difficulties, as the limited stretch which it provides is variable according to the technological advance and the States' capacities. Moreover, the extent differs from place to place and from time to time. Professor Young asked the following question. "Precisely, whose technology determines the depth of exploitability? Is it the depth which at any given moment with the aid of technology any State could reach, or is it limited to the

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(377) Goldie, L.F.E. "The Management of Ocean Resources: Regimes for Structuring the Maritime Environment", Edited in the "Future of International Legal Order", Vol. 6, 1972, p.183.

(378) One of the delegates to the Geneva Conference compared this awkward definition to "a speed limit in a town worded as follows: "Maximum speed 50 kilometres per hour, unless your motor is strong enough to go faster". See Mouton, M.W., "The Impact of Science on International Law", Hague Recueil, Vol. 119, 1966, III, p.198; Ely, op.cit., Ref. (366), at 169, p.219.

(379) Young, op.cit., Ref. (263), at 137, p.643.

capacity of the specific State?(380) In other words, does the accomplishment of a record depth by any State extend automatically the shelf areas of all other States regardless of their technological capacities and the individual problems which might pertain to their coasts? This question has been answered by the majority of writers affirmatively. However, correct as that may be, the question is controversial and disputed.(381)

In fact, the affirmative answer to that inquiry can be inferred from the Continental Shelf Convention itself in two aspects. The first step in the reasoning is in the criterion of exploitability as pointed out in Article 1. It was considered as clearly embodying an objective test(382) depending on the highest level of technical ability and not on the particular State's capacity. The second reasoning can be understood from the full implications of Article 2 of the Convention. The affirmative answer is indeed implied by the opposite meaning of Article 2 which states that the rights 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.

(380) Ibid., pp.643 et seq.; Ratiner, op.cit., Ref. (14), at 4 , p.231.

(381) See Young, Richard, "The Geneva Convention on the Continental Shelf: A First Impression", AJIL, Vol. 52, 1958, pp.733, 735; Gutteridge, op.cit., Ref. (254), at 133, pp.102-110; Oda, op.cit., Ref. (92), at 79, p.442.

(382) The objectiveness is worded in the term "... beyond that limit, to where the depth of the superjacent waters admits of the exploitation". See the text of the Article, Brownlie, op.cit., Ref. (31), at 20, p.107.

The term "without the express consent" is clearly of tacit intent. It shows that in the case of inability to exploit its continental shelf itself, the State concerned is free to concede to any other State or to any other nationals the right to explore its continental shelf or exploit its natural resources.

Here, another related question may be asked. Professor Brown posed the question whether exploitation means "economically feasible exploitation or any exploitation irrespective of cost?"(383) In reply to this question Professor Brown suggests that

> "... the term 'exploitation' must be linked with the notion of economic feasibility. Otherwise, there would be no limit whatsoever since even the Marianas Trench could be exploited given the necessary expenditure. On the other hand, in adopting economic feasibility as the test, it should be made clear that this does not necessarily involve the cost calculations which a company operating in a capitalist economy would have to make. If, in good faith 'perhaps, to develop submarine technology' a 'Socialist' government or a firm subsidised by a 'capitalist' government were to undertake exploitation of mineral resources at a cost which was far in excess of the cost of exploiting available land resources, this would, it is submitted, fall within the terms of the Convention and ground a claim."(384)

For the above reasons, coupled with the fact that the clear purpose of conferring jurisdiction upon coastal States on the continental shelf is to exploit its natural

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(383) Brown, op.cit., Ref. (338), at 158, p.7.
(384) Ibid., p.7.

resources, one is entitled to assume that only economic exploitation is meant by the exploitability test.

A further important question in ascertaining the scope of the exploitability test arises. That is to say, what is the purpose of the 200 metre contour clause which the Conference retained together with the exploitability test if it is immediately followed by a qualification which enables the coastal State to exploit an area beyond that limit? The exploitability test seems to prevent the depth test from being applied. One might just as well suggest that it is meaningless to combine these two tests, because it was known at the Geneva Conference, if not before, that technological developments in the near future might make it possible to exploit resources of the seabed at a depth over two hundred metres.(385) In the light of these facts, it is thought that the purpose of the exploitability test is to protect the rights of those States which did not have continental shelves in the geological sense.(386) Hence, it is contended that the technological advances in the future would have no effect on the test.(387) This means that the exploitability test is intended to be applicable only in the case of non-continental shelf States whose superjacent waters depths exceed 200 metres.(388)

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(385) See YBILC, 1956, Vol. II, p.296.

(386) Andrassy, op.cit., Ref. (349), at 163, pp.83-84.

(387) YBILC, 1956, Vol. II, p.296.

(388) This is because there are two kinds of non-continental shelf States. The first is that of shallow areas and in the second, the superjacent waters exceed 200 metres. The only case in which the criterion of exploitability works is the latter.

The grounds given to this view not only appear strange but also inequitable. The implication which cannot be avoided is that it confers on States having no continental shelf, rights over areas wider than those which the continental shelf States are entitled to have. Admittedly, it is a matter of justice to give non continental shelf States a claim over certain areas of the sea adjacent to their coasts. However, it is equally important to bestow the same right on States which have continental shelves. From these arguments it appears almost certain that the 200 metre test becomes superfluous by reason of gradual advance of technical efficiency.(389)

As to these immeasurable criticisms, some efforts have been made to impose some limits on the outer limit of the continental shelf in order to bring a halt to the continuous extension of claims to the continental shelf.(390) It is often pointed out that the interpretation of the test should be connected with the premise that the continental shelf is a natural prolongation of the land territory of the State,(391) and it is on that that an outer limit should be placed.(392) Also, another effort has been made to rely upon the term "continental shelf" itself to limit the exploitability test.(393)

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(389) Whiteman, op.cit., Ref. (5), at 9 , p.830.

(390) Butte, op.cit., Ref. (213), at 120, p.239.

(391) ICJ Reports, 1969, paras. 40, 43, 44, 85, pp. 29, 31 and 47-48 respectively.

(392) Oda, op.cit., Ref. (92), at 79, p.443; Brown, op. cit., Ref. (338), at 158, pp. 5 et seq.

(393) Jennings, op.cit., Ref. (63), at 32 , p.395; Brown, op.cit., Ref. (338), at 158, p.8.

Moreover, it has been tried to define the outer limit of the continental shelf by the supposed intentions of the ILC and Geneva Conference by going beyond the literal sense of Article 1. The latter view depends on ascertaining the intention of the parties and whether or not they intend to set limits for continental shelf claims.(394)

However, to say this is not to accept these interpretations as accurate. Firstly, the term "continental shelf" is employed in the Convention in a special "legal sense" not merely limited to its ordinary meaning.(395)

Secondly, it would be difficult, if not impossible, to apply this concept, since the idea of an adjacent area as noted above(396) is a relative matter and the concept of the continental shelf is in dispute.(397) Thirdly, even as regards the intentions of the ILC and the Geneva Conference which were cited as evidence that the Commission and the Conference intended some limitations on the seaward extension of the shelf, there are reasons to oppose such an interpretation.(398) The only sensible conclusion that can be reached concerning Article 1 of the Geneva Convention is that the outer limit of the

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(394) Brown, ibid., p.8.

(395) For more details concerning the reasons behind the ILC's decision not to adhere strictly to the geological concept of the continental shelf see Daintith and others, op.cit., Ref. (4), at 9, p.A321.

(396) See above pp. 160-167.

(397) The term "submarine areas" was suggested by Professor Young as a more appropriate term to cover the shallow water areas, and areas where the depths are over 200 metres. See Young, op.cit., Ref. (260), at 136, pp.227-228. Also, the term "submarine areas" was raised by Mr. Amador in the ILC. See YBILC, 1956, Vol. 1, pp.130-140.

(398) See below pp. 160 et seq.

continental shelf according to the said Convention is not limited.(399) This matter is self-evident, as that is what the conventional text indicates expressly on the one hand, and on the other, some States have already exploited beyond that limit.(400)

Theoretically, since the rights of the coastal States over their continental shelves are ipso jure as long as the seabed and subsoil is exploitable, it would appear that under the current provision, all the submarine areas of the world would be divided among the coastal States. Technology is advancing so quickly that the natural resources can be exploited or expected to be so in the near future by means of drilling from ships at any depth,(401) regardless of whether the particular State is able to exploit the resources itself.

However, to say the foregoing is not to deny that the deliberations of the ILC indicate that the Commission had not overlooked these considerations.(402) Indeed, the history of the drafting of Article 1 of the Geneva Convention on the continental shelf demonstrates clearly

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(399) Oda, op.cit., Ref. (92), at 79, p.442; Lay, Houston S. "Pollution from Offshore Oil Wells" ed. In New Directions in the Law of the Sea, Vol. III, 1973, p.103.

(400) Jennings, op.cit., Ref. (63), at 32, p.394. See also Brown, op.cit., Ref. (338), at 158,p.36. Professor Brown reaches the conclusion that "Article 1 of the Geneva Convention cannot be properly interpreted so as to restrict the extension of the shelf by reference to the geological character of the seabed, and thus, the conventional shelf may extend beyond the 'natural prolongation' of the territory". See Brown, ibid., p.36.

(401) Oda, op.cit., Ref. (92), at 79, p.443.

(402) Mouton, op.cit., Ref. (258), at 135, p.418; Brown, op.cit., Ref. (329), at 155, pp.119-121.

that the ILC was quite aware of the ambiguity of such a text and the difficulties which it would lead to.(403) So, it hesitated between 1950 and 1956 but in the final Report of 1956, it combined the two tests of "200 metre depth" and "exploitability".(404)

III. Proposals and Recommendations of Non-Governmental Organizations and the U.N.

No doubt, man's relationship to the sea has been a source of conflict throughout the course of history. Interests in the seabed's natural resources are high amongst others. In recent years there has been a growing awareness of the value of seabed resources.(405) It may be added that the rapid progress of technology has made the exploitation of resources of the seabed commercially

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(403) Brown, op.cit., Ref. (338), at 158, p.4.

(404) The support which the draft articles eventually gained is due to four main reasons. For further details, see Brown, op.cit., Ref. (338), at 158,p.14.

(405) Brown, op.cit., Ref. (5), at 2, pp.174-176; Gamble, John King, Jr., "Bloc Thinking About the Oceans: Accelerating Pluralism", Edited in "Law of the Sea: The Emerging Regime of the Oceans", Proceedings, Law of the Sea Institute, Eighth Annual Conference, June 18-21, 1973, University of Rhode Island, Kingston, 1974, pp.13-16; Dupuy, Rene-Jean, "The Law of the Sea: Current Problems", 1974, pp.26-34; Knight, H. Gray, Managing the Sea's Living Resources: Legal and Political Aspects of High Seas Fisheries", 1977, pp. 1-5; Joyner, Christopher C. ed., "International Law of the Sea and the Future of Deep Seabed Mining", Proceedings of the John Bassett Moore Society of International Law Symposium and the American Society of International Law, Regional Meeting, November 16, 1974, Virginia, 1975, pp.1-12.

possible at greater depths than before.(406)

All these factors however had led not only States, but also international and non-Governmental Organizations, to issue proposals and recommendations on the evolution of the international law of the sea in general and the question of the continental shelf in particular.(407)

a. Recommendations and Proposals of Non-Governmental Organizations

It is unnecessary to discuss all the recommendations, proposals and declarations in this connection. It is sufficient for present purposes to cite some instances. One might refer in this regard to the "Draft Declaration of Principles which Should Govern the Activities of States in the Exploration and Exploitation of the Mineral Resources of the Sea-Bed and Subsoil Beyond the Limits of National Jurisdiction" issued by the International Association.(408) This draft defined the outer limit of the continental shelf in terms of adjacency and a depth test of 200 metres or distance test of 50 nautical miles. Article 2(2) of the draft provides in part: "... submarine areas adjacent to its coast to a depth of 200 metres or 50

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(406) Auburn, F.M., "The International Seabed Area", ICLQ, Vol. 20, 1971, pp.173-176.

(407) Gamble, ibid., pp.13-16.

(408) This draft had been prepared in April 1970 and submitted to the 54th Conference of the International Association, August, 1970, at the Hague. See Oda, Shigeru, "The International Law of the Ocean Development" 1972, Vol. 1, p.255.

nautical miles from the baseline".(409)

Another criterion was proposed by the American Branch of the International Law Association: Deep Sea Mineral Resources.(410) The American Branch suggested that the limit of national jurisdiction that any State could have claimed

> ".. would be determined by negotiation at the time of creating the regime and would presumably take into account the size of each State, its population, its stage and economic development and perhaps other factors".(411)

The American Branch proposed in its report to the Committee on Deep-Sea Minerals in 1972 that the outer limit of the continental shelf should have coincided with "the outer edge of the continental margin or with a line drawn 200 miles seaward of the baseline ... whichever lies further offshore".(412)

Another illustration which may be cited(413) is the

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(409) Ibid., pp.255-256. It may be noted that the same criteria had been recommended by the Association in the text prepared by its Deep-Sea Mining Committee in February 1972 and introduced at the Session held in New York in August 1972. Oda, ibid., Vol. II, p.221.

(410) The Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association Prepared its Report in July, 1968 and a Second Report in July 1970. Oda, ibid., Vol. 1, p.259.

(411) Oda, ibid., Vol. 1. p.263.

(412) Ibid., Vol. II, p.227.

(413) Numerous proposals and recommendations in this connection can be found in Oda, ibid. See for example:
1. (Stockholm International Peace Research Institute) "Towards A Better Use of the Ocean". 1969, Oda, op.cit., Ref. (408) at 180, Vol. I, pp.231 et seq.
2. "Istituto Affari Internazionali":"International Regime of the Sea-bed". Ibid., pp.233 et seq.
3. "World Peace Through Law Centre": "Treaty Governing the Exploration and Exploitation of the Ocean Bed. Ibid., pp.244 et seq.

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Recommendations of 1970 put forth by the Commission to Study the Organization of Peace: The United Nations and the Bed of the Sea.(414) The Commission recommended revising the Convention on the Continental Shelf, particularly Article 1. It suggested that the rights of coastal States should end "at the 200 metre depth line or 50 nautical miles from shore, which ever occurs further out".(415)

b. Proposals and Draft Articles Presented at the U.N. Seabed Committee and the UNCLOS III

A number of proposals and draft articles were put forward at the U.N. Seabed Committee on the International Seabed Area and the UNCLOS III. These proposals involved the question of seaward extension of the continental shelf. While some of these proposals suggested that the jurisdiction over the continental shelf that may be claimed by a State should have been limited, others did not indicate any definite extension.

After asserting that the seabed area should have been the "common heritage of all mankind", the draft convention

(413) contd.
4. Mrs. Elisabeth Mann Borgese: "The Ocean Regime - Draft Statute". Ibid., pp.280 et seq.
5. Senator Claiborne Pell: Declaration of Legal Principles Governing Activities of States in the Exploration and Exploitation of Ocean Space". Ibid., p.272 et seq.
6. Mr. Christopher W. Pinto: "Preliminary Draft and Outline of a Convention on the Sea-Bed and the Ocean Floor and the Subsoil Thereof Beyond National Jurisdiction (1972)", Ibid., pp.305 et seq.

(414) Oda, ibid., Vol. 1, p.237.

(415) Ibid.

submitted by the U.S. to the U.N. Seabed Committee adopted a combined criteria of adjacency and a 200 metre isobath.(416) Another draft article on the use of the seabed for peaceful purposes was submitted by the Soviet Union.(417) In this draft there was no indication at all as to where the precise outer limit of the continental shelf from which the international seabed area started.

Many other proposals as to the definition of the continental shelf were expressed before the U.N. Seabed Committee and the UNCLOS III.(418) Due to the diversity and number of views of government delegations and because of the limitation of space which forbids considering the various alternative formulae tabled, it would be sufficient to examine the pertinent provision of the "ICNT". Article 76 of the ICNT reads as follows:

> "The continental shelf of a coastal State comprises the sea-bed 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

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(416) "Draft United Nations Convention on the International Seabed Area" submitted as a working paper for discussion purposes at the U.N. Sea-bed Committee on 3 August 1970 by the U.S. of America. U.N. Doc. A/AC. 138/125.

(417) "Provisional Draft Articles of a Treaty on the Use of the Sea-bed for Peaceful Purposes", Union of Soviet Socialist Republic, Submitted at the U.N. Sea-bed Committee on 22 July 1971. U.N. Doc. A/A/C. 138/43.

(418) See for example the following proposals:
1. The Greek Proposal U.N.Doc.A/CONF.62/C.2/L. 25.
2. The Argentinian Proposal, U.N.Doc.A/CONF.138/SC. 11/L. 37.
3. The U.S. Proposal U.N.Doc. A/CONF.62/C. 2/L. 42.
4. The Colombian, Venezuelan and Mexican Proposal, A/AC.138/SC. 11/L. 21.
5. The Japanese Proposal, A/CONF. 62/L 31/Rev. 1.

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."(419)

This formula quite explicitly retains the term continental shelf.(420) The second point is that under this provision the outer limit of the continental shelf will be determined by reference to a geographical criterion considering the continental margin edge as the end of the extension of the coastal States' rights over the resources of its continental shelf.(421) Certainly the continental margin edge is not similar in all cases,(422) which in turn may lead to inequality among coastal States. Bearing in mind this fact, the geographical test is coupled with another criterion in terms of fixed distance, namely 200 miles from the baseline from which the territorial sea of the coastal State concerned is measured. The purpose of the distance test is to remove the inequality which would result if the geographical criterion was applied purely and simply.

It is correct to say that the suggested criteria, if they were eventually adopted, would place a limitation on the seaward extension covered by the convention intended to be concluded. This is no reason however for ignoring

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(419) U.N. Doc. A/CONF. 62/WP. 10/Add. 52.

(420) Several considerations favour the retention of this term. For further details, see Brown, op.cit., Ref.(282), at 144, p.381.

(421) Daintith, Terence and G.D. Willoughby "United Kingdom Oil and Gas Law", London, 1977, p.168.

(422) See above pp. 154 et seq.

that it would extend the outer limit of the continental shelf to embrace parts of the sea which were otherwise res communis. It is to be noted that although the word 'adjacent' mentioned in Article (1) of the Geneva Convention on the Continental Shelf, is surely of the broadest import, there seems no reason to abandon it. Plainly, the intention behind the inclusion of the word 'adjacent' in the definition of the continental shelf was simply to rule out any question of subsequent extension of coastal States' jurisdiction over areas of the seabed, although this point is not in reality covered by the convention. Therefore, if a limitation more landward than the continental margin and 200 miles distance was intended, one might suggest the inclusion of the concept of "adjacency" in such a context to accurately cover areas within considerable proximity to the coast.

It may be added that the definition adopted by the ICNT raises problems not only of a technical character,(423) but also practical difficulties. Taking into account the subsequent geological alterations in the seabed and subsoil beneath the waters, one might easily conceive of the possible difficulties which may arise.

A further word must be said in this regard. As was indicated earlier,(424) whilst the structure beneath the waters sometimes declines steeply, it slopes gently in others. Thus, for reasons of inequidistance of the continental margin edges from the coasts, the application

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(423) Brown, op.cit., Ref. (282), at 144, p.389.
(424) See above pp. 154 et seq.

of the above criterion would obviously lead to inequity with respect to the allocation of seabed areas.

One more question may be asked. Do the national exploitation rights over seabed resources extend beyond 200 miles where the continental margin extends to that limit? Quite apart from the fact that the provision is clear in permitting the extension of exploitation rights to the continental margin edge or 200 miles from shore, whichever occurs further out, this matter is disputed. There are States which assert that States' rights to seabed areas must end at not further than 200 miles. On the other hand States with wide margins of course strongly oppose this view.(425)

Conclusion

The conclusion to be drawn from what has been stated above is, that the ILC adopted in its draft of 1951 the exploitability test as the sole criterion for determining the outer limit of the continental shelf. Due to the elasticity of the exploitability test, in that it would permit excessive claims, the Commission later adopted a test of depth in terms of 200 metres. An obvious reason for adopting this criterion is that it coincided with the continental shelf in the geological sense. There is however an additional reason, in that it was sufficient for

(425) However, the matter is unresolved. A compromise proposal presented by the U.S. for an accommodation that includes coastal State rights over the margin linked with revenue-sharing as a solution to the problem, is gaining additional support. This proposal faced opposition. See U.N. Doc. A/CONF. 62/C 2/L.40. See also Brown, op.cit., Ref.(282) at 144, p.383.

all present and foreseeable practical needs. However, such a limit would have the disadvantage of unreasonableness and inequality. Plainly, technical progress would make it possible to exploit resources at depths greater than 200 metres. On the other hand, it would deprive certain States of the right to exploit submarine areas, though adjacent to their coasts.(426) Finally, the Commission linked the isobath limit and the exploitability test so as to put all the concerned States on an equal footing. The clumsy combined criterion which was approved by the Geneva Conference has its own inherent defects.(427) The main difficulty in this criterion is that it would permit extensive claims which would result eventually in dividing all the ocean floor. Whilst it is difficult to doubt the soundness of Professor Brown's conclusion that "the scope of the convention ratione loci was not intended to include the submarine areas of the deep oceans",(428) it nevertheless appears possible to suggest that language of the kind under consideration can mean only that no clear limitation is placed on the submarine areas covered by the Convention.(429) It must be conceded that an expansive interpretation of Article 1 is undesirable but accurate. One must, it is submitted,

(426) Simply because they are at depths greater than 200 metres.

(427) Ely, op.cit., Ref. (366), at 169, p.218.

(428) Brown, op.cit., Ref. (329), at 155, p.142.

(429) Professor Oda points out that whatever the delegates at the Conference had in mind, the only logical interpretation of that provision is that it affected the allocation among coastal States of all submarine areas of the world. See Oda, op.cit., Ref. (92), at 79, p.442.

wrestle with the tension between the law that is and the law that ought to be. However, if the above conclusion is correct, it stands to reason that it would result in intense competition between States and might give rise to disputes by encouraging "gold rush" and dangerous exploitation activities. Even more important consequences would be the threat to the freedom of the high seas which has long been substantiated and assured to be an undisputed basic principle of international law.

The Need for a Definite Outer Limit of the Continental Shelf

By now however it seems evident, in view of the above mentioned uncertainties, that apart from the 200 metre isobath test, the criteria for determining the outer limits of the continental shelf are open ended.(430) Due to the need for the resources of the seabed together with the technological progress which makes oil drilling and the exploitation of other minerals possible at great depths, expansive claims have been increased. Notwithstanding the fact that, as we have seen, the majority of writers are dissatisfied with a liberal interpretation of the continental shelf definition as laid down in Article 1 of the Geneva Convention, as such an interpretation would seem to disregard other component elements contained within the definition. Nevertheless, it must be recognized that the expansionist trend has been notable among coastal

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(430) Boggs, op.cit., Ref. (13), at 14, pp.240, 245, 265-266; Butler, W.E., "Soviet Maritime Policy in Legal Perspective", Wld. Today, Vol. 28, 1972, p.462.

States. The present claims of the Latin American States are a good illustration in this respect. Also, in April 1970, Canada claimed to control and administrate exclusively an area of 100 miles in the North Polar Circle seas for the purpose of pollution prevention. If one is to believe Mr. Friedmann's logic that this control would turn to sovereignty,(431) one could realize how far the freedom of the high sea would be threatened. Bearing in mind everything that has been said, in addition to the fact that a clear continental shelf limit is a sine qua non for a new legal regime as deep sea bed resources outside national jurisdiction obviously require a specific definition of the outer limit of the continental shelf,(432) it appears that the redefinition of the continental shelf is urgently in demand today.(433) As the exploitability test in the present context offers a mean for coastal States to augment extensively the submarine areas subject to their exclusive rights, a series of ever-increasing claims further into the oceans are envisaged and the free high seas are seen as finally being enclosed within the exclusive jurisdiction of the coastal States. This would in turn lead, even according to those who believe in the restrictive interpretation of Article 1, to the eventual recognition by the international community of such extensive claims. A good illustration in this regard may be found in Mr. Andrassy's conclusion. Mr. Andrassy

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(431) Friedmann, op.cit., Ref. (253), at 133, p.45.

(432) Brown, op.cit., Ref. (338), at 158 , p.3.

(433) Brown, op.cit., Ref. (329), at 155, p.112; See further the same author, op.cit., Ref. (5), at 2 , pp.165-190.

points out:

> "we do not agree with such an interpretation, but there is sufficient ground for fear that under the influence of various factors it could in fact prevail by way of state practice and precedents which would not meet a sufficiently strong opposition at the right moment."(434)

In the light of these factors, one may suggest that the solution does not appear to lie in adherence to a test so deficient in accuracy, clarity and uncertainty. On the contrary, if this pressing problem is to be solved, work must continue with the express purpose of reconciling any provision of international law on the continental shelf with the above observations. Several factors must be taken into account if a clear, acceptable definition of the continental shelf is to be achieved.(435) These factors are not only economic and geographical in relation to the coastal States. The interests of humanity as a whole must also be considered. It is pointless to repeat that in relation to the ocean floor we stand firmly for an international regime which retains this area and its resources within the domaine public international for the benefit of all mankind. Certainly, there will not be sufficient seabed area remaining for the benefit of

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(434) Andrassy, op.cit., Ref. (349), at 163, p.111.

(435) See Brown, op.cit., Ref. (282) at 144, pp.384-385; Terr, Leonard B., "The 'Distance Plus Joint Development Zone' Formula: A Proposal for the Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy", Cornell Int. Law J., Vol. 7, No. 1, 1973, pp.58-60.

mankind,[436] if the currently suggested criterion, namely that which is laid down in the ICNT reserving 200 miles "at least" of the seabed to each coastal state, is adopted officially.

(436) An international authority has been proposed for this very purpose. See Articles 133-192 of the ICNT Relating to the Regime of the Deep Sea-bed Area. See U.N. Doc. A/CONF. 62/WP. 10/Add.1, pp.73-106.

CHAPTER THREE

THE DELIMITATION OF MARINE BOUNDARIES BETWEEN OPPOSITE AND ADJACENT STATES

Quite clearly, the determination of marine boundaries in general is one of the most important and complex problems in the law of the sea. It becomes further complicated in the case of two or more adjacent or opposite States abutting on a common, adjacent part of the sea.(1)

Stages in the Development of the Rules Relating to the Delimitation of Marine Boundaries

I. The ILC

The record of the ILC shows clearly that the Commission gave a great deal of consideration to the question of delimitation of marine boundaries between neighbouring States. The first report to be submitted to the Commission in this connection was that of the Rapporteur, Professor Francois. In that report only a few remarks were incorporated and the views of Governments as to the problem of apportionment of marine zones were requested.(2) During its 1950 Session, the Commission concentrated on the main points related to the subject in seeking for the most appropriate

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(1) Namely in areas where the depth of the superjacent waters does not exceed 200 metres, or where it does exceed that depth but is exploitable. See Oda, Shigeru, "Proposals for Revising the Convention on the Continental Shelf", Columbij transnat law, Vol. 7, No. 1, 1968, p.23; Brown, op.cit., Ref. (282), at 144, p.378.

(2) YBILC, 1950, Vol. II, pp.52-65.

ways to find a solution to the problem.(3) Additionally, after having examined the Truman Proclamation of 1945, as well as the possibilities of delimitation of marine boundaries between neighbouring States, the Commission failed to identify any general principle of determination. The most that can be inferred from the debate of the Commission is its desire for delimitation by agreement and failing agreement, an arbitral tribunal should decide.(4)

At the 1951 Session, a variety of possible methods was tested. Here again, as in the latter discussion, the Commission was unable to find a rule of general applicability in the case of adjacent States although the Commission considered the median line as appropriate in the case of States lying opposite each other.(5) Thus, in such a case, it was suggested that the parties were under an obligation ex aequo et bono to have their boundaries

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(3) YBILC, 1950, Vol. I, pp.214-239.

(4) YBILC, 1950, Vol. I, pp.232-234, 306; Brown, E.D. "The North Sea Continental Shelf Cases", CLP, Vol. 23, 1970, p.202.

(5) It may useful to cite the commentary to Article 7 of the 1951 ILC Report which is in pertinent. It provides that:

> "It is not feasible to lay down any general rule which states should follow, and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States and no general rule exists for such boundaries."

YBILC, 1951, Vol. II, pp.143, 193 and Vol. I,pp.285 et seq.; YBILC, 1950, Vol. 1 , pp.232-234 and 306. See also Brown, op.cit., Ref. (4), at 193, pp.202, 203, and op.cit., Ref. (338), at 158, p.53.

settled by arbitration.(6) This formulation was not approved as a result of the comments of governments which expressed that settlement of disputes ex aequo et bono was unacceptable.(7)

The equidistance method was first mentioned in a report of a Committee of Experts appointed to find a formula for the delimitation of territorial sea.(8) Having decided to recommend the equidistance method for the drawing of boundaries in territorial sea, the Committee of Experts added a comment in which it maintained that the same method could be used for the delimitation of continental shelf boundaries between adjacent States.(9)

In the 1953 Session of the Commission, the Rapporteur, Professor Francois, referred to the conclusions of the Committee of Experts and advocated the equidistance rule.(10) After a lengthy discussion and a number of objections raised by members of the Commission,(11) the Commission held, as did the Committee of Experts,(12) that the

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(6) ICJ, Pleadings, 1968, Vol. 1, The Counter-Memorial of the Netherlands, p.33; Brown, op.cit., Ref. (4), at 193, p.203.

(7) YBILC, 1953, Vol. II, pp.241-269. In an attempt to find a solution to this difficulty, the Rapporteur proposed a new draft in which conciliation replaced arbitration ex aequo et bono, ibid. p.1; Brown, op. cit., Ref. (4), at 193, p.203.

(8) YBILC, 1953, Vol. II, pp. 77 et seq.; Brown, op.cit., Ref. (4), at 193, p.203.

(9) See Counter-Memorial of the Netherlands, ICJ Pleadings, 1968, Vol. 1, pp.333-334.

(10) YBILC, 1953, Vol. 1, pp.107-108, 125-135, 373-375; Brown, op.cit., Ref. (4), at 193, p.204.

(11) YBILC, 1953, Vol. 1, pp.126, 130, 132; Brown, op.cit., Ref. (4), at 193, pp.204-207.

(12) It may be recalled that the Committee of Experts had admitted that the equidistance method might not always give an equitable result, and that in such a case a solution by negotiation might be necessary. YBILC, 1953, Vol. II, p.216; See also Counter-Memorial of the Netherlands, ICJ Pleadings, 1968, Vol.I, p.334.

delimitation of the territorial sea and the continental shelf should be governed by the same principles. In the light of the conclusions of the Committee of Experts, another rule was drafted. For opposite States, the Commission recommended 'the median line', and there may be special reasons, such as navigation and fishing rights, for diverting from the median line. As far as the adjacent coasts were concerned, the Commission recommended that the lateral boundary if not already fixed otherwise, should have been drawn according to the principle of equidistance from the respective coastlines. As it was necessary to provide an exception to that principle, in cases where departure from the general rule was necessary the Commission recommended the "special circumstances" principle.(13) Hence, there are three rules according to the 1953 draft of the ILC regarding the delimitation of maritime boundaries between neighbouring States. These three rules are; a) agreement if not already fixed otherwise; b) equidistance and median-line, and c) unless another boundary line justified by special circumstances.(14)

At its 1956 Session, the Commission completed its work on the law of the sea, re-examining the text of all its articles. After brief discussion the Commission

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(13) For instance where a small island near one State's coast belongs to another State. See Boggs, op.cit., Ref. (13), at 14, pp.261-263; YBILC, 1953, Vol. I, pp.106, 125, 127, 128-134; ibid., Vol. II, p.213. The commentary of the ILC on this draft article ran as follows: "As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or navigable channels. To that extent the rule adopted partakes of some elasticity". YBILC, 1953, Vol. II, p.216.

(14) YBILC, 1953, Vol. I, pp.106, 213.

slightly modified the wording of the provisions concerning the territorial sea and continental shelf boundaries of "opposite" States. Then, an almost similar text to that of the 1953 draft was again adopted.(15)

Conclusion

The conclusion to be drawn is that it was not until 1953 that the method of delimiting marine boundaries by application of the equidistance method was investigated by the ILC. In addition, the positive assistance which might settle maritime boundary problems continued to be doubted by members of the Commission. It should be noted that the Commission accepted the principle of equidistance subject to two conditions. Firstly, priority should be given to settlement by agreement, and secondly, modifications would be necessitated by special circumstances.

II. The Geneva Conference and the Relevant Provisions of the Geneva Conventions

The debates at the Geneva Conference of 1958 on the Law of the Sea were based upon the draft Articles of the Commission.(16) On the question relating to the rules of delimiting the continental shelf boundaries, only minor changes were made. That is to say, Article 6 of the Continental Shelf Convention is almost identical to that of Article 72 of the draft. The words deleted are in brackets and the words added are underlined.

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(15) YBILC, 1956, Vol. II, p.300.

(16) Brown, op.cit., Ref. (4) at 193, p.208.

> "... unless another boundary line is justified by special circumstances, the boundary (line) shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State (of the two countries) is measured."(17)

The relevant provisions of the Geneva Conventions on the territorial sea and continental shelf are as follows:

Article 12(1) of the TSCS Convention

> "1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."(18)

Article 6(1,2) of the Convention on the Continental Shelf

> "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

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(17) See YBILC, 1956, Vol. II, p.300; UNCLOS I, Official Records, Vol. VI, pp.91-98, 130-134, 138, 142, 144; Vol. II Plenary Meetings pp. 11-15; See also Brown, op.cit., Ref. (338), at 158, p.57; and op.cit., Ref. (4) at 193, p.208.

(18) Brownlie, op.cit., Ref. (31), at 20, p.82.

> the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points 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 the 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 points of the baselines from which the breadth of the territorial sea of each State is measured."(19)

A careful reading of Article 6 of the Continental Shelf Convention will reveal that it makes separate provisions for the delimitation of the continental shelf between States whose coasts are opposite each other and between adjacent States. This distinction between a median line and equidistance line appears to be in the wording rather than in substance. They are both identical in that they establish the boundary line at every point from every co-ordinate point on the baseline from which the territorial sea of the States concerned is measured.(20)

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(19) Brownlie, ibid., p.109.

(20) See Colson, David A., "The United Kingdom - French Continental Shelf Arbitration", AJIL, Vol. 72, 1978, p.109; See also Anglo-French Arbitration on the Delimitation of the Continental Shelf, Decision of Court of Arbitration of 30 June 1977. Cmnd. 7438, March 1979. (Hereafter referred to as 'Decision'). The Court of Arbitration held that: "The rules of delimitation laid down in the two paragraphs of Article 6 are essentially the same. .... both the legal rule and the method of delimitation prescribed in the two paragraphs are precisely the same..." Decision, para. 238, p.112.

Perhaps this distinction is logical from a geometrical point of view. That is to say, the term "median line" refers to the line between mid-points on the shortest lines drawn between two opposite coasts. In geometric terms, the "median" line runs roughly in the middle of maritime areas which it divides, while the equidistance line "the lateral", appears rather like a line perpendicular to the coast.(21)

Accordingly, the Geneva Conventions require delimitation between opposite and adjacent States to be made in accordance with:

I. The agreement.

II. The special circumstances.

III. The median-equidistance line.

However, the special circumstances and the equidistance rules will be discussed in two separate sections. This will be prefaced by a consideration of the value of the principle of agreement as set out in the context of Article 12 of the Convention on the TSCZ and Article (6) of the Convention on the continental shelf. For the non-parties to the Geneva Conventions, the position is governed by the rules of customary international law which is revealed by the ICJ in the North Sea Continental Shelf Cases.(22) This will require consideration of the decision of the Court in a fourth section. The remainder of this section will be devoted to examining the concept of

(21) Shalowitz, A.L. "Shore and Sea Boundaries, Vol. 1, 1962, p.231.

(22) ICJ Reports, 1969, p.4.

"equitable principles" since it occupies a prominent part in the current rules concerning the delimitation of marine boundaries.(23) Of special importance in this respect is the Decision of the Arbitral Court in the Anglo-French Continental Shelf Cases.(24)

Section One

The Agreement

The Value of Agreement as a Rule to Determine Marine Boundaries as Laid Down in the Geneva Conventions

Under Article 12 of the Geneva Convention on the TSCZ as well as Article 6 of the Continental Shelf Convention, delimitation of the boundary line between the territorial seas and continental shelves of two adjacent and opposite States, is to be determined by agreement. The Conventions placed agreement ahead of other methods in accordance with the way in which marine boundaries should be affected.

Correct as it may be that the ILC did not find any satisfactory method to apply in all cases in this context, the problem was thus left to be settled by the States concerned themselves. However correct this is, it is strange as those States had previously been able to arrange their mutual international relations by agreement.(25)

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(23) Blecher, M.D. "Equitable Delimitation of Continental Shelf" AJIL, Vol. 73, 1979, p.86.

(24) Decision, op.cit., Ref. (20) at 198; Also, Anglo-French Arbitration on Delimitation of the Continental Shelf, (Interpretation of the Decision of 30 June 1977), Decision of 14 March 1978, Cmnd. 7438, March 1979, (hereafter referred to as Decision of 14 March 1978).

(25) Andrassy, op.cit., Ref.(349), at 163, pp.91, 92.

Admittedly, the agreement is the best peaceful means of solving international disputes, but this is no reason for ignoring that the convention apparently does not suggest any criterion for drawing boundaries by agreement. It is most likely that without objective criterion, any solution by agreement will be conditioned by such political factors as the relative power of the States concerned. This appears to mean that it is necessary to indicate a guideline to determine the boundaries by agreement.(26) It is interesting to note that the rule that the boundary line shall be determined by agreement between neighbouring States, becomes superfluous since even in the absence of such a text, the parties are able to have recourse to this method and divide up their parts of the seabed as they conceive best.(27) This is due to the fact that the means provided in Article 6 is of jus dispositivm and not jus cogens. The contracting parties are always able to regulate their relations irrespective of jus dispositivm.(28) In fact, the practice of agreement governs the whole of international relations. It is well recognized that it is provided in Article 33 of the Charter of the U.N. as one of the principles for the peaceful settlement of international disputes.(29)

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(26) Oda, op.cit., Ref. (92), at 79, p.444.

(27) Andrassy, op.cit., Ref. (349), at 163, p.24.

(28) Ibid.

(29) Daintith and others, op.cit., Ref. (4) at 9 , p.A328. The authors are surely right in concluding that the only purpose of insisting upon "the fundamental character of this method of settlement ... to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted". Ibid., p.A328.

Further argument in relation to the agreement as laid down in the Geneva Conventions, requires brief mention. It is to be noted that even in cases when the equidistance or the median line rule should be applied, agreement would be necessary in order to reach an exact boundary line. Most of the agreements concerning the delimitation of the continental shelf in the North Sea are concluded to that effect, as for instance were the British-Norwegian agreement of March 10, 1965,(30) and the agreement between the Netherlands and the U.K. on October 6, 1965.(31)

Admittedly, agreement as a peaceful legal principle for settlement of international disputes has several advantages, but it nevertheless has inherent defects which might result in its eclipse on the international law plane.(32) The advantages and the defects of the principle of agreement in the context of Articles 12 and 6 of the Geneva Conventions on the territorial sea and continental shelf will be dealt with in the following subsections.

Subsection One

The Advantages of Agreement

Generally speaking, contractual procedure is not only the prevailing superior principle in arranging international relations, but also where it acquires the conditions of international custom, it constitutes a source of customary international law rules. It would be fair to say that

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(30) U.K. T.S., No. 71, 1965 Cmnd. 2757.
(31) U.K. T.S., No. 23, 1967 Cmnd. 3253.
(32) Andrassy, op.cit., Ref. (349), at 163, p.24.

agreements have a number of advantages. To demonstrate this, it may be sufficient to refer to the following:

1. Undoubtedly, international law requires no particular formalities in the conclusion of an agreement. Agreements now take a variety of forms such as an agreed minute, a memorandum of agreement etc. Moreover, writing is not necessary in the creation of an agreement. That is to say, it is not necessary to be produced in a written document,(33) it may be oral.(34)

2. It is an easy and rather rapid means of settling international disputes since it does not take a long time to be reached. Also, the consent of States can be given even by mere silence.(35)

3. It seems, prima facia, that the agreement ensures the consent of the contracting parties, as they usually accept the rights and obligations that come from the agreement which they accept. While it is correct to say the foregoing, it is submitted that the agreement sometimes ensures only an ostensible consent. However, an agreement at least ensures, when looked at objectively and regardless

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(33) McNair, Lord, "The Law of Treaties", 1961, pp. 6-30; Waldock, op.cit., Ref. (234), at 126, pp.70-87.

(34) As in the case of Eastern Greenland. The PCIJ found that the Ihlen dec, the statement by the Norwegian Foreign Minister that Norway would not object to certain Danish acceptance was an international agreement. See PCIJ, Series A/B, No. 53, p.71. (1933).

(35) Bishop, William W., Jr., "Reservations to Treaties", Hague Recueil, Vol. 103, 1961 II, pp.266-302; Henkin, Louis, "International Law and the Behavior of Nations" Hague Recueil, Vol. 114, 1965 I, pp.200-201; Jennings, op.cit., Ref. (63), at 32, pp.528-532.

of the pressure which might be exercised,[36] the consent of the contracting parties which leads to settlement of disputes.

4. In reaching agreements on marine boundaries by coastal States, it is doubtful that disputes will arise. In this context, agreements frequently clarify rights and obligations of the parties. Consequently, such a solution implies lasting resolution by avoiding and cutting off protracted boundary disputes.

5. Seen from the point of view of international law, these agreements afford a means of affirming these rules, or of adopting, varying, suspending or supplementing them in the relations of the parties inter se.[37]

6. In the case of disagreement, the parties should have recourse to one of the means of settlement for international disputes, such as arbitration or international courts. Obviously, such means not only require a long time to achieve solution, but they also result frequently in undesirable consequences which might prejudice the parties concerned.

For the above, it is clear that agreement is a speedy means to arrest international disputes and to maintain the rights of the contracting parties. To say the foregoing, however, is not to argue that inherent in it is a dangerous defect which may override all its merits if it is made

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(36) As will be seen later, the agreement does not set up more than a false consent when it is accompanied by surrenders and relinquishments. See below pp.205 et seq.

(37) Wilson, R.R. "The International Law Standard in Treaties of the United States", 1953, p.1.

among unequal states, as will be discussed in the following subsection.

Subsection Two

The Defects of Agreement

It is worth observing that international community relations are not governed by the principle of "equality" which is more apparent in private law. Here, the question is whether or not the coastal State has absolute freedom in determining its marine boundaries.(38) The answer to such a question according to Judge Koretski and Judge Lachs, could not be other than the negative.(39)

However, while agreement represents consensus between the parties on the municipal plane, it is mostly dependent on political considerations on the international law plane. One might just as well suggest that this leads to chaos and to artificial consent, by which the less powerful party has to acquiesce in face of the wishes of the powerful side.(40) The weaker nation, so to speak, abandons some of the rights to avoid losing all its natural resources, or at least, impeding their exploitation. In such a case, agreement might appear as if it is really made on the pure consent of the parties concerned. To

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(38) Moreover, another point calls for comment. It may be asked, what principles, if any, apply ipso facto if the States concerned failed to reach an agreed solution. This matter becomes more acute, according to Judge Lach's view, in that the coastal State is not bound to negotiate and conclude agreement. See ICJ Reports, 1969, p.219.

(39) ICJ Reports, 1969, pp. 155 and 219 respectively.

(40) Oda, op.cit., Ref. (92) at 79, pp.444, 445; Detter, Ingrid, "The Problem of Unequal Treaties", ICLQ, Vol. 15, 1966, pp.1069-1089.

demonstrate this, one may refer to the 1968 Agreement between Iran and Saudi Arabia,(41) under which a maritime boundary line between the two States is to be drawn so as to divide the exploitable oil resources in the disputed area.(42) The division of that area however was too complicated as there are a number of islands, especially Kharg.(43) The need to resolve this problem of offshore jurisdiction was recognized by both States.(44) This need to divide up the submarine boundaries became more urgent for two reasons. Firstly, offshore oil exploration indicated the predicted presence of large reserves of oil

(41) This agreement was signed at Tehran on October 24, 1968 and entered into force on January 29, 1969. The official English translation together with a map cited in ILM, Vol. 8, 1969, pp.493-496.

(42) The marine distance between the mainlands of the two States ranges from 95-135 miles approximately. The depth of the waters is never more than 75 metres and the average is less. So the whole of the area is clearly continental shelf in the legal sense and appertains to both States. Young, R. "Equitable Solutions For Offshire Boundaries: The 1968 Saudi Arabia-Iran Agreement", AJIL, Vol. 64, 1970, pp.152-157.

(43) This island lies about 16 miles from the Iranian mainland and relatively closer to the Arabian side. Kharg is waterless and normally uninhabited. The sovereignty over this islet was disputed between Iran and Saudi Arabia for a long time prior to the negotiations and at various times an Iranian Army force was stationed on Al-Farisiyah Island and a Saudi Arabian co-ordinate force on Al-Arabiyah Island, Ibid.

(44) The Royal Pronouncement of Saudi Arabia of May 28, 1949 affirmed the government's desire to settle submarine boundary disputes between Saudi Arabia and her neighbours consistent with equitable principles. See Young, R., "Saudi Arabian Off-shore Legislation", AJIL, Vol. 43, 1949, pp.530-532; Also, a similar declaration was announced by the Iranian Law of June 19, 1955. See ST/LEG/SER. B/16 (1974) p.151.

lying in the centre of the gulf. Secondly, the overlapping between the offshore concessions granted by both countries consequently impeded by one means or another oil operations on both sides. Thereupon, negotiations between the two parties commenced using the basis of the median line. This was described in an agreement prepared by representatives of both governments in Tehran on December 13, 1965. According to this agreement the Iranian baseline was the median line between the Iranian offshore and Kharg Island. The agreement further considered that the Al-Farisiyah Island was subject to Iranian Sovereignty and the Al-Arabiyah Island to the sovereignty of Saudi Arabia.(45) However, this draft was never formally signed or ratified because of Iranian reluctance to do so.(46)

In 1968, strained relations between the two countries was marked inter alia by the use of Iranian Army forces to protect Iranian oil operations and prevent others from so operating. It was clear that the 1965 legislation ended in deadlock. So, further negotiations between the two States were renewed. In the light of those negotiations, a new boundary line was ultimately worked out. This line was actually drawn closer to the Saudi Arabian coast in favour of Iran. It would not have been drawn if such military pressure had not been used.

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(45) Al-Arabiyah and Al-Farisiyah are two small islands situated in the middle of the Arabian Gulf between Saudi Arabia and Iran.

(46) This was due to the subsequent discovery by the Iranian concessionaire of important deposits which lay mostly on the Arabian side of the proposed line.

It might be contended that the above agreement is based on the consent of the two contracting powers. To answer such an argument, it is submitted that it does not represent the real consent of Saudi Arabia, who undoubtedly accepted this agreement in an atmosphere of constraint. The boundary line produced by this agreement between Saudi Arabia and Iran is seen as a result of the pressure used on Saudi Arabia. It should be remembered that if such military pressure had not been used, this line would perhaps not have been drawn. Therefore, the concept of agreement in the present context, if the parties were not on an equal footing and no guideline was prescribed, leads to subversion of the will of the less powerful State which might concede more than the other party under certain conditions.(47) Whilst this risk may always exist in the conclusion of international agreements, it is particularly dangerous with respect to the determination of disputed boundaries.

Hence, one may suggest the amendment of the text of Article 6 of the Geneva Convention on the continental shelf, so as to include an objective criterion. This appears to mean that it is essential to furnish the text with some guidelines in the light of which the parties concerned may negotiate.

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(47) Equal and unequal agreements have been known on the international law plane for centuries. For more details see Alexandrowicz, Charles H., "Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries", Hague Recueil, Vol. 100, 1960, II, pp.278-287.

Section Two

Special Circumstances

The Special Circumstances as Laid Down in the Geneva Convention on the Continental Shelf

As mentioned above, Article 6 of the Continental Shelf Convention permits deviation from the application of the equidistance or median line rule in situations where special circumstances justify another boundary line.(48) This appears to mean that various problems concerning the delimitation of the continental shelf were expected to arise by reason of the extreme variety of legal and material factors which may be relevant. The Geneva Conference was quite aware of the fact that no principle would ever satisfy all cases and some provision had therefore to be made for situations requiring special treatment.(49)

However, the concept of special circumstances is an equitable principle by which the contracting parties have an opportunity to reach a solution involving exceptional considerations. That is to say, the task of the special circumstances principle is to mitigate the rigidity of the equidistance line, which if applied in an unqualified

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(48) The debate in the Geneva Conference tends to reflect the conclusion that the special circumstances term was met with general approval although a number of States proposed its deletion. See Grisel, Etienne, "The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases", AJIL, Vol. 64, 1970, pp.570-584.

(49) Ibid., pp.579-580.

manner, results occasionally in absurdity as well as inequity.(50)

Correct as that may be, an important question is to be decided here. If the presence of the special circumstances is dependent on the unilateral estimation of the concerned parties themselves, would there be any necessity to refer to them independently? The answer is obviously in the negative, since the agreement itself is considered as an independent method for delimitation of the boundaries and accordingly, any unusual conditions would be considered during the negotiation in the pre-stages of the agreement. In other words, the concept of agreement itself assimilates the effects of the special circumstances or any other factors.(51)

After this brief clarification it is to be noted that the special circumstances as adduced in Article 6 of the Continental Convention has its own virtues and disadvantages which are the object of what follows.

I. The Virtues of the Special Circumstances

Considering special circumstances in the delimitation of marine boundaries is of great value. As noted above, recourse to agreement might not assist the less powerful party in substantiating its claims in the absence of absolute good faith or in circumstances where the powerful

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(50) In analogy it may be observed that the principle of the thalweg constitutes an exception to the medium filum aqual in the case of navigable river boundaries. See Kenworthy, William E., "Joint Development of International Waters" AJIL, Vol. 54, 1960, pp.592-602.

(51) See Padwa, David J., "Submarine Boundaries", ICLQ, Vol. 9, 1960, p.651.

side wishes to dictate and impose its will and conditions ignoring whatever special circumstances might be in favour of the less powerful party.(52) One might suggest that the text of the special circumstances is an instrument in the hands of the less powerful party to persuade the powerful one to recognize these circumstances and to take them into account in the course of reaching an agreement.

II. The Defects of the Special Circumstances

The special circumstances term appears in Article 6 of the Geneva Convention on the Continental Shelf in an apparently general context. In fact, no criterion is suggested for identifying these special circumstances nor for their effects. Additionally, while the text indicates that "another boundary line" may be justified by the presence of such special circumstances, it nevertheless implies neither what other boundary line is justified thereby, nor how such a boundary should be constructed.(53)

It is more sound to assume that the phrase "another boundary line" is a descriptive term contemplating any boundary other than one based on the equidistance rule. Correct as this may be, it is submitted that the generalization in the text might create serious disputes. Apparently, it gives the less powerful party an opportunity to claim many factors as special circumstances as well as the powerful party the ability to deny all such claims if it does not believe in absolute good faith that these circumstances are included in the Article. Such vagueness

(52) See above pp. 205 et seq.
(53) Jennings, op.cit., Ref. (63), at 32, p.400.

perhaps even impedes the international tribunal in its performance in the course of determining a boundary line between neighbouring States and thus prolongs the dispute.

Three further questions call for comment. Firstly, how and when such circumstances would be enumerated?(54) Secondly, who could be charged with interpreting their application?(55) Finally, is a State pleading special circumstances under an obligation to formulate them or can it plead at the outset in general terms?(56)

It must be admitted that there are no satisfactory answers to these questions. Nor is there any indication as to the question of the onus of proof. It is undecided where the onus of proof lies or whether the matter should be referred to arbitration.(57) It is also to be observed that the special circumstances clause in Article 6 of the Continental Shelf Convention neither identifies factors falling within its category, nor eliminates other considerations to set up guidelines for the evaluation of claims.(58) Professor Brown is surely correct when he

(54) This is by reason of the special circumstance principle not being a delimitation criterion. Its presence only reveals that the equidistance and the median lines cannot be constructed without the express consent of the coastal States concerned.

(55) See the Statement of the Yugoslav delegate at Geneva Conference, UNCLOS I, Official Records, Vol. VI, p.91.

(56) Jennings, op.cit., Ref. (63), at 32, p.401.

(57) It has been suggested that the onus pro bandi would lie on the State wishing to rely on that criterion. Judge Lach suggested that it was not only necessary to prove that special circumstances exist, but also that the coastal State concerned would suffer from special hardship if the equidistance line method were applied. See ICJ Reports, 1969, pp.239-240.

(58) Andrassy, op.cit., Ref. (349), at 163, p.94.

suggests that "while it would clearly be wrong to attempt to draw up a closed list of cases of special circumstances", this is no reason for ignoring the necessity of a reasonable and "restrictive interpretation of this difficult concept".(59) Otherwise, this clause opens up a liberty to claim the existence of special circumstances wherever a State finds that such a claim gives a result which satisfies its ambitions.(60) It may be stated that there was some mention of islands situated in the area to be determined.(61) Especially islands which are far from the coast of the State to which they belong, or nearer to the coast of the other party.(62) Also, mention of the case of the existence of mining or fishing rights and of navigational routes was made.(63) Therefore, as the

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(59) Brown, op.cit., Ref. (338), at 158, p.70.

(60) See the Dissenting Opinion of Judge Sørensen in the North Sea Continental Shelf Cases in which he states that "The clearer the rule, and the more automatic its application, the less the seed of discord is sown", ICJ Reports, 1969, p.256.

(61) Although there was nearly unanimity that islands might constitute special circumstances, there was no agreement as to how account should be taken of their presence.

(62) For instance, the Channel Islands off the French coast belonging to the U.K.

(63) As regards the mineral deposits. See below pp. With respect to the historical special circumstances, Professor Brown rightly suggests they will "very seldom be relevant to the delimitation of the continental shelf as distinct from delimitation of the territorial sea. Thus, for example, where certain waters are recognized as possessing the status of a historic bay or other historic waters, the baseline of the territorial sea will be extended to encompass these waters. The continental shelf delimitation, however, will be made not by reference to historic special circumstances but rather to the baseline of the territorial sea determined by those historical circumstances". See Brown, op.cit., Ref. (338), at 158, p.69.

preparatory work gives little information if any on the content of the special circumstances principle, there are two attitudes with respect to the interpretation of this term.(64) The first depends on the application of the rule and whether or not it may be appropriately applied. The second depends upon the formulation of Article 6 itself, namely, the circumstances must be "special" and "justify" a departure from the general rule.(65) Obviously, these interpretations are not substantiated.

Section Three

The Equidistance Line Rule

The equidistance line as a rule for drawing marine boundaries between States whose coasts are opposite or adjacent to each other, simply means that the boundary line is to be drawn in such a way that every point on the line is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. This rule was adopted during the discussion in the ILC on the delimitation of the territorial sea and of the continental shelf as an appropriate boundary under certain conditions. It was then incorporated in the Geneva Conventions on the Law of the Sea.

To demonstrate the role of the equidistance method in

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(64) It may be noted that the recent decision of the Court of Arbitration in the Anglo-French Continental Shelf Case has examined the question under consideration. It is intended to deal with this decision later, see below pp.256-265.

(65) Grisel, op.cit., Ref. (48), at 209, p.581.

determining the marine boundaries between neighbouring States,[66] an examination of the method will be dealt with under the following headings

I. Practice of States.

II. The Application of the Rule.

III. The Evaluation of the Rule.

The Equidistance Line Rule in State Practice

I. Unilateral State Practice

It must be admitted that a number of States have employed the equidistance rule in their national legislation. Among these, the Democratic Republic of Germany made a provision as to the exploration and exploitation of its continental shelf adopting the equidistance method as laid down in the Geneva Convention on the Continental Shelf. Article 3 of this law provides that the delimitation of the continental shelf is determined by the median line,

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(66) It may be noted at the outset that the equidistance line rule is in fact pertinent to the establishment of territorial sea boundaries between neighbouring States unless there exist islands. Obviously, the purpose of conferring upon States limited sovereignty over the territorial sea is to exercise control therein. Therefore, it appears sound to take into consideration the distance from the nearest points on the coast as a criterion for the apportionment of territorial sea. In the case of delimitation of the continental shelf, the different purposes justify the delimitation to be based on their principles. This view might find clear support in the fact that although Article 12 of the CTSCZ and Article 6 of the Continental Shelf Convention deal with the delimitation of marine boundaries, their wording is not similar. Therefore, it seems that the Commission deliberately wanted different treatment of the problem. See ICJ Pleadings, 1968, Vol. 1, pp.62-63.

namely, a line every point of which is equidistant from the nearest points of the baselines.(67)

Other examples of State practice may be found in the collection of National Legislation concerning the seabed and the ocean floor published by the U.N. in June 1968 which reflects the trend in national legislation promulgated since 1960.(68) The conclusion arrived at in the collection reveals that the Netherlands and Sweden made specific reference in general terms to the Geneva Convention.(69) Denmark, Finland, Malaysia and the Soviet Union went even further by adopting Article 6 of the Convention.(70) Italy based the delimitation on the median line pending agreement;(71) Norway referred to the median line.(72)

A further example of State practice in establishing the boundary line, where it may be regarded as a lateral boundary between adjacent States, on the basis of the equidistance rule as set out in Article 6 of the Geneva

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(67) Article 3, Law of 20 February, 1967 on the Exploration, Exploitation and Delimitation of the Continental Shelf as modified by the Law of 11 June 1968, ST/LEG/SER, B/18 Add.2 (Preliminary Issue), April 1975, p.111.

(68) U.N. Secretariat, Survey of National Legislation Concerning the Sea-bed and the Ocean Floor, and the Subsoil thereof Underlying the High Seas Beyond the Limits of Present National Jurisdiction. U.N. Doc. A/AC. 135/11. June 4, 1968 p.39; Brown, op.cit. Ref. (338) at 158, p.60.

(69) U.N. Secretariat, ibid., pp.44, 49; Brown, ibid. p.61.

(70) U.N. Secretariat, ibid., pp.28, 31, 41, 58; Brown, ibid.

(71) U.N. Secretariat, ibid., p.38; Brown, ibid.

(72) U.N. Secretariat, ibid., p.46; Brown, ibid.

Convention, may be found in a Decree dated May 16, 1969 promulgated by Uruguay.(73) In this context it is useful to quote in full Article 5 of this Decree which provides that:

> "The lateral delimitation of the continental shelf shall be effected, following appropriate international negotiation, by application of the principle of equidistance, provided for under Article 6 of the Geneva Convention on the Continental Shelf."(74)

There is one more precedent in which the rule of equidistance has been applied. The Canadian "Arctic Waters Pollution Prevention Act" of August 2, 1972 confirmed that the line which divides the islands of the Canadian Arctic and Greenland is the equidistance line.(75)

II. Bilateral Agreements

Apart from the unilateral state practice discussed, the rule of equidistance arose in bilateral agreements.(76) Even more important is the fact, that some of these agreements were concluded by States not party to the Geneva Convention of 1958 on the continental shelf.(77) There are clear examples of non-party States which concluded agreements on the basis of the equidistance rule found in

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(73) Brown, ibid., p.61.

(74) Cited in ILM, Vol. 8, 1969, pp.1071-1072.

(75) Cited in Lay, S. Houston, Churchill Robin and Nordquist, M., "New Directions in the Law of the Sea, Documents, Vol. 1, Oceana Publications, New York, 1973, p.200.

(76) Bouchez, Leo J., "The North Sea Continental Shelf Cases", J. Marit. Law Com., Vol. 1, No. 1, 1969, pp. 113-114.

(77) See Brown, op.cit., Ref. (338), at 158, p.59.

Norwegian practice, Norway for instance employed the equidistance method in agreement with the United Kingdom.(78) It may be useful to quote in full Article 1 of the aforementioned Convention which provides that:

> "The dividing line between the part of the continental shelf which appertains to the United Kingdom of Great Britain and Northern Ireland and that part which appertains to the Kingdom of Norway shall be based, with certain minor divergencies for administrative convenience, on a line, every point of which is equidistant from the nearest points of the baselines from which the territorial sea of each country is measured."(79)

The equidistance principle is also enunciated in the British-Netherland Agreement of 1965. The Preamble of this agreement reads as follows:

> "Desiring to establish the boundary between the respective parts of the continental shelf under the North Sea on the basis of a line every point of which is equidistant from the nearest points of the baselines from which the territorial sea of each country is at present measured."(80)

Along these lines is the Danish-Dutch agreement of 1966 in which both States referred to the equidistance

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(78) The same rule, namely the equidistance, has been used in a number of agreements to which Norway is a party. See agreements cited in Brown, op.cit., Ref. (338), at 158, p.59; see also Article 1 of the Norwegian-Swedish Agreement concerning the Delimitation of the Continental Shelf of 1968. Cited in Oda, op.cit., Ref. (408), at 180, Vol. 1, p.391.

(79) U.K.T.S., No. 71, 1965. This agreement was convened on 10 March, 1965, entered into force on June 29, 1965. Cmnd. 2757.

(80) Signed on October 6, 1965, entered into force on December 23, 1966. U.K.T.S. No. 23, 1967, Cmnd. 3253.

line as the boundary line between their continental shelf areas.(81) The same trend may be observed in the Italian-Yugoslav agreement of 1968 which considered the frontier between the two countries on the basis of the equidistance line.(82) Further examples are to be found in the British-Danish Agreement of 1971,(83) the Bahrein-Saudi Arabian Agreement of 1958(84) and finally the Danish-Canadian Agreement of 1973.(85)

The instances of bilateral agreements already referred to, are only illustrations, inevitably superficial, and far from exhaustive. However, while it is correct to say the foregoing, this is no reason for ignoring that among the bilateral agreements cited and many others, importance has been attached to the special circumstances and equitable principles.(86) It may be added that the occasional division of areas of the continental shelf by equidistance lines is no proof of a general recognition of the equidistance line rule. As Professor Brown rightly concludes:

> "In one sense, it is rather superfluous to cite this treaty practice if the intention is to illustrate the general acceptance of the three-point rule expressed in Article 6. The fact that they are treaties is sufficient to bring

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(81) Lay and others, op.cit., Ref. (75) at 217, pp.128-129.

(82) See ILM, Vol. 7, 1968, p.547; Brown, op.cit., Ref. (338) at 158, p.60.

(83) Signed on November 25, 1971, entered into force on 7 December 1972. U.K.T.S., No. 6 1973, Cmnd.5193.

(84) Oda, op.cit., Ref. (408), at 180, p.420; Brown, op. cit., Ref. (338), at 158, p.56.

(85) ST/LEG/SER. B/18/Add. 2, 1975, p.309.

(86) See below pp. 272 et seq.

> them within that rule-delimitation based on agreement. They do, however, help to emphasise that, almost invariably, agreement is reached on the basis of the other two elements in Article 6, namely, equidistance and allowance for special circumstances."(87)

It is to be noted that there is no other interpretation of this conclusion than that the adoption of the equidistance rule in those agreements was not because they attained the status of a general principle.

III. Multilateral Treaties

Not only do bilateral agreements adopt provisions in establishing marine boundaries on the basis of the equidistance rule, but this rule has even found a striking application in multilateral treaties. In support of what has been just stated, one might turn to the European Fishery Convention of 1964. Article 7 which speaks for the delimitation of the exclusive fishing rights, runs as follows:

> "Any straight baseline or bay closing line which a contracting party may draw shall be in accordance with the rules of general international law and in particular with the provisions of the Convention on the Territorial Sea and the Contiguous Zone opened for signature at Geneva on 29th April, 1958."(88)

Moreover, one does not need to recall what has been noted earlier that by virtue of the Convention on the TSCZ and the Convention on the Continental Shelf, the

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(87) Brown, op.cit., Ref. (338), at 158, p.60.

(88) Cited in ILM, Vol. 3, 1964, p.478; see also Andrassy, op.cit., Ref.(349), at 163, p.93.

delimitation of marine boundaries is to be established in accordance with the equidistance rule.(89)

It is worth observing that up to the end of February 1972, 41 States have taken the formal steps to accede and ratify the TSCZ Convention.(90) As to accession and ratification of the Continental Shelf Convention, the number of States was 49.(91)

One related point worth brief mention at this stage is that the Convention on the Continental Shelf permitted reservation to all articles with the exception of Articles 1 to 3 and four reservations to Article 6 have already been made.(92) While it is not intended to examine these reservations and their legal effect on the equidistance rule, it is necessary in order to complete the picture to state these reservations briefly. Two States, Iran and Venezuela, made their reservations at the time of signing the Convention.(93) The Iranian reservation paid special attention to Article 6 in the sense that it accepted it on the understanding that the interpretation of "special circumstances" meant that the high water line should be taken as the baseline for establishing the continental

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(89) See above pp. 197-199

(90) See Oda, op.cit., Ref. (408), at 180, Vol. 1, pp. 25-26; See also the table laid down in Nawaz, op.cit., Ref. (373) at 170, p.40.

(91) Oda, ibid. It may be added that the ICJ pointed out in the North Sea Continental Shelf Cases that: "The Convention received 46 signatures and up-to-date there have been 39 ratifications or accessions". ICJ Reports, 1969, para 26, pp.24, 25.

(92) See Article 12 of the Continental Shelf Convention.

(93) For texts of the reservations, see ICJ Pleadings, 1968, Vol. 1, pp.230-233.

shelf boundary.(94)

Venezuela at the time of signature declared that in certain areas off the Venezuelan coast there are "special circumstances" to be taken into account.(95)

France also made a reservation to Article 6 when she ratified the Convention. The French Government by this reservation refused the application of the equidistance rule in determining any boundary of the continental shelf in the absence of specific agreement in three conditions:

a. When such a boundary is measured from baselines drawn after 29 April, 1958.

b. When such a boundary extended to a distance beyond the 200-metre isobath.

c. When such a boundary lies in certain areas which in the French Government's view constitute special circumstances within the meaning of Article 6 of the Convention. Those areas were specified in the French reservation so as to include "the Bay of Biscay, the Bay of Granville and the sea areas of the Straits of Dover and of the North Sea off the French Coast".(96) The force behind this reservation was, as mentioned by a French commentator, the desire of the French Government "to avoid inter alia the danger that it might be cut off from parts of the continental shelf to which it was entitled."(97)

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(94) Brown, op.cit., Ref. (338) at 158, p.59. ICJ Pleadings, 1968, Vol. 1, p.230; UNCLOS I, Official Records, Vol. VI, 1958, (A/CONF. 13/42), p.142.

(95) ICJ Pleadings, ibid., p.230.

(96) U.N.T.S., Vol. 538, p.336; Brown, op.cit., Ref. (338), at 158, p.58. However, these reservations have attracted categorical objections declared by other States. For details see ICJ Pleadings, 1968, Vol. 1, pp.232-233.

(97) Brown, op.cit., Ref. (338), at 158, p.58.

It appears, according to Professor Brown that "the French Government regarded fishery and navigation interests as constituting 'special circumstances' in the Straits of Dover and Bay of Biscay".(98)

The other reservation is that of Yugoslavia in which she declared that "in delimiting its continental shelf, Yugoslavia recognizes no 'special circumstances' which should influence the delimitation".(99)

A careful examination of the above reservations will certainly reveal that "only the Venezuelan reservation appears to amount to a rejection of the rules in Article 6".(100) Correct as this may be, it appears that permitting coastal States to make reservations to Article 6 only means that this Article is not a general rule of international law; otherwise members of the Convention would not be able to contract out from the rules laid down in this Article.

The Application of the Rule

The equidistance or median line rule as set out in the Geneva Conventions means drawing the boundary line by reference to charts and geographical features as they exist on a particular date. Every point on this line must be precisely the same distance away from the baselines from which the breadth of the territorial sea of each of the countries concerned is measured.

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(98) Brown, ibid.

(99) ICJ Pleadings, 1968, Vol. 1, p.344, Brown, ibid., p. 59.

(100) Brown, ibid., p.59.

It is to be noted that if the coastlines of the affected States are regular, the most appropriate boundary is a single straight line from the baselines of the land boundary terminus to the point of intersection of the envelopes of T-mile arcs drawn from the nearest points of the baselines of the two States.(101) Such a line will usually be perpendicular to the shoreline. If the coast is exceptionally irregular, so that the two adjacent States are in fact opposite to each other,(102) the most reasonable boundary is the line beginning at the land terminus and continued by a median line between the lands of the two countries. Then, the boundary line beyond this first segment is established as mentioned above.

However, to clarify the manner in which the equidistance and median line rules are applied in practice, it is useful to give the following examples.

As to the median line, if there are two States a and $\bar{a}$ situated opposite each other, one on the North and the other on the South, the median line between them according to the Geneva Convention is the line, each point of which is equidistant from the baselines from which their respective territorial seas are measured. Assuming that the points on the baseline of State a are b, c and d, and on State $\bar{a}$'s coastline are $\bar{b}$, $\bar{c}$ and $\bar{d}$, a certain point equidistant from b and $\bar{b}$ is chosen. This point is the

(101) "T = width of the territorial sea: 3 nautical miles 4, 6, 12 etc." See Boggs, op.cit., Ref. (13) at 14, p.247. For the delimitation of the seaward limit of the territorial sea by the envelopes of arcs of circles method. See ibid., pp.247 et seq. and 253.

(102) Such is the case in the boundary between Denmark and Norway.

first one on the boundary line between the two States and may be called x. Another point, say y, equidistant from c and $\bar{c}$ is chosen. Then a third point, "z" is in the same way equidistant from d and $\bar{d}$. A line shall be drawn between x, y and z. This is the first part of the median line between State a and State $\bar{a}$. By fixing other co-ordinate points on the baselines of the two States and points on the waters equidistant from each two co-ordinate points and then drawing a line between these points on the water, the median line according to the Geneva Conventions is set up between the States.

As regards the equidistance line, a fictitious coastal State in the east neighbours another in the west and the land frontier line between them ends at a point "m" at the coast. The points on the baseline of the eastern State are a, b and c from "m" to the east. Also, the points on the baseline of the western State are $\bar{a}$, $\bar{b}$ and $\bar{c}$ from "m" to the west. The boundary line shall be drawn between these two States according to the equidistance line rule in the following way. A certain point on the waters the same distance from a and $\bar{a}$ is to be chosen. This point is the first one on the boundary line and may be called "x". A line shall be drawn between the points "m" and "x". This line will constitute the first part of the boundary line on the continental shelf. This operation shall be repeated relative to the points b and $\bar{b}$ to obtain a new point, "y" and by drawing a line between x, y and z etc., the boundary line shall be fixed between the

States in accordance with the equidistance rule.(103)

The Evaluation of the Equidistance Line Rule

The rule of equidistance line which is to be applied according to the Geneva Conventions in the absence of agreement, is a well known method. It is applied in various situations, for example to determine State boundaries on rivers and other waterways.(104) More important is that this method is frequently characterised as a "general rule".(105) Further, it certainly results in an equitable division when a simple geographical configuration exists. It follows that such an apportionment would be acceptable to the concerned parties and would in turn serve in avoiding long international conflicts.(106) It may be added that the equidistance line rule has significant practical value which no other method of delimitation has. Indeed, as the ICJ revealed, it had a combination of "practical convenience and certainty of application".(107)

(103) These operations beyond all doubt are technical ones and they should be performed by technicians and engineers. See Mouton, op.cit., Ref. (258) at 135, p.419.

(104) An alternative boundary in this situation is the middle channel line of thalweg.

(105) See YBILC, 1953, Vol. 1, p.107. In the opinion of the British delegate at the Geneva Conference, even in the case of special circumstances where a departure from the median or equidistance line would be justified, the median or equidistance line would provide the best starting point for negotiations. See UNCLOS I, Official Records, Vol. VI, (A/CON.13/42) p.93.

(106) See ICJ Reports, 1969, paras. 23, 24, p.23. Andrassy, op.cit., Ref.(349), at 163, p.93; Colombos, op.cit., Ref. (4) at 9 , pp.81-82.

(107) ICJ Reports, 1969, para. 23, p.23.

However, the equidistance line rule, as the ICJ clearly pointed out,(108) is neither inherent in the doctrine of the continental shelf nor is it a customary law rule.(109) It was criticized during the 1952 Session of the ILC as it "failed to take existing practice into account and would not be satisfactory in a number of cases".(110)

To review the argument for and against the equidistance line rule it is worth answering the question whether or not the equidistance line rule always propounds the best solution in all cases. The answer is clearly in the negative, since coastlines are so varied that it is difficult to formulate any one rule as an ideal method. Only when shores of the affected States are almost similar does the equidistance line method achieve equitable consequences. Indeed, this is rarely to be found. This amounts to stating that in order to offer an equitable solution, there is a need for numerous exceptions which would be applicable more often than the rule itself.(111)

Assuming however that the rule of equidistance is to be applied, then an obvious question for one to ask would

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(108) Ibid., para. 49, 50, pp. 33, 34; para 101(a), p.53.

(109) Ibid., para 101(a), p.53. There were three factors behind adopting the equidistance line rule. These factors are; (1) a strong need for a general substantive rule which would apply in the absence of agreement; (2), it appeared also that in the case of failing to reach an agreement, the only line which could be drawn automatically in all cases was the equidistance line, and (3) the Commission felt that it was inevitable that the continental shelf be determined by the same method which the territorial sea set by.

(110) YBILC, 1952, Vol. 1, p.180.

(111) Oda, op.cit., Ref. (92) at 79, p.447.

be how the points from which the equidistance line is to be measured would be established. Three probabilities may be envisaged in this regard. The line could be drawn either from the points along the seaward boundary lines of the territorial seas of both States concerned, or from the points along their shores, or also from the straight baselines determined under Article 4 of the territorial sea convention.

Perhaps the first idea, prima facia, seems the most reasonable, as long as the continental shelf legally begins beyond the territorial sea. Suggested in 1953,(112) this rule was rejected on the grounds that there was no adopted uniform breadth of the territorial sea. That is to say, supposing this argument is accepted, it is to be observed that by stating a claim for a wide territorial sea, a State would consequently gain a larger area of the continental shelf. The second alternative is also unacceptable since the shores are too varied. It remains to examine the last proposal which the Geneva Convention on the Continental Shelf adopts. This view, it must be noted, is opposed on the grounds that the baseline itself is by no means a line which is in all cases beyond dispute. Accordingly, this solution would lead to conflicts in situations where no such baselines were predetermined.(113)

In addition, the analogy drawn between delimiting the territorial sea and the continental shelf appears to be

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(112) YBIL, 1953, Vol. 1, p.125.

(113) See Chapter One concerning the rule relating to the demarcation of the points from which the baseline of the territorial sea is measured.

misleading in two aspects. Firstly, whilst the division of territorial sea would be rather immaterial, as territorial seas are relatively narrow belts, it might create injustice and be of great importance if it relates to the establishment of the continental shelf boundaries which extend further seaward. Secondly, a general principle for the delimitation of territorial sea boundaries has not been universally accepted and if such a principle did exist, it would not necessarily be used for the delimitation of the continental shelf.(114)

To the foregoing it may be added that Article 6 of the Continental Shelf Convention treats separately two types of situation between which it is not always possible to distinguish. In governing the delimitation of the continental shelf, the distinction is made in the above Article between States lying opposite and adjacent to each other. However when can it be said that two coasts are opposite or adjacent to each other?(115) In fact there are cases, for example the coasts of Italy and Yugoslavia on the Adriatic Sea, where the land frontier between two States reaches the sea so that they must be considered 'adjacent', and yet the larger parts of them are opposite each other within the usual meaning of the word.(116) It

(114) For these reasons suggestions were made in the early stages of the ILC that the continental shelf should be divided by agreement between the parties, or by arbitration. See YBILC, 1950, Vol. 1, p.234, p. 384.

(115) Shalowitz, op.cit., Ref. (21), at 199, pp. 231 et seq.

(116) Italy and Yugoslavia. Concluded an agreement on January 8, 1968 dividing the continental shelf between them in the Adriatic Sea. See the separate opinion of Judge Amoun. In the North Sea Continental Shelf Cases, ICJ Reports, 1969, p.109.

may be argued that as long as both situations have to be treated in the light of the same principles, the problem may appear to be rather moot.

The above proposition, though it seems admissible, is not however conclusive in at least two respects. Firstly, under the circumstances just described, namely, in the Adriatic Sea, the relevant method to determine the "lateral" boundary line might not be appropriate to delimit the median line. In such a case, where does the former end, and the latter start? Article 6 leaves this question unanswered, since it does not define "opposite" and "adjacent" coasts.(117) This deficiency perhaps leads to a second consequence when two States purport to delimit their shelves' boundaries by agreement. The parties concerned are entitled under Article 6 to do so only if their coasts are "opposite" or "adjacent"; otherwise agreement between them would not be binding on third States.(118)

To the above it may be added that the equidistance line rule does not eliminate the need for agreement in order to set an exact boundary line.

A further point deserves particular consideration. In the delimitation of marine boundaries in the presence of islands another obstacle arises. This is because islands may not only possess their own territorial sea and

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(117) See above, footnote (116).

(118) ICJ Reports, 1969, see the separate opinion of Judge Padilla Nervo, p.91; the dissenting opinion of Judge Morelli; p.203 and the dissenting opinion of Judge Sørensen, pp. 250 et seq.

continental shelf[119] but they may also affect the drawing of baselines from which the territorial sea is measured.[120] Islands belonging to one State make drawing the median line more complicated when they are situated somewhere in the sea closer to another opposite State. Here the problem is whether or not the median line in this case should be altered so as to accommodate that island. Of even further complexity is the situation when an island between two opposite States is subject to a third country. Article 6 of the Convention speaks only about baselines without indicating whether these are to be related to the "mainland" or "island". It is perhaps more complicated that the Continental Shelf Convention contains no reference to whether or not, the islands referred to in Article 1(b), are those of established sovereignty. Consequently, it hardly needs explanation that, if such islets were given full rights under the Convention, the results would be very harmful to the interests of many coastal States which might consider such an interpretation of the Convention to be contrary to the principles of equity. Finally, another observation should be made that Articles 2 to 7 refer only to coastal States as having rights over the areas of the continental shelf, Article 10 indicates to the States entitled to accession to the Convention referred to in Article 8. The latter

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(119) Article 10 of the CTCZ and Article 1 of the Continental Shelf Convention.

(120) Jennings, op.cit., Ref. (63), at 32, p.401. With respect to the problem of islands in so far as it relates to the delimitation of the territorial sea and consequently the delimitation of the continental shelf, see above pp. 42 et seq.

enumerates those States by providing that:

> "... all States members of the U.N. or any of the specialized agencies and by any other State invited...".(121)

Section Four

The Rules of International Customary Law

By now, it seems clear that the equidistance rule, strictly speaking, is not the only rule in delimiting marine boundaries, irrespective of the nature of the apportionment achieved by its application. Nor is there a presumption in favour of the equidistance method as it represents a general rule of law. In determining marine boundaries between neighbouring States, a rule of customary international law has apparently been developed.(122) There is sufficient proof, as will be seen, of a recognition on the international law level, that the concept of equity has come into its own in the delimitation process. The establishment of the customary rule in this context could be constructed from the judgment of the ICJ in the North Sea Continental Shelf Cases,(123) and the decision of the Court of Arbitration in the Anglo-French Continental Shelf Case.(124)

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(121) See the text of the Article, Brownlie, op.cit., Ref. (31) at 20, p.109.

(122) Daintith and others, op.cit., Ref. (4), at 9, Vol. 1, p.A327; Jennings, op.cit., Ref. (345), at 161, pp.819 et seq.

(123) ICJ Reports, 1969, p.4.

(124) Decision, op.cit., Ref. (20), at 198, Decision of 14 March 1978 op.cit., Ref. (24), at 200.

I. The North Sea Continental Shelf Cases

Importance has been attached to and extensive commentaries and analysis have been made on the decision of the ICJ in the North Sea Cases.(125) It is to be noted that there are special reasons why this judgment received such attention. One may accept unreservedly that the whole problem in which the Court in this case dealt with, reflects an aspect of a wider field of the law of the sea on which contradictory views are still expressed.(126)

However, in order to understand the case certain aspects of the dispute must be discussed.

The Dispute

The North Sea waters, apart from the well-known Norwegian Trough, are shallow and the bottom almost wholly continental shelf.(127) Seven coastal States border the North Sea; the U.K., Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium and France. All of these States apart from Belgium, Germany and Norway have ratified or acceded to the Continental Shelf Convention.(128)

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(125) See for example, Brown, op.cit., Ref. (4), at 193, pp. 187-215; and op.cit., Ref. (338), at 158, pp. 41-71; Hunnings, N. March and others, "Current Legal Developments", ICLQ, Vol. 21, 1972, pp.563-564; Grisel, op.cit., Ref. (48), at 209, pp.562-593; Friedmann, op.cit., Ref. (253), at 133, pp.229-240; Merrilis, op.cit., Ref. (201), at 116, pp.638-659.

(126) Friedmann, ibid., p.229.

(127) Hopkins, C.A., "Delimitation of the Continental Shelf-Conventional and Customary International Law," Camb. Law, Vol. 28, 1970, pp. 4,5.

(128) Young, Richard, "Offshore Claims and Problems in the North Sea", AJIL, Vol. 59, 1965, p.505.

Several agreements were concluded between the States concerned for the delimitation of the continental shelf boundaries. The U.K. which is situated along the western side concluded agreements with Norway, Denmark and the Netherlands.(129) The line xy on figure 1 reflects these delimitations which have been based on the median line rule. Norway and Denmark have set up by agreement a boundary line between them ('op' on figure '1').(130) Also, short, partial boundary lines between the Netherlands, Denmark and Germany ('cd' and 'ab' on figure '1') were agreed upon in 1964 and 1965 respectively.(131) In addition, Denmark and the Netherlands whose coasts are not adjacent, agreed in March 1966 upon the division of their continental shelves. These agreements were based on the equidistance line rule.(132) Germany, which has a concave coastline, disagreed with extending the partial boundary lines on the basis of the same rule, since if it were applied it would have resulted in the dotted lines ('be' and 'de' on figure '1') and consequently the outcome would be inequitable. This is because it would prevent her from extending her continental shelf to the middle of

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(129) The U.K.-Norwegian Agreement, signed on March 10, 1965, relating to the Delimitation of the Continental Shelf Between the Two Countries, U.K.T.S. No. 1, 1965, Cmnd. 2626; The U.K.-Denmark Agreement signed on March 3, 1966. U.K.T.S., No. 1, 1966, Cmnd. 2973; U.K.-Norway two agreements signed Oct. 6, 1965, U.K.T.S., No. 1, 1965. Cmnd. 2830 and 2831.

(130) Agreement Between Denmark and Norway Relating to the Delimitation of the Continental Shelf, UNTS, Vol. 634, p.71.

(131) See Brown, op.cit., Ref. (338)at 158, p.42. See also, Hopkins, op.cit., Ref. (127) at 233, p.45.

(132) Oda, op.cit., Ref. (92) at 79, p.449; See also ICJ Reports, 1969, pp.7-10.

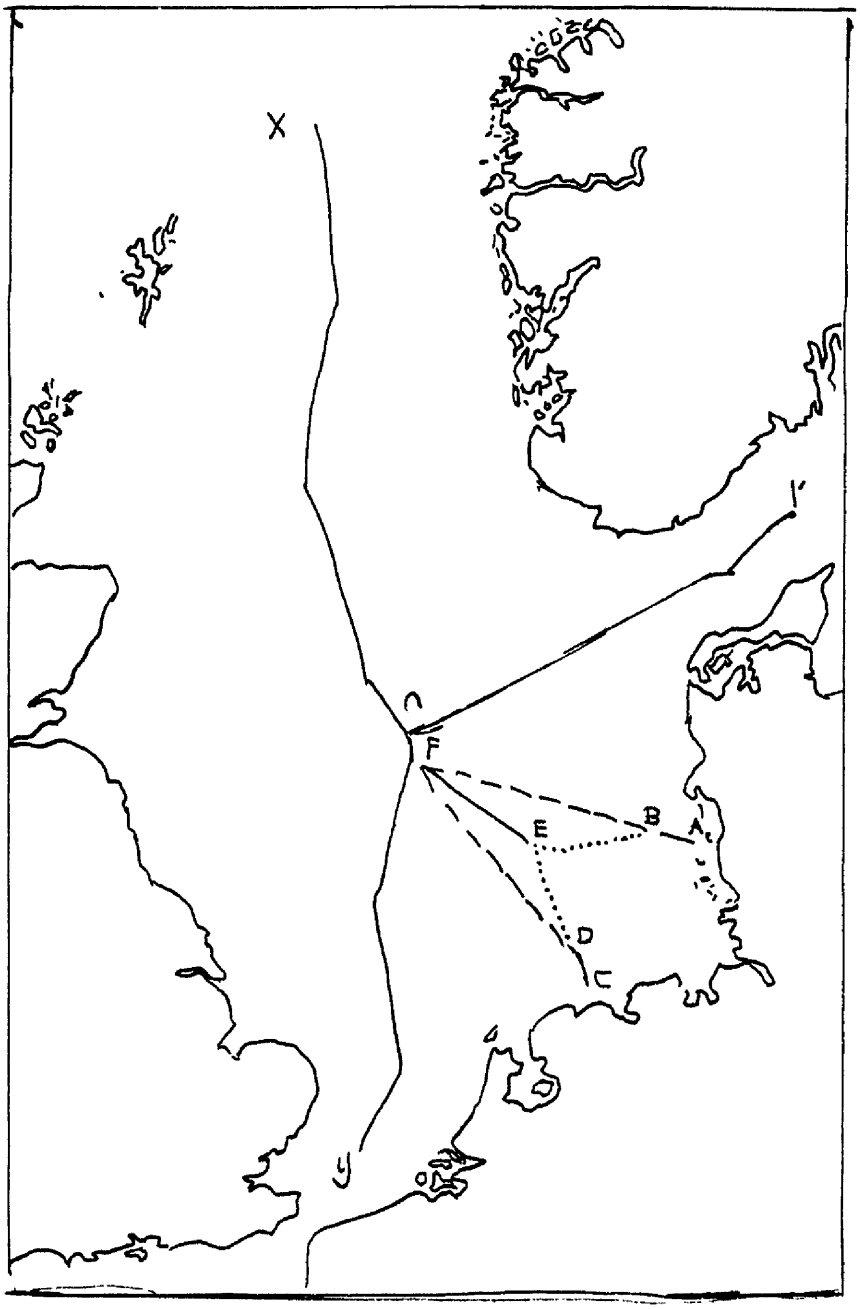

Figure (1)

Reproduced from the Judgment of
the ICJ in the North Sea Cases

the North Sea, and would confer upon her the enjoyment of only a narrow portion of the continental shelf.

After further unfruitful negotiations for the prolongation of the partial boundaries, it was decided by special agreements between the parties to submit the matter to the ICJ.(133) Also, the parties agreed that they would delimit the continental shelf area between them by agreement in the light of the judgment of the Court.(134)

The Claims of Germany

It was submitted before the Court on behalf of Germany that:

1. The delimitation of the continental shelf between the parties in a case such as that of the North Sea, was governed by the principle that coastal States are entitled to "just and equitable" shares of the divisible areas on the basis of the length of their coastlines or sea frontages.
2. The equidistance rule provided in Article 6(2) of the Geneva Convention on the Continental Shelf was not applicable for determining the boundaries between the parties since it was not and had not become a rule of customary international law.

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(133) Two special agreements together with a tripartite protocol were signed at Bonn, on Feb. 2, 1967. See ICJ Reports, 1969, pp.7-10; See also Hopkins, op. cit., Ref. (127), at 233, pp.4, 5.

(134) Brown, E.D., "Recent Trends in the International Law of the Sea with Particular Reference to the Legal Regime of Submarine Areas", A thesis submitted for Ph.D. degree to the University of London, 1970, pp.63-65; and op.cit., Ref. (338), at 158, p.42.

3. Even if that rule found application in the "present case", special circumstances, within the meaning of Article 6 of the Convention, would allow an exception in this case.
4. The equidistance rule was inapplicable between the parties for the delimitation of areas of continental shelf unless it was set up either by agreement or arbitration. Alternatively, if the equidistance line method achieved a "just and equitable" apportionment of the continental shelf among the States concerned, then in this case it would also be applicable. Accordingly, as long as the application of this rule would not apportion a "just and equitable" share to the Federal Republic of Germany, it would be excluded.
5. "Consequently, the delimitation of the continental shelf in the North Sea between the parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the parties in the light of all factors relevant in this respect".(135)

The Claims of the Netherlands and Denmark

The submissions of Denmark were identical mutatis mutandis to those of the Netherlands. It had been contended on behalf of them that:

1. The delimitation of the shelf areas between the parties was governed by the basic principles of international law embodied in Article 6 of the Geneva Convention of 1958 on the Continental Shelf.

(135) ICJ Reports, 1969, pp. 8,9.

2. Since the parties failed to agree and as the existence of special circumstances justifying another boundary line had not been proven by the Federal Republic of Germany, the boundary line of the parties' continental shelf was to be determined by the equidistance method.(136)

However, the essential question the Court was asked was to decide and declare

> "What principles and rules of international law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary"determined by the Conventions of 1964 and 1965 between the Federal Republic and each of the Netherlands and Denmark respectively?"(137)

The Court felt that the cases between Germany on the one hand, and Denmark and the Netherlands on the other could be treated as one, since the legal argument presented on behalf of them both were identical.(138)

The Judgment of the Court

In the light of the geographical and legal realities, factors and contentions, the Court held on 20 February 1969 by eleven votes to six that:

(a) the use of the equidistance method was not obligatory between the parties, and

(b) there was no other single method of delimitation, the use of which is in all circumstances obligatory;

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(136) ICJ Reports, 1969, ibid., pp. 10, 11.

(137) Article (1) of the special agreements. See ICJ, 1969, pp. 7-10.

(138) ICJ, ibid., para. 11, p.19.

(c) the delimitation of areas of the continental shelf was therefore to be effected by agreement "in accordance with equitable principles, and taking account of all the relevant circumstances".

(d) The factors to be taken into account, in the court's view were:

1. the general configuration of the coasts together with the presence of any unusual features,
2. the physical and geological structure and natural resources of the continental shelf areas involved.
3. Following all of the above, the delimitation must be carried out in such a way as to achieve a reasonable degree of proportionality between the area of continental shelf to be allocated to each State and the length of its coast measured in the general direction of the coastline.(139)

The Main Findings and Principles of the Judgment

To draw a conclusion from the full implications of the judgment certainly requires an examination of the basis on which the Court relied. Turning now to the reasonings and findings of the Court, it may be observed that after considering the contentions and arguments of both parties, the Federal Republic of Germany on the one hand and the Netherlands and Denmark on the other, the Court criticised the wording of Article 6 of the Geneva Convention of 1958 on the Continental Shelf. The Court also focused on the extent of the obligatory character of the above Article.

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(139) ICJ Reports, 1969, pp. 53, 54.

Moreover, it analysed the legal concepts of adjacent and opposite States and placed emphasis on the natural prolongation of the land territory beneath the sea.

The aim of what follows is to examine in brief the principles on which the Court based its judgment.

1. The equitability of the equidistance rule is questionable

While admitting that the equidistance rule excelled other rules in aspects of "practical convenience and certainty of application",(140) the ICJ amply verified that these reasons were not sufficient in themselves to convert what was merely a method into a principle of law.(141)

In the view of the Court, two deductions were to be drawn from an examination of the perspective of the equidistance rule. Firstly, not only was this method questionable, but there was no other single satisfactory rule of determination in all cases. The Court found that determination of marine boundaries should be achieved either by agreement or by reference to arbitration. Secondly, and more central to the delimitation is that it should be effected on equitable principles, as could be inferred in the view of the Court from the formulation of Article 6 of the Geneva Convention on the Continental Shelf itself. The Court's main argument was based on the premise that the Convention gives priority to agreement

(140) ICJ Reports, 1969, para. 23, p.23; see also Lambert, Michael C., "Notes on Recent Cases: Delimitations of the Continental Shelf to be Made on Equitable Principles in Accordance with the Natural Prolongation of the Land in Absence of Bilateral Agreement or Application of International Convention. The North Sea Continental Shelf Cases 1969, ICJ," J. Marit. Law Com., vol. 1, No. 2, 1970, p.329.

(141) ICJ Reports, 1969, para. 23, p.23.

for determination of marine boundaries, and in the case of failing to reach agreement, the Convention introduced the special circumstances exception to the equidistance rule. In reviewing the record of the ILC, the Court demonstrated that even with these mitigations, the equidistance method was still doubted, especially as to whether or not it would lead to equitable consequences in all cases.(142) More important in the view of the Court is that there was no sign in the record of the ILC, which discussed and examined the question from 1950 to 1956, to indicate that any of the Commission members felt that the equidistance rule was an incumbent principle of customary international law.(143)

In considering the argument that the process of delimitation of continental shelf areas between opposite and adjacent States is similar, thus the results ought, in principle, to be the same or at least comparable, the Court observed, that this argument appeared to operate not on a rational or conceptual level. Such an argument as the Court commented, failed to appreciate the distinction between two wholly different situations. The lateral "equidistance" line did not divide as did the median line, the areas between the concerned States equally, rather it frequently left to either party areas that were a natural prolongation of the territory of the other.(144)

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(142) ICJ Reports, 1969, Para. 49, p.33; Para. 53, p.35; Para. 55, pp. 35, 36.

(143) Ibid., para. 49, p.33.

(144) ICJ Reports, 1969, para. 58, p.37; para. 57, p.36.

2. The Equidistance Method is not a Rule of Law

The Court added that the ILC during its early and middle stages, not only declined to give the equidistance rule any priority, but also ignored claims to the effect that its application was a necessity. The Commission on the contrary discussed other rules such as delimitation by agreement, by recourse to arbitration, by drawing lines perpendicular to the coast et cetera, and on occasion the Commission seriously considered adopting one or other of these solutions. In the Court's view, there was no definite rule to be formulated as the superior technique concerning the delimitation in all cases.(145) The Court drew from the discussion of the Commission that the adopted rule was founded on the recommendation of the Committee of Experts and even so that text gave priority to other rules, namely the agreement and special circumstances. The Court thought that the experts were affected by considerations not of legal theory but of practical matters.(146) For the Court, neither in the Committee of Experts, the ILC nor consequently at the Geneva Conference had there been any discussion concerning the question of determination of lateral boundaries not merely between two adjacent States, but also among three or more States on one common shelf "in the same vicinity". From this the Court deduced that such situations were not really considered.(147) In rejecting the submission that

(145) Ibid., paras. 50, 51, p.34; see also Colombos, op. cit., Ref. (4), at 9, pp.78-86.

(146) ICJ Reports, 1969, para. 53, p.35.

(147) ICJ Reports, 1969, para. 54, p.35.

the equidistance rule was a general rule of law, the Court relied on the grounds contained within the view of the PCJ in the Lotus Case.(148) It emphasised that there were clear dicta in that case which could be relied upon for the present case:

> "Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstances alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, there are other circumstances calculated to show that the contrary is true."(149)

In view of the above dictum, and in applying it to the present case, the Court pointed out that in certain cases, when the States concerned agreed to draw or did draw the boundaries in accordance with the equidistance rule, there was no evidence that they did so because they felt that they were under an obligation.(150)

3. The equidistance method is not a customary rule of international law

One of the main contentions of Denmark and the Netherlands was that Germany had been bound by the equi-

(148) Ibid., para. 78, p.44.
(149) Ibid.
(150) Ibid. para. 76, pp. 43, 44.

distance method, whatever her position may have been in relation to the Convention, since this rule was erga omnes because of its prior character.(151)

After having examined the history of determination of the continental shelf boundaries between adjacent coastal States, the Court concluded that the method provided in Article 6(2) was not of the norm-creating character. Neither the Truman Proclamation nor the deliberations of the ILC demonstrated that the equidistance method was a rule of customary international law, and therefore it did not bind Germany. The Court, to enhance this finding, resorted to article 12 of the Convention which permitted reservations to the Articles other than 1 to 3.(152) The Court concluded that the only customary international law rules related to the continental shelf were those mentioned in Articles 1 to 3. The Netherlands and Denmark claimed that:

> "... there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf sea bed 'Article 4', and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on 'Article 5, paragraphs 1 and 6'."(153)

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(151) Ibid.para. 37, pp. 28, 29.

(152) Hopkins, op.cit., Ref. (127), at 233, p.6. See also ICJ, Reports, ibid., paras. 48-63, pp.33-39.

(153) Hopkins, op.cit., Ref. (127), at 233, p.6. See also ICJ, para. 65, p.39.

Also, they claimed that even if the equidistance rule had not been a principle of customary international law, it became so since it was included in the Geneva Convention.(154)

The Court refuted these pleas as the matters cited, namely the obligation not to impede the laying or maintenance of submarine cables or pipelines and so on, are all related "to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention."(155)

Then the Court went on to say that Article 6 is so framed as to give precedence, firstly to agreement and secondly to the exception of special circumstances. So the equidistance method did not have a norm-creating character. The Court added that even if it had such a character, it should have evolved through extensive and uniform practice into a rule of customary international law.(156) Moreover, the Court was not convinced that such a conventional principle became a general rule of

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(154) See para. 73, p.42.

(155) ICJ Reports, para. 65, p.39.

(156) Hopkins, op.cit., Ref. (127), at 233, p.7. See also paras. 73, 74, pp. 42, 43.

international law within such a short time. The convention had been in force for less than five years.(157) Furthermore, to decide whether state practice subsequent to the Convention amounted to a sufficient degree of uniformity and certainty as to satisfy its being a rule of customary international law, the Court examined fifteen cases in which the continental shelf boundaries have been delimited according to the equidistance rule. The Court reached the conclusion that over half of these fifteen were acting according to the Convention since they were, or became, parties to it. As regards States which were not parties to the Convention, the Court declared that there was not any material evidence that these States believed themselves bound to apply the equidistance rule because of its obligatory nature or because it was mandatory rule. Further, no inference could be legitimately drawn from the first group actions to the existence of a customary international law rule with respect to the equidistance line. In addition, in almost all cases cited, the delimitation concerned was of a median line between opposite States and not a lateral line between adjacent States. The lateral line and the median line cases, in the Court's view, differed in various respects.(158)

A commonly voiced criticism of the Court's finding in this respect is that the rules mentioned in Article 6 have been employed in bilateral and unilateral state

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(157) The Convention came into force on June 10, 1964.

(158) ICJ Reports, 1969, paras. 75, 76 and 79, pp.43-44 and 45. See also para. 57, pp. 36-37.

practice from which it can be deduced easily that this method has become a principle of customary international law.(159)

In answer to this criticism it is respectfully submitted that the Court did not deny the use of that rule. The only fact which the Court stressed was that States which employed the rule did not feel they were under an obligation to use it.(160) There would seem to be no difficulty in agreeing that it is not impossible to say that a customary international law rule has come into existence where there is practice but no opinio juris. Certainly, there is a distinction between "a rule of law" and mere "usage". The use of the equidistance rule would of course need to be hedged with opinio juris. That is to say, there are in fact many occasions on which States have followed a certain rule or principle without intending it to be a matter of law.(161) As to the ordinary requirements in relation to the establishment of a customary international law rule, a combination of two elements must exist as Article 38(b) of the Statute of the ICJ reports.(162) Firstly, a custom comprising a general practice. Secondly, the acceptance of that general practice as law.(163)

The ICJ, it is submitted, has analysed the interaction

(159) Brown, op.cit., Ref. (338) at 158, pp.59-62.

(160) ICJ Reports, 1969, paras. 75, 76 and 79, pp.43-44 and 45. See also para. 59, p.37.

(161) Waldock, op.cit., Ref. (234), at 126, pp.40-53.

(162) Article 38(b) provides that:"(b) international custom, as evidence of a general practice accepted as law;" See Brownlie, op.cit., Ref. (31) at 20, p.276.

(163) Bishop, op.cit., Ref. (2), at 8, pp.220-230.

of the requirements of both the consistent practice and of the acceptance and the application of such a practice as opinio juris in the well-known "Right of Passage Case".(164) There, the Court considered that a customary right of transit for persons and goods existed on the basis of a "constant and uniform practice", saying that it was satisfied that the practice had been "accepted as law by the parties and has given rise to a right and a correlative obligation".(165) Portugal also claimed a right of passage for armed forces but the Court rejected Portugal's claim on the grounds that prior permission which had to be obtained for each transit, excluded the existence of a right or obligation, even though the permission had always been granted.(166) The question is then why the Court regarded one practice as law binding the two States and not the other. In exploring the above case to find the answer, one may deduce that there was a matter of law present in one case but not in the other.(167)

Further, in the Asylum Case,(168) the Court insisted that

> "Colombia must prove that the usage on which she relied was the expression of right appertaining to the State granting the asylum and a duty incumbent on the territorial State."

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(164) Right of Passage Over Indian Territory, Portugal v. India, ICJ Reports, 1960, p.6.

(165) ICJ Reports, 1960, p.40.

(166) See Waldock, op.cit., Ref. (234), at 126, pp.40-53.

(167) ICJ Reports, 1960, pp.40-42; Waldock, ibid., pp. 40-53.

(168) Asylum Case, Colombia v. Peru, ICJ Reports 1950, pp. 276, 286, Jennings, op.cit., Ref. (63), at 32, pp. 333-338.

Again, in the United States Nationals in Morocco Case[169] an impression also emerged that the Court reaffirmed its statement in the Asylum Case and rejected the U.S. claims on the grounds that the practice was shown to have been inspired by considerations other than a sense of legal duty.

Obviously, the impression given by the cited cases, is that the existence of a customary international law rule requires in addition to the uniformity and continuity of practice, the vital element of opinio juris which in the World Court's view was not present in relation to the equidistance rule.

4. The land dominates the sea. The legal regime of the continental shelf is that of the seabed and subsoil

The Court emphasized that the notion of the continental shelf was a recent legal concept. It was an example of encroachment on maritime extensions, which had been considered to appertain to no one for centuries. According to this recent doctrine, "the land dominates the sea". It is consequently necessary to examine closely the geographical configuration of the coastlines of the States concerned.

The Court remarked that partly due to the land being the legal source of the rights which coastal States exercised over the continental shelf, and also as the continental shelf was concerned with submerged land, then

(169) The Rights of Nationals of the United States of America In Morocco Case, France v. United States of America, ICJ Reports, 1952, pp.176-233.

it must first be clearly established what features do in fact constitute such extension.(170)

5. The Principles governing the delimitation of the Continental Shelf boundaries

Then the Court turned to the fact that in particular situations, the use of the equidistance method produced great inequity, such as in the following instances:

a. Where the configuration of the coastlines of the States concerned was irregular. The concave or convex coastlines, however slight, magnify automatically in the delimitation of the continental shelf areas if the equidistance line method was applied solely.

b. Where there was no outer boundary to the continental shelf as in the North Sea. In such shallow areas the claims of the coastal States over their continental shelves might converge and intersect. The use of the equidistance rule ignoring such irregular geographical configurations in the determination of the continental shelf areas between adjacent States, led to inequitable and unreasonable consequences which were contrary to the whole continental shelf notion as a seabed and subsoil doctrine.(171)

Having reached these conclusions, the Court declared that its function was not to delimit the areas of the continental shelf appertaining to each State, but merely to point out and demonstrate the principles and rules for

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(170) ICJ Reports, 1969, para. 96, p.51.

(171) See Daintith and Others, op.cit., Ref. (4) at 9, p.A329.

eventually affecting the delimitation of lateral boundaries between adjacent States.(172) The Court went on to stress that Article 6 was not a part of customary international law. It did not embody any pre-existing customary international law rule applicable automatically in the case of failing to reach agreement between the States concerned. Nor had its subsequent effect been sufficient to promote the conventional rule to customary rule.(173) Accordingly, the Court did not see itself under an obligation to determine whether or not the configuration of the German coastline constituted "special circumstances" within the meaning of Article 6.(174)

In attempting to decide the principles governing the delimitation of continental shelf areas between the parties, the Court explained that there was an obligation on the part of opposite or adjacent States to negotiate. Equitable principles must be followed in such a way as to leave each party all those parts of the continental shelf that constitute a natural prolongation of its land territory beneath the sea, without encroachment on the natural prolongation of the land territory of the other.(175) In the words of the judgment,

> "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a

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(172) ICJ Reports, 1969, para. 84, p.46.

(173) Ibid., paras. 69, 81, pp. 41, 45.

(174) Ibid., para. 82, pp. 45, 46.

(175) Ibid., para. 43 p.31 and p.54; See Daintith and Willoughby, op.cit., Ref. (421), at 184, p.180.

> formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so as to conduct themselves that the negotiations are meaningful."(176)

This appears to mean that the parties must approach the negotiations with an open mind and make a reasonable effort to reach common ground for agreement.(177)

However, the Judgment's treatment of the concept of the natural prolongation is criticized in that it has been unreasonably stretched. It is argued that the natural prolongation belongs to the problem of the seaward extensions of the continental shelf. Further it is contended that there seems to be no relation between the natural prolongation and the delimitation of the continental shelf between opposite and adjacent States.(178)

It is of course correct to suggest that the natural prolongation concept relates to the seaward boundaries. However, it is submitted with the utmost respect that, applying the equidistance line in such a case as the North Sea, noticeably restricts the extension of the submarine territory of either party to something less than what may be the real natural prolongation of its land mass. Consequently, it confers upon one of the States concerned the right to exploit an area which constitutes a natural prolongation of the land territory of the other State.

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(176) ICJ, Reports, 1969, para. 85(a), p.47.

(177) Daintith and Others, op.cit., Ref. (4) at 9, p.A328.

(178) Brown, op.cit., Ref. (338), at 158, p.49; and op.cit., Ref. (4) at 193, p.197.

6. The Concept of Equity

In the course of determining the scope and content of the concept of equity, the Court noticed that in the North Sea Cases, the shores of three countries were comparable in length. This fact, in the Court's view, had considerable importance in the sense that they should have therefore been given equal treatment. However, the configuration of one of the coastlines would, if the equidistance line rule were employed, deprive one of the three States of the right to gain a part of the continental shelf area equal to the parts which the others would obtain. The inequity of this situation, the Court indicated, was that one of the States would enjoy continental shelf rights considerably different from those of its neighbours, merely because in the one case the coastline is roughly convex in form, whilst in the other it is concave.(179)

The Court explained that the delimitation of the continental shelf in a sea with a particular configuration such as that of the North Sea, might lead to an overlapping of the areas appertaining to the States concerned. In these circumstances, according to the Court, the situation must be dealt with by agreement or failing that an equal division, or by agreement for joint exploitation of the overlapping areas.(180)

Another slant has been given to the Court's judgment in suggesting that the delimitation of marine boundaries

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(179) ICJ Reports, 1969, Para. 91, pp. 49, 50, para. 98, p.52.
(180) ICJ Reports, 1969, para. 99, p.52.

must be achieved on equitable principles. There is a strong case for saying that the judgment adds nothing to the criteria mentioned in the Convention. Further it is stated that the concept of "equitable principles" is superfluous since Article 6 of the Convention provides special circumstances as one of the rules governing the delimitation, and equitable principles imply much the same consequences.(181) Moreover, it is pointed out that

> "Equity is a term which lawyers have used to convey many different meanings and there is therefore considerable scope for argument as to the exact content of the term 'equitable principles' used in the Truman Proclamation.(182)

So far as the relationship between the special circumstances and equitable principles is concerned, it is submitted that it is quite correct to say that both special circumstances and equitable principles rest on similar bases. However, they nevertheless differ vastly if they were looked at from another side. The special circumstances concept in the context of Article 6, justifies another boundary line. This appears to mean that the special circumstances principle permits ignoring or modifying the equidistance line method but it still does not refer to what the boundary line should be. The object of equitable principles remains not only to permit the exclusion or the modification of the application of the equidistance rule, but also to direct the parties concerned

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(181) Brown, op.cit., Ref. (338) at 158, pp.62, 63 and op.cit., Ref. (134) at 236, pp.87-97; Brown, E.D., "It's Scotland's Oil? Hypothetical Boundaries in the North Sea - A Case Study", Marine Policy, 1978, p.12.

(182) Brown, ibid., p.48 and p.86 respectively.

to the approach in the light of which they must consider the problem. Determining whether the delimitation is fair or unfair shall depend on whether or not the outcome is equitable. The corollary to this argument in the Court's view is that the equidistance rule is not to be solely applied and no one factor is to determine the issue. It is permissible to employ a combination of any rules seeming to be appropriate in a given situation to achieve an equitable result.(183)

In turning now to the argument concerning the import of the concept of equity it is submitted that it is true that equity is a broad concept, but it is important to appreciate that the Court did not consider that it could propound an automatic technique to delimit the continental boundaries. On the contrary, it emphasized that its task was not to delimit the areas of the continental shelf, but only to indicate the factors affecting the delimitation,(184) and that the parties were under an obligation to negotiate a solution. The "equitable principles" which the Court adopted were only a starting point for negotiation. It is merely guidance for the States concerned.

One further criticism levelled against the Court's judgment is its considerable reliance on only one factor, the length of the coast, and using it as a criterion for equitable apportionment.(185)

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(183) ICJ Reports, 1969, para. 89, p.49.
(184) ICJ Reports, 1969, para. 84, p.46.
(185) Brown, op.cit., Ref. (338), at 158, p.50.

It is submitted with great respect that the Court decided that this factor should be considered in the course of delimiting the continental shelf boundaries because the land was the source or the basis of the legal regime of the continental shelf and the land, as noted above, dominated the sea.(186)

II. The Anglo-French Continental Shelf Case

In the most recent Judgment, the full Court of Arbitration in the Anglo-French Continental Shelf Case,(187) has given a further lead to the concept of equity in the rules of law concerning the delimitation of marine boundaries. The Court in an unanimous judgment reached conclusions of considerable interest. It is sufficient to say that despite the disimilarity of some of the facts of the case with those of the North Sea Cases, great emphasis was laid by the Court of Arbitration, that the continental shelf boundaries should be delimited in accordance with the principle of equity. This will be discussed in greater detail later.(188)

The Importance of the Decision

The decision in the Anglo-French Case seems to represent an important step in the process of the development of rules relating to the delimitation of continental shelf boundaries. It may be observed that the decision gives a clear indication of the Court's attitude in relation

(186) ICJ Reports, 1969, para. 96, p.51.

(187) Decision, Ref. (20) at 198, and Decision of 14 March 1978, Ref. (24) at 200.

(188) See below pp.277-282 and pp. 420 et seq.

to the principles of equity. More important is the fact that the present decision of the Court of Arbitration and the Judgment of the ICJ generally recognized an almost similar conclusion concerning the rules applicable to the delimitation of continental shelf boundaries. One is entitled to suggest that this decision as a whole, is a very considerable achievement in at least six aspects:

1. It is a decision agreed by all the members of an international tribunal body. All five members of the Court found this line of thought convincing.(189) It is submitted that international judicial decisions are seldom taken unanimously. One might assume that this "myth" does not so easily occur. Undoubtedly, the importance and implications of international decisions taken unanimously are self evident.
2. Presumably as the disputant States were parties to the continental shelf convention, it was a first opportunity to consider the rules for delimiting continental shelf boundaries between States party to the Convention.(190) The decision therefore is helpful in discovering the relationship between the rules of customary international law and the rules embodied in the Geneva Convention.(191) Bearing in mind that the Court of Arbitration although it adopted a dissimilar sort of reasoning than that

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(189) Decision Para. 255, p.119.

(190) Brown, E.D., "The Anglo-French Continental Shelf Case", YBWA, Vol. 33, 1979, p.304.

(191) Brown, E.D., "The Anglo-French Continental Shelf Case", San Diego Law Rev., Vol. 16, Number 3, 1979, p.529. For further details about the importance of the decision see Brown, ibid., pp.304-305 and pp. 528-530 respectively.

relied upon by the ICJ, nevertheless admitted the fashion had been set by the ICJ in regarding equitable principles as governing the delimitation of the continental shelf.(192) Certainly, the effect of the Court's decision is therefore to reflect the stability and widespread recognition of the principle of equity in delimiting marine boundaries between neighbouring States.

3. The judges who participated in the case were not only high authorities(193) but also well known for their objective attitudes. Moreover two of the five members, Judge Grods and Judge Waldock, were members of the ICJ.

4. More important is the fact that while similar to the ICJ, the Court of Arbitration was asked to decide "in accordance with the rules of international law applicable in the matter as between the parties".(194) The Court of Arbitration was further requested to determine "the course of the boundary 'or boundaries' between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively...".(195) Moreover, the decision, according to Article 9(1) of the Arbitration Agreement, "shall include the drawing of the course of

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(192) See also below pp.277-282 and Chapter Five in this regard.

(193) The Court consisted of: Sir Humphrey Waldock, Mr. Paul Reuter, Mr. Herbert Briggs, Mr. Erik Castren, Mr. Endre Ustor. Mr. Paul Reuter was subsequently replaced by Mr. M. Gros. See Article 1 of Arbitration Agreement of 1975, U.K.T.S., 1975, No. 137 Cmnd.6280; See Brown, op.cit., Ref. (191), at 257, p.467.

(194) Article 2 of the Arbitration Agreement, ibid.

(195) Agreement of Arbitration Article 2.

the boundary or boundaries' on a chart".(196)

5. It is most noteworthy that the North Sea Continental Shelf Cases related to boundaries between adjacent States, in contrast to the present case which is chiefly concerned with the situation of States lying opposite each other. That is not to say that different principles are to be applied in each of the above situations. Rather it suggests that difficulties and inequities arise in the course of determining lateral boundaries more often than in the case of a median line. From the above it is intended to prove that although the effect and probability of inequity are less than they had been in the North Sea Cases, the Court emphasized the necessity for the application of the equitable principles. The decision may help marginally to promote stability of the role of equity in delimiting marine boundaries.

6. Admittedly, the Court of Arbitration prescribed the application of "equitable principles" as a general principle of international law not because it is recognized in national legal systems.(197) The difference is important in that the Court could resort to the latter only with the mutual consent of the parties concerned, something which France and the U.K. seem to have failed to express or even contemplate.

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(196) Article 9(1), ibid.

(197) See Article 38(1-c) of the Statute of the International Court of Justice, Brownlie, op.cit., Ref. (31) at 20, p.276.

The Dispute

After unsuccessful negotiation between France and the U.K. for the apportionment of their respective continental shelves, the two Governments subsequently agreed on July 10, 1975[198] to refer the dispute to an arbitral tribunal[199] to determine

> "in accordance with the rules of international law applicable in the matter as between the parties, the following question:
>
> What is the course of boundary 'or boundaries' between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic..."[200]

The appliable law

The facts of the case in outline were centred on whether or not the Geneva Convention was applicable between the parties. It is true that both France and the U.K. were parties to the Convention, nevertheless they disagreed on whether it was in force between them or not.[201] France contended that her acceptance of the Convention had been vitiated by the reservations which she had made and were rejected by the U.K. Therefore, she totally rejected the idea that she was bound by the Geneva Convention in the case before the Court. On the other hand the U.K. claimed that the Geneva Convention was in force between herself and France, thus the delimitation

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(198) Arbitration Agreement, The Preamble; See Brown, op.cit., Ref. (190), at 257, p.305.

(199) Decision p.5.

(200) Article 2 of the Arbitration Agreement.

(201) See Brown, op.cit., Ref. (191) at 257, p.463.

was to be carried out by the application of Article 6.(202)

The Court decided that in view of the facts before it, there was no evidence raising a reasonable supposition that the U.K. in rejecting the French reservations had intended an ulterior purpose to prevent the Convention coming into force between the two States.(203) Therefore, the decision confirmed that the Geneva Convention was applicable in the case, in general, in accordance with Article 2 of the Arbitration Agreement.(204) However, the Court after observing the French reservations meanwhile asserted that Article 6 would not be applicable to the whole case as the U.K. alleged, nor would it be excluded as France contended. The Court seems to have taken an intermediate position in which it considered that Article 6 is inapplicable only within the scope of the French reservations.(205) The delimitation of the continental shelf only in the area meant by the reservations had to be carried out, in the view of the Court, in accordance with the rules of customary international law.(206)

The findings of the Court

Attention must now be turned to the reasonings upon which the Court principally relied. At this stage an

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(202) Decision, pp.11-21. For the text of the French reservations and the U.K.'s reject see ibid., paras. 33, 34, pp.32-34.

(203) Decision, paras.56-61, pp.43-45.

(204) Decision, para. 48, p.40; Paras. 59-110, pp. 44-63.

(205) Decision, para. 61, p. 45.

(206) Decision, para. 62, p.45. See Brown, op.cit., Ref. (191) at 257, p.468; and op.cit., Ref. (190) at 257, p.306.

attempt will be made to examine briefly the arguments made by the Court, as it is hoped to consider the subject in more detail later.(207)

I. The relationship between Article 6 and international customary law

It is interesting to note at the outset that the Court of Arbitration was inclined to consider both the rules of customary international law, as had been expressed by the ICJ in the North Sea Cases, and Article 6 of the Geneva Convention. The Court made it clear that there was no evidence that the Geneva Convention on the Continental Shelf, as the French Government claimed, had been obsolete. On the other hand, the Court placed great store in the principles of customary international law. It was the firm belief of the Court that it did not regard

> "itself as debarred from taking any account in these proceedings of recent developments in customary law. On the contrary, the Court has no doubt that it should take due account of the evolution of the law of the sea in so far as this may be relevant in the context of the present case."(208)

The decision is interesting in stressing that whilst it considered Article 6 of the Geneva Convention applicable in principle, it was unreasonable to infer that it regarded the rules of customary international law discussed in the North Sea Continental Shelf Cases to be

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(207) See below pp. 423 et seq.

(208) Decision, para. 48, p.40.

inapplicable.(209) In the words of the Court:

> "As already pointed out, the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule; moreover, the equidistance-special circumstances rule and the rules of customary law have the same object - the delimitation of the boundary in accordance with equitable principles. In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6."(210)

2. "Special Circumstances" and "Equitable Principles"

The Court of Arbitration went on further to draw attention to another aspect. It observed that the effect of applying or not applying the Geneva Convention on the Continental Shelf, and in particular Article 6, would make little if any practical difference to the boundary line in the case before it.(211) The Court was quite specific in saying that:

> "The double basis on which both parties put their case regarding the Channel Islands confirms the Court's conclusion that the different ways in which the requirements of 'equitable principles' or the effects of 'special circumstances' are put reflect differences of approach and terminology rather than of substance."(212)

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(209) Brown, op.cit., Ref. (191), at 257, p.470.

(210) Decision, para. 75, p.50.

(211) Decision, para. 65, p.47; Brown, op.cit., Ref. (191), at 257, p.497.

(212) Decision, para. 148, p.77.

3. The status of the equidistance rule

The Court noticed that the fundamental issue at stake was the role given to the equidistance principle in the delimitation of the continental shelf. The Court took the view that no reason could be relied upon for supposing that there had ever been an equidistance rule on its own. It remarked that:

> "Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and 'special circumstances' as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule. This being so, it may be doubted whether, strictly speaking, there is any legal burden of proof in regard to the existence of special circumstances. The fact that the rule is a single rule means that the question whether 'another boundary is justified by special circumstances' is an integral part of the rule providing for application of the equidistance principle. As such, although involving matters of fact, that question is always one of law of which, in case of submission to arbitration, the tribunal must itself, proprio motu, take cognisance when applying Article 6."(213)

However, the Court did not deny that the equidistance rule had under Article 6 a more obligatory nature than it had under the rules of customary law.(214) Beyond that, in the Court's view, the parties to the Convention were under an obligation to apply the equidistance method but this application ought to be confined only to cases where

(213) Decision, para. 68, p.48.

(214) Decision, para. 70, p.48.

no special circumstances existed, namely when such application leads to an equitable solution. From this the Court concluded that the role of the principle of "special circumstances" was to secure equitable delimitation.(215) This would seem to be tantamount, itis submitted, to saying that the "equitable principles", even under Article 6, is the basis according to which it could be said that the rule of equidistance is applicable or not. This would apparently mean that in deciding whether application or non-application of the equidistance rule is relevant, one must consider the solution which it would lead to, namely its equitability.

III. Rules Emerging From UNCLOS III

From the foregoing two points may be made. Firstly, the means of delimitation of marine boundaries between neighbouring States in the 1958 Conventions are the equidistance or median line-special circumstances. The word agreement occurred in Article 6 in a context which suggests that the matter has been left to bilateral negotiation without any guideline. As shown above there is no legal basis whatsoever for the State which is not a party to the Convention to accept the application of the equidistance line on its own unless it would effect an equitable apportionment of marine zones. Therefore, a different rule has been evolved on the customary international law plane. That rule has been enunciated by the ICJ in the North Sea Continental Shelf Cases, namely "delimitation is to be effected by agreement in accordance

(215) Decision, para. 70, pp.48-49.

with equitable principles.(216)

Secondly, the question of determination of marine boundaries is highly divisive. It follows that there are widely varying views on both the substance and the application of international law on this issue.(217) Consequently, the contrasting points of view obviously would lead to international disputes.

Undoubtedly, the reasons described reflect not only the importance of the question under consideration, but also that there have been some ambiguities and uncertainties as to the rules applicable in delimiting marine boundaries. Therefore, it has been one of the crucial issues discussed in the course of the debate in the UNCLOS III.

However, it does not seem necessary to recount here the course of the debate in detail, rather it is sufficient to state that there is a more fundamental difference concerning the role of the equidistance line principle. Two main trends arise. The first maintains that the rule of equidistance does not constitute a rule of general international law, but offers only one useful method among others for drawing marine boundaries between opposite or adjacent States. This view appears to mean that the rule of equidistance is not to be deprived of all legal force, rather to be accepted only when it leads to an equitable solution. On the other hand the other trend is that which suggests that the rule of equidistance should be recognized as a general rule.(218)

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(216) ICJ Reports, 1969, Para. 101. pp. 53, 54.
(217) Stevenson and Oxman, op.cit., Ref. (137) at 94, pp. 780-781.
(218) See Brown, op.cit., Ref. (99), at 44, p.276.

In the July 1973 Session of the U.N. Seabed Committee, the Greek delegate presented its amendment(219) to the Turkish draft on the question.(220) According to this amendment, in the absence of agreement, States were not entitled to extend their territorial sea beyond the median line.(221) Further proposals submitted to the U.N. Seabed Committee referred to the rule of equidistance and considered it by some means as a general rule.(222) Admittedly, similar proposals were submitted to the UNCLOS III and regarded again, the equidistance line rule as a general principle referring meanwhile to the special circumstances and equitable solution.(223)

The Iraqi delegation to the Conference voiced strong objections to the approach, namely the one espoused by those desiring to invest the equidistance rule with primacy. It was its position at the fifth Session of the Conference that the general recognized rights of a coastal State over marine zones before its coasts did not necessarily imply a certain mode of delimitation. The rights over the continental shelf imply a certain spatial

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(219) U.N. Doc. A/AC. 138/SC. 11/L. 17.

(220) U.N. Doc. A/AC. 138/SC. 11/L. 16/Rev.1.

(221) U.N. Doc. A/Ac. 138/SC. 11/L. 17; Oda, op.cit., Ref. (408), at 180, Vol. II, p.244.

(222) See the Cyprian Proposal of March 28, 1973 (U.N. Doc. A/AC. 138/SC. 11/L, 19, Oda, ibid., Vol. II, p.244; The Japanese Proposal of August 15, 1973, (U.N. Doc. A/AC. 138/SC. 11/L. 56; Oda, ibid., p.251; The Uruguayan Proposal of July 3, 1973, (U.N. Doc. A/AC. 138/SC. 11/L. 24; Oda, ibid., pp.258-259.

(223) See for example A/CONF. 62/C.2/L.25; A/CONF. 62/C. 2/L. 31/Rev. 1; A/CONF. 62/C. 2/L.43; A/CONF. 62/WP 8/Rev.1.

extension of the areas under control into the high sea, but by no means provide any rule for their lateral delimitation.(224) Iraq, amongst ten other States, submitted a draft in which much weight was given to the equitable principles, taking into account all the relevant circumstances which would lead to an equitable solution.(225)

Setting aside matters concerning the position of Iraq at the Conference, other draft articles were submitted to the Conference according to which the role of the equidistance principle would be weakened in favour of equitable principles.(226)

However, the pertinent Articles of the ICNT are as follows:

Article 15

> "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary to extend its territorial sea beyond the median line every point of which is equi-distant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This article does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial

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(224) The Report of the Iraqi Delegate to the UNCLOS III. which was submitted to the Iraqi Ministry of Foreign Affairs after the adjournment of the Fifth Session of the Conference.

(225) The Report of the Iraqi Delegate ibid.

(226) See for example the Australian and Norwegian Proposal, U.N. Doc. A/AC. 138/SC. 11/L. 36; The Japanese Proposal, U.N. Doc. A/AC. 138/SC. 11/L 56; see also U.N. Doc. A/CONF. 62/C. 2/L. 82; A/CONF. 62/C. 2/L. 18; A/CONF. 62/C. 2/L. 23; A/CONF. 62/C. 2/L 28; A/CONF. 62/C. 2/L. 74.

seas of the two States in a way which is at variance with this provision."(227)

Article 83

"1. The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, median or equidistance line, and taking account of all the relevant circumstances.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement."(228)

In the light of Article 83, one may assume that, for the determination of the boundary line between States lying opposite or adjacent to each other, the ICNT is laying great emphasis that the boundaries should be determined by agreement. Article 83 of the ICNT, in contrast to Article 6 of the Geneva Convention on the continental shelf, makes it mandatory to base the agreement on equitable principles. That is to say while similar to Article 6 in that it regards agreement as the main means

(227) U.N. Doc. A/CONF. 63/WP. 10/Add. 1, pp. 24, 25.
(228) Ibid., p.55.

of delimiting the continental shelf boundaries, the ICNT goes further in stipulating that the agreement should be made in accordance with the equitable principles. Moreover, it imposed restrictions on the applicability of the equidistance or median line, the most important being that they are applicable only where circumstances are appropriate. It may be argued that the concept of "equitable principles" is both vague and divisive. What the ICNT is suggesting, to counter such criticism, is in effect that all the other pertinent factors are to be taken into consideration.

However, whilst the above provision offers an excellent opportunity for the recognition of equity as the main principle in delimiting the continental shelf areas, it would, if approved, pose some difficulties. It is right to take into account the numerous considerations which are likely to occur in diverse circumstances. It should also be remembered that the term "relevant circumstances" adopted in Article 83, is more, not less, ambiguous than the concept of "equitable principle". There must, at least, be guidance on these factors. There is also much to be said for the case of failure to reach agreement. Under Article 83 of the ICNT coastal States are permitted to recourse to a provisional procedure in the case of failure to reach agreement within a reasonable period of time. It would seem a matter of reasonable inference from the negative sense of Article 83 that prior to agreement it permits the concerned parties the enjoyment of rights over the continental shelf area up to the

equidistance or median line. One particular deficiency is felt to be that if a State prefers the median or equidistance line rule, it could simply refuse to accept any other line as long as such a refusal entitled it easily and automatically to enjoy the rights over the continental shelf it desires. It may be contended that the compulsory dispute settlement under Part (XV) might mitigate this outcome.(229) For such a contention to be answered, it is to be noted that this problem still remains at least either until agreement is reached or the controversy is settled by the means specified in the draft.

A further criticism lies in asking what weight is to be given to islands. In this regard, no reference in the draft is made to islands apart from Article 121.(230) This raises the problem as to whether or not they will all be entitled to full rights in respect of the continental shelf. It could be argued that the terms "equitable principles" and "all relevant circumstances" adduced in Article 83, may embrace this exception. However, for

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(229) There was some opposition in the dispute settlement group to compulsory dispute settlement of marine boundaries between neighbouring States. See Stevenson and Oxman, op.cit., Ref. (137), at 94, p.781. Moreover, settlement of disputes ex aequo et bono had been suggested in the early stages of the ILC and had been rejected. See YBILC, 1953, Vol. II, pp.241-269; See below pp. 192 et seq.

(230) Article 121 provides that "1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territory.

"3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". U.N. Doc. A/CONF. 62/WP. 10/Add. 1,pp.68, 69.

reasons already put forward, in the sense that these concepts lack clarity, the question remains in dispute.(231)

IV. The Equitable Principles

1. The Concept of equitable principles in the Truman Proclamation

By now it seems clear that under general international law there is no obligation on coastal States to accept the equidistance method, strictly speaking, for the determination of continental shelf boundaries, if such a boundary does not lead to equitable apportionment. It is to be noted that the generally recognized continental shelf doctrine conferring the seabed and subsoil of areas under the high seas to the exclusive jurisdiction of the coastal States, implies equitable apportionment. The principle of equity has been recognized by State practice.(232) Moreover, the Truman Proclamation of 1945, which for reasons mentioned in paragraph 47 of the Judgment of the ICJ in the North Sea Continental Shelf Cases, must be considered as having pr pounded the basic rules of law in this field;(233) maintained that the delimitation of

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(231) Deliberations at the UNCLOS III have shown support for the proposal that islands which cannot sustain human life or economic life of their own should not be entitled to a continental shelf. See Daintith and Willoughby, op.cit., Ref. (421) at 184, p.171.

(232) See above pp. 238 et seq.; see also ICJ Pleadings, North Sea Continental Shelf Cases, 1968, Vol. 1, p.31.

(233) ICJ Reports, 1969, para 47 pp.32-33. See also Brown, op.cit., Ref. (99), at 44, Part I, p.186.

the continental shelf, where two States are adjacent to the same continental shelf, is governed by the concept of "equitable principles". The aforementioned Proclamation declared in part that:

> "In cases, where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."(234)

However, to appreciate the importance of the Truman Proclamation in the establishment of the continental shelf doctrine, one may refer again to the Judgment of the ICJ in the North Sea Cases. In the course of discovering the principles applicable as to the delimitation of the continental shelf boundaries, the Court referred to the Truman Proclamation and described it as having "a special status". After a few sentences the Court maitained that:

> "The Truman Proclamation however, soon came to be regarded as the starting point of the 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 a vested' right to the continental shelf off its shores, came to prevail over all others..."(235)

While the World Court particularly focused upon the Truman Proclamation, it stressed meanwhile the concept of equitable principles which had found wide recognition in State practice. A number of subsequent declarations followed the same pattern in adopting the equitable

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(234) The Truman Proc., op.cit., Ref. (283) at 144.

(235) ICJ Reports, 1969, para. 47, pp.32-33. See also Blecher, op.cit., Ref. (23), at 200, p.60.

principles. Although more will be said later, for the moment it is sufficient to say that more frequently States are referring by some means to equity or equitable principles.(236)

2. The Concept of equitable principles in the Judgment of the ICJ in the North Sea Continental Shelf Cases

As noted above, the ICJ in the North Sea Continental Shelf Cases found that the equidistance rule was not an "inherent necessity of the continental shelf doctrine".(237) Among the grounds put forward for this view is the fact that if the equidistance line rule were to be considered a customary method and consequently applied in all situations where no agreement could be reached and no other boundary line was justified by special circumstances, it should be consonant with certain basic legal principles which have reflected the opinio juris in all cases in which the delimitation of the continental shelf boundaries has been required. According to these basic principles delimitation must be the object of agreement between the States concerned and such an agreement should be reached in accordance with equitable principles.(238)

The Court then went on to outline certain cardinal ideas which must guide the application of equitable principles and these ideas are of such fundamental nature that it is worth quoting them in full.

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(236) Padwa, op.cit., Ref. (51), at 210, pp.628-630.
(237) ICJ Reports, 1969, para. 55, p.35.
(238) Ibid., para. 85, p.46.

"(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

"(b) the parties are under an obligation to act in such way that, in the particular case, and taking all the circumstances into account, equitable principles are applied - for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

"(c) for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State."(239)

Turning to the legal basis of this obligation, the Court relied not only upon Article 1(2) of the special agreement between the parties, but also upon additional grounds. Firstly, recourse to negotiation was enunciated by the Truman Proclamation. Secondly, this main principle obviously underlies all the international relations. Finally and most significantly, it is recognized in Article 33(5) of the Charter of the U.N.(240)

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(239) ICJ Reports, 1969, para. 85, p.46.

(240) Ibid., para. 86, p.47.

It is important to remember that the Court in this case considered certain aspects in the process of discovering the scope of the concept of "equity". The Court was quite specific in deciding that equity did not necessarily imply equality. Delimitation had to be equitably affected, but it did not necessarily produce equal shares in the continental shelf areas of the concerned parties. The Court went on to say:

> "... equity does not require that a State without access to the sea should be allotted an area of continental shelf any more than there could be a question of rendering the situation of a State with an exclusive coastline similar to that of a State with a restricted coastline."(241)

In indicating to the parties the factors which ought to be taken into consideration the Court stated that there was no legal limit to the consideration which States may take into account for the purpose of making sure that they employ equitable methods.(242) It observed that there was no single incumbent satisfactory rule for delimitation of marine boundaries in all cases. Yet, the Court disclosed some factors, for example the geographical features, the geological structure, the natural resources of the continental shelf areas involved and the unity of deposits. One factor alone, the Court asserted, would often be inadequate and the relevant criteria to lead to

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(241) ICJ Reports, 1969, Para. 91, pp. 49, 50.

(242) Ibid., para. 93, p.50; para. 94, pp. 50, 51 and para. 98, p.52; See also Daintith and others, op. cit., Ref. (4) at 9, p.A330.

equitable division depended on each set of circumstances.(243)

3. The concept of equitable principles in the decision of the Court of Arbitration in the Anglo-French continental shelf case.

So far as can be detected, the judgment of the ICJ in the North Sea Continental Shelf Cases, was not the only occasion on which judicial approval was given to the notion of equitable principles in the delimitation of marine boundaries. The Court of Arbitration in the Anglo-French Continental Shelf Case appears to agree with the World Court in this respect, since it asserted that the continental shelf boundaries must be determined in accordance with equitable principles. It is worth observing that in the course of searching for the law in force between the parties for example, the Court noticed that:

> "Article 6 is applicable in principle, to the delimitation of the continental shelf as between the parties under the Arbitration Agreement. This does not, however, mean that the Court considers that the rules of customary law discussed in the judgment in the North Sea Continental Shelf Cases to be inapplicable in the present case. As already pointed out, the provisions of Article 6 do not define the conditions for the application of the equidistance-special circumstances rule; moreover, the equidistance-special circumstances rule and the rules of customary law have the same object - the delimitation of the boundary in accordance with equitable principles."(244)

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(243) ICJ Reports, 1969, paras. 98, 99, p.52; See also Daintith and Willoughby, op.cit., Ref. (421) at 184, p.180.

(244) Decision, para. 75, p.50.

The Court pointed out that the aim of the rule laid down in Article 6, like that of the customary law was to lead to an equitable apportionment.(245)

In turning to the judgment of the ICJ in the North Sea Cases, the Court of Arbitration made it clear that it was true that the World Court had taken into account the particular circumstances of the case before it. What was equally true, the Court stated, was that it would be a pity if one ignores that a number of principles which had been laid down by the ICJ were of a general nature. Quoting the ICJ's passage in which the World Court had placed so much reliance on the concept of natural prolongation, the Court of Arbitration maintained expressly that this concept was "the most fundamental of all the rules relating to the continental shelf".(246)

Another question more important in assessing the evidential value of the decision of the Court of Arbitration in approving the principle of equity in the delimitation of the continental shelf, must be considered. Here one might test the Court of Arbitration's view towards what had been decided by the ICJ in relation to the equidistance method. It is worth recalling that the ICJ had held:

> "... for this purpose the equidistance method can be used, but other methods exist and may be employed, along or in combination...".(247)

Here again, the Court of Arbitration appears to be in agreement with the ICJ in not regarding the equidistance

(245) Decision, para. 148, p.77.
(246) Decision, para. 77, p.51.
(247) ICJ, 1969, para. 85(b), p.47.

rule or any other method as applicable in all situations. Whilst affirming the unity and link between the equidistance and special circumstances, there is another aspect it is submitted in the decision which purports to uphold that the more appropriate method in each particular situation rested with the relevant circumstances of the case. The Court was quite specific in deciding that the fundamental condition to be observed in judging the relevance or non-relevance of the method, is the equitability of the consequences to which it would lead.(248) In the words of the Court:

> "As this Court of Arbitration has already pointed out in paragraphs 81-94, the appropriateness of the equidistance or any other method for the purpose of effecting an equitable delimitation in any given case is always a function or reflection of the geographical and other relevant circumstances of the particular case. In a situation where the coasts of the two States are opposite each other, the median line will normally effect a broadly equal and equitable delimitation. But this is simply because of the geometrical effects of applying the equidistance principle to an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf. In short, the equitable character of the delimitation results not from the legal designation of the situation as one of 'opposite' States but from its actual geographical character as such. Similarly, in the case of 'adjacent' States, it is the lateral geographical relation of the two coasts, when combined with a large extension of the continental shelf seawards

(248) Decision, para. 84, p. 54; para. 97, pp. 59, 60.

> from those coasts, which makes individual geographical features on either coast more prone to render the geometrical effects of applying the equidistance principle inequitable than in the case of 'opposite' States. The greater risk in these cases that the equidistance method may produce an equitable delimitation thus also results not from the legal designation of the situation as one of 'adjacent' States but from its actual geographical character as one involving laterally related coasts".(249)

Further evidence of the fact that the decision of the Court of Arbitration has to be taken to have approved the principle of equity in the delimitation of marine boundaries, may be found in another passage of the decision. In considering the rules to be applied the Court paid particular attention to the actual circumstances of the region. It concludes for instance that:

> "... the specific features of the Channel Islands region call for an intermediate solution that effects a more appropriate and more equitable balance between the respective claims and interests of the Parties."(250)

The Court went on to emphasize that in order to maintain equitable solution the situation demanded "two fold solution". It decided that the first part of the boundary between the two States "shall be a median line".(251) The second part of the boundary, in the opinion of the Court must not "be so drawn as to allow the continental shelf of the French Republic to encroach upon the

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(249) Decision, para. 239, p.112.

(250) Decision, para. 98, p.94.

(251) Decision, para. 201, p.95.

established 12-mile fishery zone of the Channel Islands". The Court continued:

> "this boundary shall be drawn at a distance of 12 nautical miles from the established baselines of the territorial sea of the Channel Islands."

The effect would be in the words of the Court:

> "to accord to the French Republic a substantial band of continental shelf in mid-Channel which is continuous with its continental shelf to the east and west of the Channel Islands region."(252)

Furthermore, in the course of determining the boundary line between the parties, the Court affirmed the necessity of observing the particular situation. It went on to say

> "The effect of the presence of the Scilly Isles west-south-west of Cornwall is to deflect the equidistance line on a considerably more south-westerly course than would be the case if it were to be delimited from the baseline of the English mainland. The difference in the angle is 16°36'14'; and the extent of the additional area of shelf accruing to the United Kingdom, and correspondingly not accruing to the French Republic, in the Atlantic region eastwards of the 1,000 metre isobath is approximately 4,000 square miles."(253)

All this evidence shows quite conclusively, it is submitted, that equity falls to be considered as the well established and dominant principle of international law in delimiting marine boundaries.

The decision of the Court of Arbitration has further strengthened the validity of this suggestion in regarding

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(252) Decision, Para. 202, pp.95, 96.

(253) Decision, Para. 243, p.114.

equity as a principle of general application not only under rules of customary law between non-parties to the Convention, but, also under Article 6 between the parties.

4. The concept of equitable principles in the UNCLOS III

Without going into this question in any detail, one may simply say that the decision of the ICJ in the North Sea Continental Shelf Cases has exerted immense influence on the debate concerning the question of the delimitation of marine boundaries in the UNCLOS III, and has encouraged the trend towards delimitation based more closely on the concept of equity. Thus a certain group of States not wishing to invest the equidistance rule with any primacy, lay stress on the fact that the delimitation of maritime areas should be effected by agreement in accordance with equity.(254)

Moreover, a review of the provisions made in the draft articles produced by the Conference shows the prevalence of the trend to delimit marine boundaries on the basis of equitable principles.(255) Those provisions, cannot, for reasons of space, be dealt with here. One matter, however, ought to be mentioned. It is sufficient to refer to Article 74 "E.E.Z." and Article 83 "Continental Shelf" of the ICNT in this regard.(256)

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(254) For example Libyan Arab Jamahiriya, III UNCLOS, off. Rec. VI, 145; Romania, ibid. 156; Turkey, ibid. 158; Iraq; ibid. 159; Algeria; ibid. 223.

(255) U.N. Doc. A/CONF. 62/WP. 8/Rev. 1: Part II.

(256) U.N.Doc. A/CONF. 62/WP. 10/Add. I, pp. 50 and 55 respectively.

Conclusion

Having examined the rules for delimitation of marine boundaries between States lying opposite or adjacent to each other, the conclusion to be drawn is that the question under consideration is one of the most complicated problems of international law. Positive law offers little, if any, assistance on this matter. No established conventional rule for drawing boundaries between neighbouring States has yet to be unanimously recognized on the international law level. The delimitation of the seaward areas is mostly regulated by national laws which differ from one country to another.(257)

Turning to the relevant bilateral agreements pertinent to the subject, it may be noted that they were concluded by reference to local geographical conditions and they do not employ any single technique with any "degree of uniformity".(258)

Although the determining of a marine boundary by the agreement principle as adduced in the Territorial Sea and Continental Shelf Conventions is a reasonable matter, nevertheless, this provision is pointless since the parties are always able thus to arrange not only their differences on the seaward limits but also all their disputes. Had this provision contained a guiding criterion in the light of which negotiations might have been carried out, then the reaching of agreement on an equitable basis would have been facilitated.

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(257) Padwa, op.cit., Ref. (51) at 210, p.629.

(258) Daintith and Others, op.cit., Ref. (4) at 9, p. A329.

A brief word ought at this point to be said about the equidistance rule. Clearly, the equidistance rule is not the only rule for determining a maritime boundary. Moreover, international law does not involve any imperative principle for the purpose of the delimitation of seaward boundaries.(259)

In this regard, in the absence of a conventional undertaking, States are not obliged to adopt a specific mode of conduct with respect to submarine boundaries unless that would lead to equitable delimitation. Apparently, international law permits resorting to multifarious means, as may be appropriate.(260)

The difficulties inherent in the application of the equidistance rule are of three types. The first appears to relate to baselines from which seaward extensions are to be measured. It is well known that this line is disputable. Perhaps the measurement of a baseline of a non-party to the territorial sea Convention, is further seaward than those specified in the Convention. According to the literal interpretation of Article 6 of the continental shelf Convention, the non-party State to the territorial convention consequently acquires more shelf area than those whose baselines are drawn in accordance with the conventional rule.(261) The second category of

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(259) See Daintith and others, op.cit., Ref. (4) at 9, Vol. 1, p.A329. The authors are surely correct in doubting the possibility of a sole, general and automatic method to govern the delimitation of the seaward boundaries.

(260) Ibid., p.A329.

(261) This occurs in both cases where the median line or the equidistance line are applied.

problem concerns islands. The continental shelf Convention as was explained, is silent in this respect except to affirm in Article 1 that islands are given full rights under the regime of the continental shelf.(262) Article 6 does not indicate whether this text refers to the "mainland" or the "island" baselines. If Articles 1 and 6 were applied literally it would mean that if State "Y" has an island two-thirds of the distance across the sea toward State "X", State "Y" would get seven-ninths of the shelf between itself and State "X". If another island belonging to State "X" is situated close to State "Y", does that mean that the shelf should be drawn in a zig-zag line? If such an island belongs to a third party it would cause great difficulties, if islands were given full rights to all the benefits of the continental shelf.(263)

A more difficult problem exists where the configuration of the concerned States' coastlines are irregular, namely, where one or both is either concave or convex. This hiatus might be contested on the premise that the special circumstances principle justifies the exclusion of the equidistance rule in this situation. However, while such an argument is logically correct, it is submitted that this clause covers a wide range of situations. This is to say, the Convention offers no clear guideline as to the

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(262) The Geneva Convention on the Continental Shelf does not define the term island, while the territorial sea Convention does define it in Article 10(1). See Daintith and Willoughby, op.cit., Ref. (421) at 184, p.171.

(263) Failure in classifying islands into different groups has led to disputes. For more details, see Daintith and Willoughby, op.cit., Ref. (421) at 184, p.171.

scope and content of the term, as explained earlier, and the way therefore remains open for doubt and ambiguity.

The median line dividing the continental shelf area when two States face each other is to some extent acceptable, since it would very often lead to equitable consequences. Correct as that may be, it is to be observed that the equidistance line, to produce acceptable results, must be drawn perpendicularly to the common coastline. Beyond this however, is the clear fact that the analogy drawn between the territorial sea and the continental shelf boundaries represents a gross error. As to this point, reference has been made to the fact that the former is a "narrow region" whilst the latter is a wider area. It would be reasonable to suppose that if the lateral boundary of the territorial sea is inequitably drawn, it would not greatly affect the interests of the concerned States in sea resources. Unlike the delimitation of the territorial sea, the effects can be drastic when the boundary line is inequitably drawn in the delimitation of the continental shelf.(264)

However, the ICJ in the North Sea Cases stressed that the equidistance rule was not an imperative rule of international law and Article 6 of the continental shelf convention was only a point of departure for negotiation. The Court pointed out that the "key word" of any meaningful negotiation was equity.(265) Equity is the way to any

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(264) Oda, op.cit., Ref. (1), at 192, p.26.

(265) ICJ Reports, 1969, para. 85, pp. 46, 47.

just and lasting boundary settlement.(266) This concept has been confirmed most frequently in the unilateral proclamations and agreements of States claiming rights over their continental shelves.(267) In addition, it has been provided for in the Truman Proclamation. Therefore, the only reasonable principle for delimitation of seaward boundaries is equity.(268) This also seems to have been the conclusion reached by the Court of Arbitration in the Anglo-French Case, although with a slight difference in reasoning. Similarly clear support in favour of the establishment of the "equitable principles" in delimiting marine boundaries between opposite as well as adjacent States may be found in the ICNT.

Admittedly, equitable principles are unlike any other automatic rule in the sense that they do not render a ready method for delimitation. This argument, however, does not affect the validity that it propounds a starting point for negotiation or grounds for decision by a third party.

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(266) Daintith and others, op.cit., Ref. (4) at 9, p. A329.

(267) Examples are cited in Padwa, op.cit., Ref. (51), at 210, p.30.

(268) Daintith and others, ibid., p. A329.

PART TWO

THE DELIMITATION OF THE IRAQI TERRITORIAL SEA AND CONTINENTAL SHELF

INTRODUCTORY SECTION

THE ARABIAN GULF*

It is imperative in considering the maritime boundaries of any State to convey an overall perspective of that State and its surrounding area.(1) A glance at the map of Iraq (figure 2) will reveal that she lies at the head of the Arabian Gulf between Iran, to the north-east, and Kuwait, to the west. Thus, some comments on the importance of the Arabian Gulf area seem pertinent. It is firmly believed that the Arabian Gulf area has always been of considerable strategic, political and economic importance.(2) This importance has increased momentously in recent decades by virtue of the ever increasing significance of oil in the regional and international contexts.(3)

However, prior to the discovery of oil, the Arabian Gulf States used to depend on the pearl trade, fishing and shipbuilding.(4) The discovery of oil has been

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* See below pp.299-310 concerning the controversy on whether the gulf is Arabian or Persian.

(1) See in this sense Young, op.cit., Ref. (128) at 233, p.505; Brown, op.cit., Ref. (99) at 44, p.182.

(2) Marlowe, John, "Arab-Persian Rivalry in the Persian Gulf", J.R.C.A.S., Vol. 51, 1964, p.25; Tahtinen, Dale R., "Arms in the Persian Gulf", 1974, p.1; Glubb, Sir John Bagot, "Britain and the Arabs: A Study of Fifty Years, 1908 to 1958", 1959, p.19.

(3) Singh, K.R., "The Security of the Persian Gulf", Ira rev int relat, 1977, p.5.

(4) Hay, Sir Rupert, "The Persian Gulf States and Their Boundary Problems", Geoj, Vol. 120, 1954, pp.433-436.

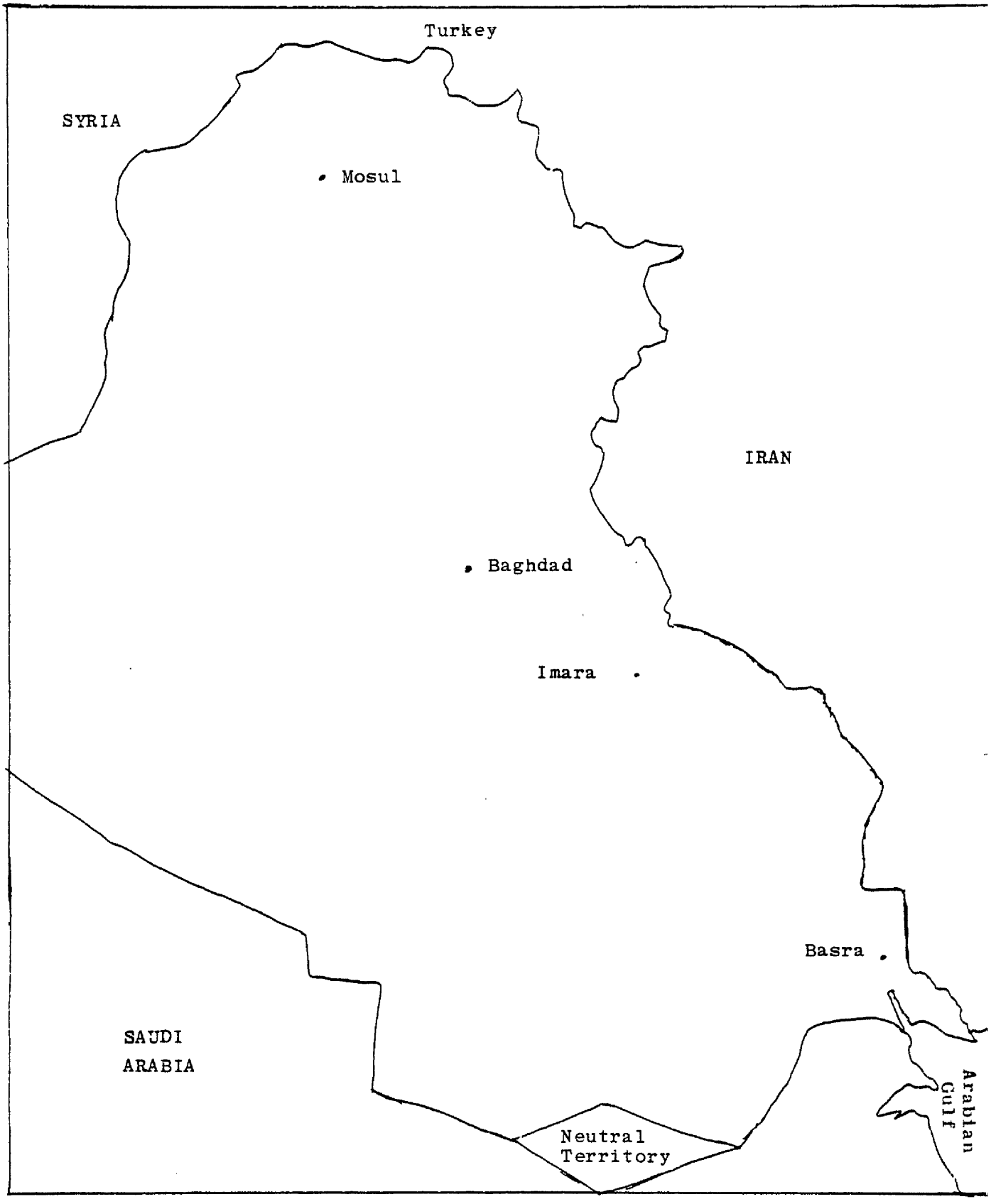

Figure (2)
IRAQ

regarded as the turning point in the history of the region, giving way to improvements in all aspects of life there. The oil-fields in the area are now considered to be the world's richest, and the Arabian Gulf States enjoy a revenue from this source.(5)

No doubt, many forces lie behind the claims to marine boundaries. Factors both geographical, historical and economic have an important bearing on the problems which confront the marine boundary-makers, and these factors must be considered as a background to our discussion of the marine boundaries of Iraq. In this section an attempt will be made to review some of the above considerations involved in the Arabian Gulf region and also discuss these elements in the light of the various interests and legal principles concerned.

It is the object of this section to deal with this under the following headings:

I. The Geographical Setting of the Arabian Gulf.

II. The Historical Perspective of the Arabian Gulf.

III. The Economic Position of the Arabian Gulf.

I. The Geographical Setting of the Arabian Gulf

The Arabian Gulf (figure 3) has been defined geographically as "That arm of the Indian Ocean lying between the Arabian Peninsula and Iran".(6) It consists (a) of the Arabian Gulf proper, stretching from the mouth of the Shatt al-Arab River in the north-west, to the Strait

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(5) Hay, op.cit., Ref. (4), at 288, p.435.

(6) Young, R., "The Persian Gulf", in New Directions in the Law of the Sea", Vol. III, 1973, p.231.

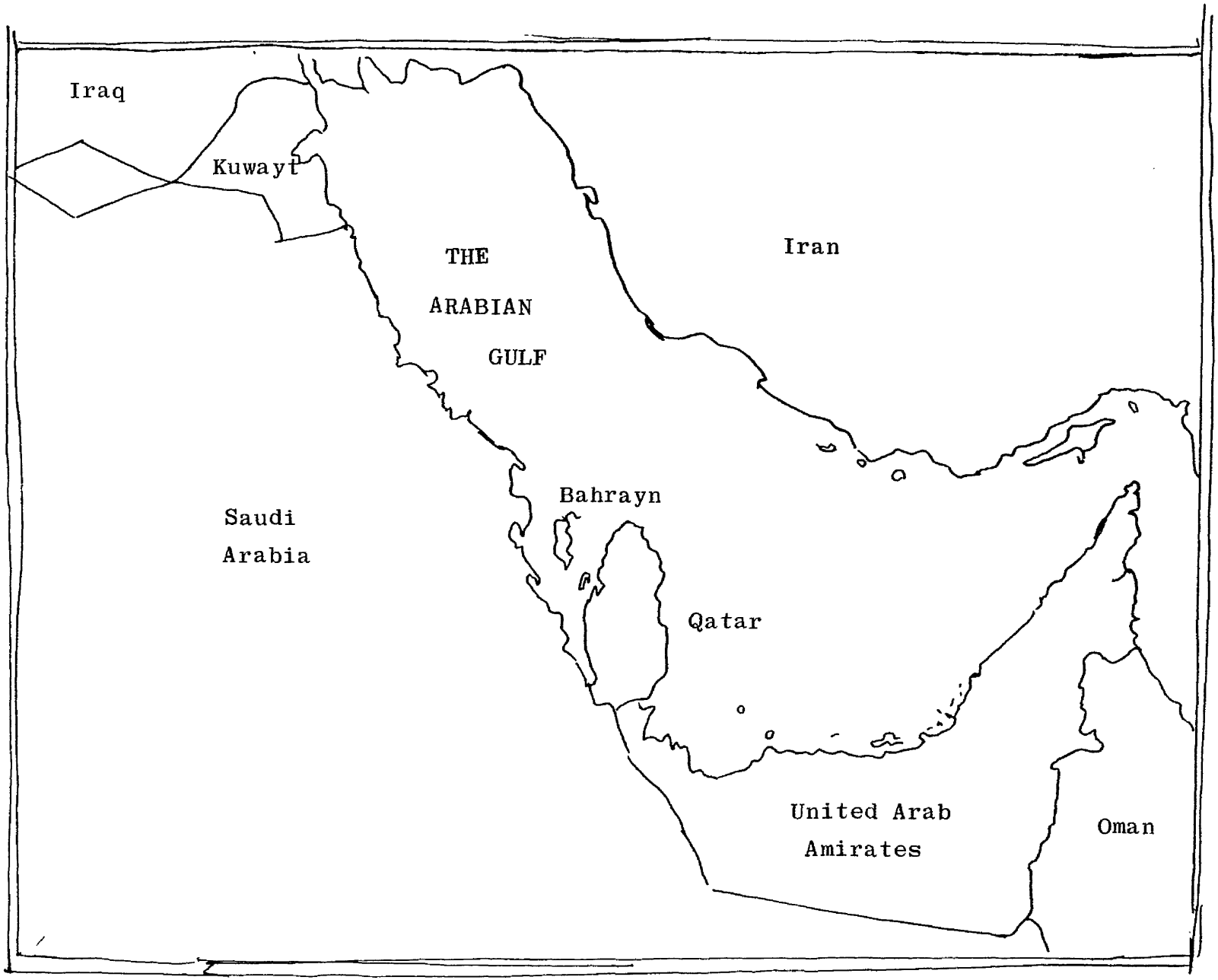

Figure (3)
The Arabian Gulf

of Hormuz in the south-east and (b) from the Gulf of Oman stretching south-east from the Strait of Hormuz to Ras al-Hada at the eastern tip of the Arabian Peninsula.(7) These two gulfs in fact, separate the Iranian side from the Arabian(8). From its entrance at the Strait of Hormuz to its head at the mouth of the Shatt al-Arab River the distance is some 430 miles. Then the distance from the Strait of Hormuz to the Ocean is some 300 miles. The breadth of the gulf varies from 210 miles at its widest to 35 miles at the Strait of Hormuz. It covers an area of some 92,500 square miles (240,000 square kilometres).(9) Its total coastline is approximately 615 miles long and the volume of its waters, about 2000 cubic miles or 8500 cubic kms.(10)

On its eastern shore, the Arabian Gulf is bordered by the great plateau of Iran, projecting upwards precipitously to a mean altitude of 5,000 feet above sea-level. Ascending to a lesser height and more gradually, from a wide and mostly desert coastal plain, the Arabian table-land borders the western side of the Arabian Gulf.(11)

It is remarkable that for the most part and particularly along the Arabian side, the waters of the Arabian

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(7) The New Encyclopaedia Britannica, Macropaedia, William Benton Publisher, Vol. 14, 1974, p.106.

(8) See Al-Feel, Dr. M.R., "The Strategic Importance of the Arabian Gulf", n.d., p.25.

(9) It is considerably larger than the Gulf of St. Lawrence, two thirds the size of the Baltic approx. See Young, op.cit., Ref. (6), at 290, p.231.

(10) The New Encyclopaedia Britannica, Ibid., p.106.

(11) Marlowe, John, "The Persian Gulf in the Twentieth Century", 1962, p.1.

Gulf proper are extremely shallow and full of coral shoals. Only in a few places does its depth exceed 100 metres and the average is no more than 40 metres.(12) The line of greatest depth runs much nearer to the Iranian coast than to the Arabian. Only in the Gulf of Oman, beyond the Strait of Hormuz, does the seafloor descend swiftly to a maximum depth of approximately 1,800 fathoms.(13)

The coasts of the Arabian Gulf are wholly forbidding; the Persian Coast is backed by many parallel ranges of barren mountains; the Musandam Peninsula and Ras al-Jibal promontory are composed of precipitous barren mountains; the Arabian Coast from Ras al-Sham to Ras al-Ardh is desert, with reefs, shoals and islets; and the head of the gulf is formed by deltas, mud flats, and marshes.

The rivers which enter the gulf are the Euphrates, Tigris and Karun.(14) The Tigris and the Euphrates which now converge into the single stream of the Shatt al-Arab, some 150 miles from the sea, discharge into the headwaters of the Arabian Gulf. Some 1.22 million cubic yards of silt annually are carried past Falluja by the Euphrates. The volume of silt carried by the Tigris measured at Baghdad is 2.2 cubic yards and the Karun brings down about 1.5 million cubic yards.(15)

Isolated reefs, banks and shoals are widespread near the shoreline particularly on the Arabian side. A

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(12) Young, op.cit., Ref. (6), at 290, p.231.

(13) Marlowe, John, op.cit., Ref. (11) at 292, p.2.

(14) Great Britain Admiralty, "Iraq and the Persian Gulf", Geo. Hand B. Ser., September 1944, pp.123-133.

(15) Wilson, Sir Arnold, "The Persian Gulf", 1954, p.4.

notable feature of the western coast of the Arabian Gulf is the parallel series of sandy buffer-type formations, several kilometres in length. These form littoral lakes between themselves and the shores.(16) The north end of the Arabian Gulf is marked by marshes.(17)

The river ports of Basra, Abadan, Khorramshahar (Mohammerah) and Bandar Shahpur, at the head of the gulf, are the major ports. Other ports, which are all quite inadequate and exposed, are Bushire, Lingen and Bandar Abbas on the Persian side, and Kuwait, Manama, Dubai and Sharja on the Arabian side.(18)

The Arabian Gulf has been considered a semi-closed sea and its sole outlet to the sea is the Strait of Hormuz.(19) The Iranian coast including the close, inshore Iranian islands of Qishm, Henjam, Larak and Hormuz border the northern side of the Strait of Hormuz. The southern side is formed by the great promontory of Oman, terminating in the Musandam Peninsula which is under the sovereignty of the Sultanate of Oman. Three small islets known as Salamah Wabanatahen or the Quoins lie in the Strait,within nine miles of the Musandam Peninsula, which is the most constricted part of the Strait of Hormuz. The width

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(16) Motwally, Dr. M. "The Arabian Gulf Basin", 1970, Vol. 1, p.44; Al-Feel, op.cit., Ref. (8), at 292,p.10.

(17) Motwally, ibid., pp.38-39.

(18) Great Britain Admiralty, op.cit., Ref. (14) at 293 , p.127; Berbuy, J.J. "The Arabian Gulf" translated to Arabic by Najdat Hajir and Saaid Al-Kis, 1959, p.53.

(19) New Encyclopaedia Britannica, op.cit., Ref. (7), at 292, p.106; Nofel, Dr. Sayyed, "The Arabian Gulf or the Eastern Boundaries of the Arabian World", 1969, pp.17-18.

between Larak island to the north and Great Quoin (8,5 miles north of Musandam Peninsula) is 20,75 miles. In this area about 16,5 miles of the Strait's length is 26 miles or less in width.(20)

It is to be observed that on either side of the Arabian Gulf, a great number of inlets penetrate the land mass for several kilometres. These creeks have affected the history of the Arabian Gulf in that, at their heads, early civilizations were established.(21) Furthermore, the shoals of the Arabian Gulf contribute to the existence of civilizations in the area, as they formed natural shelters from attacks by Nomads.(22)

Attention must now be turned to the Arabian Gulf's position. It is worth observing that the Arabian Gulf has an advantage over other inland seas throughout the world, as it has a central position on one of the main routes between east and west, lapping the shores of the territories of the Arabian Peninsula, Iraq and Iran.(23) One might just as well suggest that the Arabian Gulf has acted as an important bridge over the centuries, both commercially and strategically.(24) Trade activities in the Arabian Gulf are of vital concern. It is important to note that history on this matter records continuous

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(20) Young, op.cit., Ref. (6), at 290, p.231.

(21) Al-Feel, op.cit., Ref. (8), at 292, p.45.

(22) Areas which have been established by reason of this natural shelter are Dubai, Sharja, Ajman, Aumal-Kayon and Ras al-Kayma. The multifarious recent political units in the area have grown around these cores. See Motwally, op.cit., Ref. (16), at 294, pp.35-36.

(23) Wilson, op.cit., Ref. (15), at 293, p.2.

(24) Al-tikrity, S.T., "The Competition Over The Arabian Gulf", 1966, p.10.

competition between the gulf and the rival route of the Red Sea,(25) the other arm of the Indian Ocean, which was almost as important as the Arabian Gulf as a trading route. It would be fair to say that the Arabian Gulf has held the advantage over the Red Sea, in that it has preserved its superiority from the earliest times, proved by the fact that its trade volume with India was triple that of the Red Sea.(26)

Coupled with what has been said, the introduction of air travel has further enhanced the importance of the Arabian Gulf's position. However, it is now one of the great channels of international communication. One cannot dispute the fact that almost all airlines from western Europe and the U.S. to south east Asia, the far east and Australia pass over the Arabian Gulf landing at Basrah, Bahrain and Dhahran. As a matter of reasonable inference this strategic position makes the gulf a significant link between east and west.(27)

II. Historical Perspective

The Arabian Gulf, like any other marine highway, has always been of great importance to international trade. Although similar in character to others the Arabian Gulf

(25) Wilson, op.cit., Ref. (15), at 293, pp.18 et seq.

(26) Motwally, op.cit., Ref. (16), at 294, p.26; "The Gulf: Implications of British Withdrawal", The Centre for Strategic and International Studies, Series No. 8, Feb. 1969, p.3.

(27) Wright, Sir Denis, "The Changing Balance of Powers in the Persian Gulf, A Paper of an International Seminar at the Centre for Mediterranean Studies", Rome, June 26th to July 1st 1972, p.24.

differs markedly in at least two respects. Firstly, its geographical location, as was mentioned earlier makes it one of the most important strategic transit areas in the world for air, land, and maritime traffic.(28) Secondly, it possesses the largest proven reserves of oil in the world. Clearly, it has thus been the playground for numerous rival powers over the centuries.

There is some evidence since Achaemenian times of trade through the Arabian Gulf between Mesopotamia and southern Arabia, the Horn of Africa and India by the Assyrians and Babylonians.(29) It was also used as a channel for trade by the Phoenicians.(30)

However, the Arabian Gulf was to become the principle channel of communication between the markets of the east and west in the eighth century A.D. The rise of Islam, the Arab conquest of Mesopotamia and Persia, and the establishment of the Abbasid caliphate in Baghdad all contributed to the increasingly important role of the Arabian Gulf in trade.(31) The eastern goods which became increasingly in demand in the markets of Europe were spices, precious stones, perfumes and silks. These eastern goods were exchanged for cloth and metals.

From the twelfth century, western Europe was cut off from Asia for several hundred years. First of all this

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(28) See above pp. 295-296.

(29) Motwally, op.cit., Ref. (16) at 294, pp.1,2.

(30) Wilson, op.cit., Ref. (15) at 293, pp.8-17.

(31) De Gaury, Lieut.-Colonel Gerald, "Between the Mediterranean and the Persian Gulf", J.R.C.A.S., Vol. 39, 1952, pp.259-268; Marlowe, op.cit., Ref. (11), at 292, pp. 2,3.

was caused by the fall of the Roman Empire in the west, and then later the rise of Islam in the east. During this period the area was mostly dominated by Arabs.

Once more, by means of the Crusades, western Europe turned to the shores of the Levant and thereby revived the previous trading relationships with the east's "Fertile Crescent" via the Arabian Gulf.(32)

The history of the Arabian Gulf then enters into a new phase when the Cape route was discovered by Vasco da Gama in 1498. Among the European peoples, the Portuguese were the first to use its waters.

It was at the beginning of the sixteenth century, that the Portuguese, profiting by the recent discovery of the Cape of Good Hope route, appeared in the Arabian Gulf and under the famous Albuquerque expedition, and laid the foundations for their shortlived but showy empire.(33) Having maintained political and commercial supremacy for about a century the Portuguese were finally driven out of the region in 1622.(34) Following the expulsion of the Portuguese, a commercial rivalry began between the British and Dutch. In 1763 the East India Company had been formed. Its residency in the region was at Bushire. Although of an entirely commercial nature at first, circumstances forced the company to assume a political character. The Dutch also, had succeeded in becoming for a time, the predominant power influencing the area.

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(32) Marlowe, op.cit., Ref. (11), at 292, p.3.
(33) Wilson, op.cit., Ref. (15), at 293, p.11.
(34) Ibid.

However, by the middle of the eighteenth century, 1766, they gradually fade out of the picture, and the field was left open to the British to establish political dominance in the nineteenth and twentieth centuries.(35)

To a certain extent, it can be seen that the opening of the Suez Canal diminished the importance of the Arabian Gulf as a marine route by economising the outlays of loading and unloading through the Iraqi and Syrian territories to the Red Sea. This being so, then it can safely be said that during the twentieth century, the advent of oil completely restored the importance of the Arabian Gulf.(36)

The Controversy Over the Gulf's Identity: Arabian or Persian

Before ending this section, one final point deserves special attention. It is sometimes argued whether the gulf is Arabian or Persian.(37) Although it is not intended in this work to dwell on the Gulf's Arabian character or to examine each aspect pertinent to the subject, a brief discussion of this question does seem necessary.

It is self-explanatory that any name given to a certain area or marine zone is not necessarily sufficient in itself to affect its natural and legal status. For

(35) Ibid.

(36) See below pp.310 et seq.;De Gaury, op.cit., Ref. (31), at 297, pp.259-268.

(37) See for instance, Paul, H.G. Balfour, "Recent Developments in the Persian Gulf", J.R.C.A.S. Vol. 56, 1969, p.12; New Encylcopaedia Britannica, op. cit., Ref. (7), at 292, Vol.7, p.890.

example, although its waters are obviously not red, the Red Sea has been called thus for centuries. It appears rather that a name must rely for its validity only upon factors of actual position and history. Consequently, the Tanzanian Republic is now so called in accordance with its current, actual position, notwithstanding the fact that it is composed of what were formerly two independent States, namely Tanganyika and Zanzibar.

Before proceeding further, it may be asked, what is the reason for and the origin of the naming of the "Persian Gulf". If one goes carefully through what has been written on the history of the gulf, it will appear that the word Persian was wrongly passed on by the Greeks. The story in short is that a marine mission under the command of Nearchus, had been sent in 326-325 B.C., by Alexander the Great to the Indian Ocean on a geographical expedition. Nearchus crossed the Arabian Gulf to Suzah which lies on the Iranian side and there Alexander was waiting for his expedition. During the voyage, Nearchus followed the eastern side of the Arabian Gulf. The western side thus, remained unknown to him. After asking Nearchus which way he had sailed, accordingly Alexander then named the Arabian Gulf "Persian".(38)

Greek geographers and historians are therefore considered the first to record this name and to mention it in the Ptolemaic Atlas. This Atlas was then translated into the Arabic language by the Syriacs. It seems to follow that this particular version was then regarded to

(38) Sykes, Sir Percy, "A History of Persia", 1915, Vol.1, pp.43-52.

be the principle, geographic reference for both the Arabian and Islamic Worlds.(39)

Correct as it may be that any name given would not affect either the legal status of the Arabian Gulf, or the rights of the adjacent States, or indeed again the legal status of its waters,(40) it would seem reasonable to suggest, for reasons to be mentioned later to refer to the gulf as "Arabian".

A look at the geographical position of the Arabian Gulf, shows that seven of the littoral States within the gulf are Arabic.(41) Furthermore, from a historical viewpoint it can be seen that it is the interaction between Arab and Arab that has not only dominated the use of the Arabian Gulf, but has also duly controlled both sides of the gulf and navigation on it.(42) In contrast, the Persians have been cut off from the Gulf's eastern shores by the chain of towering mountains parallel to these shores.(43) This range has undoubtedly had the effect of creating geological formations which divide the two areas. In addition it is considered that it acts as

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(39) Jawad, Dr. M., "It Will Remain Arabian Gulf Whether Ignorants Desire or Not", Al-Aklam J., Vol. II, 1970, p.78.

(40) See above p. 299.

(41) They are counter-clockwise from the Strait of Hormuz, Iran, Iraq, Kuwait, Saudi Arabia, Bahrain, Qatar, The Union of Arab Emirates (the seven former Trucial States); and Oman. See Young, op.cit., Ref. (6), at 290, p.231.

(42) Al-Mitoori, S.A., "Navigation in Shatt-al-Arab: The Treaty of Al-Giers (1975) in Historical Perspective", Thesis submitted to USIT for L.L.M. Degree, 1977, p.30.

(43) Al-Hiti, Dr. S.F., "The Arabian Gulf: A Study in Political Geography", Thesis submitted to the University of Baghdad in 1976 for the Degree of Ph.D. in Geography, 1976, p.5.

a border area both in an ethnological and cultural sense as well as a geographical and psychological separation. This situation has been pointed out by numerous historians as confirmation of the isolation of the Persians from the sea.

The Rev. Charles Forster, for instance, in his book "The Historical Geography of Arabia", reaches the conclusion that Arabs

> "under various disguises and corruptions of their proper name, have, in all ages, composed its chief inhabitants."(44)

Exactly the same view was taken by the Danish explorer, Niebuhr, who visited the Arabian Gulf in 1765. Mr. Niebuhr reached the same conclusion in his book "Travels Through Arabia and Other Countries in the East", edited in 1772. He laid stress on that fact when he stated that it had been erroneous to name the Arabian Gulf "Persian" since the Arabs occupied both its shores eastern and western. He wrote in full:(45)

> "But I cannot pass, in equal silence, over the more considerable colonies, which, although they are also settled without the limits of Arabia, are, however, nearer to it. I mean the Arabs upon the southern coast of Persia, who are commonly in alliance with, and sometimes subject to the neighbouring Schiechs. A variety of circumstances concur to indicate, that these tribes were settled along the Persian Gulf, before

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(44) Forster, Charles, "The Historical Geography of Arabia; or, the Patriarchal Evidences of Revealed Religion" 1844, Vol. 2, pp.208-212.

(45) Niebuhr, Karsten, "Travels Through Arabia and Other Countries in the East", Translated into English by R. Heron, 1792, Vol. II, p.8.

> the conquests of the Caliphs, and have ever preserved their independence. It is ridiculous in our geographers, to represent a part of Arabia as subject to the Kings of Persia; when, so far from this, the Persian Monarchs have never been masters of the sea-coast of their own dominions, but have patiently suffered it to remain in the possession of the Arabians."

Yet another historian, Roderic Owen, an Englishman, found it strange to call the Arabian Gulf "Persian". Having visited the Arabian Gulf Region, Mr. Owen wrote:

> "No English map shows the Arabian Gulf; a matter of some concern for those who live there. A traveller has to proceed as though bound for the Persian Gulf - will probably think that is where he is, when he reaches Kuwait or Bahrain; only to be told that that is where he is is not the Persian Gulf? These dry expanses of brown sand, those blue expanses of shallow water - and every thing above and especially everything below - are, have been, will be, integral parts of the Arabian Gulf.
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> This was one of the many things I did not know before going there. It was the first Arab statement of opinion I heard and it was repeated at intervals over a year of wandering until now it is an effort to think of such a place as a Persian Gulf. Since this is an account of a journey where after the initial effort I regularly took the line of least resistance, where I purposely deprived myself of a purpose, willed myself to have no will and heaped the result on to the lap of Allah, I shall refer to this burning, humid gulf of the world as "Persian" before my arrival and as "Arabian" after, for that is only polite...."(46)

(46) Owen, R. "The Golden Bubble - Arabian Gulf Documentary", 1957, p.13.

The conclusion which we arrive at above as to the correct name of the Arabian Gulf is amply confirmed by certain other evidence which follows. Striking evidence of the Gulf's Arabian character may be found in the fact that it has been known in older times as the "Erythrian Sea", that is the "Red Sea". It was also called by Strabo (64-19 B.C.) the "Red Sea" and sometimes the "Arabian Gulf".(47) According to proven evidence from Acadian engravings, the "Lower Water"(48) was the commonly used name, by the people who lived near its shores, especially those who lived in Iraq.(49) Numerous other names were attributed to the gulf. It was once called the Gulf of Basrah by Ottomanis, who occupied part of the region. The Gulf of Oman, Gulf of Bahrain and Gulf of Kaateef were all names well known to the Arabs.(50) Not a single title among these was Persian, indeed to the contrary, they were all Arabic names, which seems to provide unequivocal evidence that the Arabs have controlled the Gulf since early times. In this regard, European historians again have stressed this fact. Sir Arnold Wilson, for instance, asserted that the actual authority over the Eastern shores since the times of Sabor II (4th Century A.D.) had been in the hands of the Arabs. This

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(47) Jamil, Dr. Fouad, "The Arabian Gulf in the Records of Early Historians", Sumar Journal, Vol. 22, Part 1, 1960, pp.40-42.

(48) Wilson, op.cit., Ref. (15), at 293, p.26.

(49) Similarly the "Mediterranean" was called "Higher Sea" because it was situated to their north. See Al-Mitoori, op.cit., Ref. (42) at 301, p.30.

(50) Jamil, ibid., pp.40-42; Al-Mitoori, ibid., p.31.

control continued until the establishment of the Islamic State, and even then the Persians still had never been the masters of the Eastern side of the Gulf. Sir Arnold Wilson mentioned that:-

> "Certain it is, however that on the rise of the Persian Empire, all references to those people 'Babylonians' as participators in the maritime trade of the gulf disappear and the Arabian navigators come into prominence. It may even be that the actual navigation of its waters was throughout in the hands of the latter, and that both Phoenicians and Babylonians were no more than the middle men who received the commodities carried by the Arabians."(51)

To the foregoing, it may be added that whilst the Persians not only knew little of navigation in the Arabian Gulf but were also cut off from its shores, the Arabs on the other hand were good sailors and keen traders. Sir Arnold Wilson confirms the theory of Dr. Theodore Bent in this respect. It is worth quoting in full the statement of Sir Arnold Wilson which shows who the skilled navigators over the Arabian Gulf really were

> "We must not omit to inquire who were the skilled navigators responsible for what must have constituted, long before our era, a considerable and increasing volume of trade. The theory advanced by Dr. Theodore Bent was that they were Phoenicians,(52) and that this race was responsible for the construction, over a very long period of years of the vast number of sepulchral tombs."(53)

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(51) Wilson, op.cit., Ref. (15), at 293, p.34.

(52) The Phoenicians were Semites; see Wilson, op.cit., Ref. (15), at 293, p.29.

(53) Wilson, ibid., p.29.

The same view has been taken by other historians. Mr. Miles pointed out that the Arabs

> "were the great mediaries and carriers of Indian goods to the west, successfully monopolising it and excluding all others from the Indian Sea, navigating their vessels between India and the Euphrates and enjoying a most lucrative trade."(54)

More important is that the Arabian Gulf's identity has been alluded to in the writings of European historians. Having described the city of Karak,(55) Pliny, the Roman historian (62-113 A.D.) mentioned:

> "Charax is a city situated at the furthest extremity of the Arabian Gulf, at which begins the more prominent portion of Arabia Felix 'Eudaemon': it is built on an artificial elevation having the Tigris on the right, and the Eulaeus on the left, and lies on a piece of ground three miles in extent, just between the confluence of those streams."(56)

The Danish explorer, Karsten Neibuhr, in his description of the inhabitants of the Arabian Gulf corrected the error of using the so called "Persian Gulf" term. He wrote:

> "Our geographers are wrong, as I have elsewhere remarked, in representing a part of Arabia as subject to the Monarchs of Persia. So far is it from being so, that, on the contrary, the Arabs possess all the sea-coast of the Persian Empire,

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(54) Miles, S.B., "The Countries and Tribes of the Persian Gulf", 1960, p.3.

(55) Historians take upon themselves that the City of Karak is Mohamurah. See Al-Mittory, op.cit., Ref. (42) at 301, p.31.

(56) Wilson, op.cit., Ref. (15), at 293, p.49; see also Al-Mitoori, op.cit., Ref. (42), at 301, p.31.

from the mouths of the Euphrates, nearly to those of the Indus.

These settlements upon the coast of Persia belong not, indeed, to Arabia properly so called. But, since they are independent of Persia, and use the same language, and exhibit the same manners, as the native inhabitants of Arabia, I shall here subjoin a brief account of them.

It is impossible to ascertain the period at which the Arabians formed their settlements upon this coast. Tradition affirms, that they have been established here for many centuries. From a variety of hints in ancient history, it may be presumed, that these Arabian colonies occupied their present situation in the time of the first Kings of Persia. There is a striking analogy between the manners ascribed to the ancient Ichthyophagi, and those of these Arabs.

They live all nearly in the same manner, leading a seafaring life, and employing themselves in fishing, and in gathering pearls.....

Their dwellings are so paltry, that an enemy would not take the pains to demolish them. And as, from this circumstance, these people have nothing to lose upon the continent, they always betake themselves to their boats at the approach of an enemy, and lie concealed in some isle in the Gulph (Gulf) till he has retreated. They are convinced that the Persians will never think of settling on a barren shore, where they would be infested by all the Arabs who frequent the adjacent seas.

.....One cause of the failure of Nadir-Shah's attempt to subdue these Arabs. In the presecution of this object, the usurper had, at immense expense, equipped a fleet of twenty-five large ships, upon the Persian Gulf. But as he had no Persian sailors, he was obliged to take Indians..... These refusing to fight against their brethren ..... Towards the

> end of his life, Nadir-Shah was meditating to seize these Arabs, to transport them to the shores of the Caspian Sea, and to settle a colony of Persians in their room. His tragical death prevented the execution of this project; and the disturbances in Persia have ever since prevented all encroachments from that quarter upon the liberty of these Arabs." 57)

The historian Mr. Miles appears to agree with this conclusion. He confirmed that the first original inhabitants of the Arabian Gulf region known to the genealogists were the Arabs.(58)

Beyond this is the clear fact that the "Arabian Gulf" was agreed upon by another European historian. This name had long been used by the Rev. Forster. So much so that he explicitly titled Section II part II of his book "The Historical Geography of Arabia" 'Coast of the Arabian Gulf'.(59)

Although his book was published under the title "Persian Gulf", the French historian Jan Jack Berbuy maintained that the Arabian Gulf had been properly named. He justified using this title for his book on the basis of current usage.(60)

Conclusion

The result of the foregoing discussion shows that, there are weighty considerations to support the Gulf's Arabian character. The Arabs have been the seafarers of

(57) Niebuhr, op.cit., Ref. (45), at 302, pp.137-140.
(58) Miles, op.cit., Ref. (54), at 306, pp.1-3.
(59) Forster, op.cit., Ref. (44), at 302, p.116.
(60) See Al-Mitoori, op.cit., Ref. (42), at 301, pp. 34, 35.

almost the entire Arabian Gulf. On both sides the gulf was peopled almost exclusively by Arabs. Everywhere around the Arabian Gulf, north, west and south has been dominated by the Arabs. Even the people living in the littoral area to the east of the Arabian Gulf, which now belongs politically to Iran, in spite of the recent immigration of some thousands of Persians,(61) have been and still are all but entirely Arab.(62) The Arabs were, moreover, skilled navigators and traders, having a knowledge of seamanship while navigation on the Arabian Gulf was beyond the expertise of Persians who learnt no more than a little seafaring. An examination of the history of the Arabian Gulf shows that Arabs have repelled all invasions into the Arabian Gulf and have controlled the area.(63) As they acquired their livelihood from the sea, a spirit of affinity developed between them and the area and thus all foreigners seeking a foothold in the region, whether Portuguese, Dutch, French, Russian, German, Turkish or English were driven away by the Arabs.(64)

In the light of this evidence it seems most surprising

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(61) See Al-Katteeb, Dr. M.S. "The Legal Status of the Territorial Sea", 1975, p.573.

(62) Ibid.; Arabs have inhabited both sides of the Arabian Gulf. Even the people living on the Eastern side of the Gulf (Arabistan Province), which was annexed to the Persian Territory after the war which Persia waged over Kaab State in 1925, belongs to the Arab tribes which migrated from the Arabian Peninsula after it dried out. The main tribes in Arabistan are: Kaab, Beni Turuf, Bawia, Benilam, Arafijah, Kethir, Muhaisin, Beni Temim, Zargan, and Akrash. See Hakky, Dr. A.M.I., "The Legal Status of the Province of Arabistan", 1974, pp. 36-56, 74-79.

(63) See for instance, Miles, op.cit., Ref. (54), at 306, p.200.

(64) See Al-Mitoori, op.cit., Ref. (42), at 301, p.36.

that some have sought to arrogate the status of "Persian" for the Arabian Gulf.

III. The Economic Position of the Arabian Gulf Region

The Arabian Gulf Sector, standing at the meeting point of the three continents of Africa, Asia and Europe, has for many centuries, played an important role in worldwide economic trade as well as in the political and military relationships of its littoral states. Quite apart from the changes introduced into the economy of the region, by the advent of oil, the traditional forms of livelihood centred around the principle activities of agriculture, trading, seafaring, pearling and fishing.(65)

Due to several factors, such as the geological formation of the seabed, the temperature of its waters and their shallowness, the Arabian Gulf is a favourable environment for the growth of the pearl oyster.(66) Pearl fishing was the premier industry until the beginning of the present century.(67)

Fishing provides a livelihood for many. In the shallow waters are huge V-shaped traps in which the fish are stranded and then collected at low tide. Large cage-like traps which are sunk in deeper water are also used

(65) Long, David E., "The Persian Gulf: An Introduction to its Peoples, Politics, and Economics", 1976, p.103.

(66) El-Hakim, Ali Abed El-Muti, "Practice and Policies of Certain Middle Eastern States Towards Aspects of the Law of the Sea", A Dissertation submitted for the Degree of Ph.D., University of Cambridge, 1977, p.62; Long, ibid.

(67) El-Hakim, ibid., pp.62-64.

as umbrella nets.(68)

However, although all of these pursuits are still present, the coming of oil has impaired these means of livelihood and seriously crippled them elsewhere in the area.(69) Those who used to dive now mostly prefer steady employment with the oil companies to the hardships and risks of their old profession and not more than a few hundred boats go out every year. Fishing also remains mostly a small scale enterprise confined to local markets.(70)

To turn now to the subject of oil, notwithstanding that it had been discovered in Iran and Iraq by the beginning of the present century.(71) Owing to the Second World War, exploration, production and export were delayed and were not resumed until the end of the war. Once the war was over companies intensified their operations searching and exploring for oil in the Arabian Gulf region and now it has become the centre of world oil production replacing the Carribean Sea.(72)

The whole of the Western World, and more particularly its two most dynamic segments Western Europe and Japan, is greatly dependent for its essential oil supplies on a number

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(68) Hay, Sir Rupert, "The Persian Gulf States", 1959, pp. 51-59.

(69) Long, op.cit., Ref. (65), at 310, p.104.

(70) Lenczowski, George, "Oil and State in the Middle East", 1960, pp.37-53.

(71) Marlowe, op.cit., Ref. (11), at 292, pp.79-97.

(72) Motwally, op.cit., Ref. (16), at 294, Vol. 2, pp. 461-488; Al-Hiti, op.cit., Ref. (43), at 301, pp. 223-238.

of the Middle Eastern States.(73)

In an attempt to ascertain fully the economic picture of the region, it is now our concern firstly to deal briefly with the proven reserves of oil in the area, secondly its percentage of production and finally the amount of its exported oil.

a. The Proven Reserves of Oil in the Region

Concerning the matter of proven reserves, the region holds a dominating position. The region's reserves have risen rapidly, both in absolute terms and as a percentage of the world total.

In 1950 the Arabian Gulf reserves were under 42 per cent of the world total. By 1975 this figure had risen to 49.2 per cent. At the beginning of 1976, world proven reserves of petroleum were estimated at 658,686 million barrels. Of these, 359,662 million barrels or 54.6 per cent were in the Arabian Gulf region.(74) Table 1 shows the ratio of the reserves of petroleum in the Arabian Gulf region compared with that of the world. It reflects the fact that the region's reserves of oil are more than half of the world total.

Furthermore, experts forecast that the Arabian Gulf

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(73) Two important points deserve particular attention; firstly, nearly 90 per cent of the Middle Eastern regional subtotal are located in the Arabian Gulf Area; second; 86 per cent of the Arabian Gulf subtotal is in Arab lands. See Issawi, Charles, "Oil, the Middle East and the World", The Washington Papers, 4, pp.1-24.

(74) Source, The Annual Statistical Reports, The Second and Third Reports, OPEC, 1973-1974, 1975. As regards Information about Iran's Reserves are obtained from the Ministry of Iraqi Oil and Minerals.

Table No. 1

Estimated Oil Reserves "million barrels"(75)

Country	1975	1976
UAE	32,920	32,200
Bahrain	00,336	00,312
Saudi Arabia	141,040	151,800
Iraq	35,000	34,300
Qatar	6,000	5,850
Kuwait	72,800	71,200
Iran	64,000	64,000
Total	352,096	359,662
Total World	715,697	658,686
Percentage of the Arabian Gulf to total world	49.2	54.6

oil will continue to flow for a period of 23-43 years after 1976 even although production will increase in annual output. Table 2 shows the expected year of the exhaustion of the Arabian Gulf oil reserves if it is exploited at the contemplated production averages. If production continued at its present rate the reserves of petroleum would last for about 30-65 years in all the Arabian Gulf States apart from Bahrain, whose reserves are predicted to run out after 18 years. The above figures when compared with the average age of wells in

(75) Ibid.

Table No. 2(76)

Country	Production Averages in 1980 (million Tonnes)	Year of exhaustion
Saudi Arabia	1000	1997
Kuwait	200	2019
Iraq	250	1990
U.A.E.	200	1990
Qatar	100	2014

other producing countries,(77) illustrate that the Arabian Gulf Area is in possession of relatively huge reserves of oil.(78) All this no doubt reflects the ever increasing importance of the area.

b. Production of Oil in the Arabian Gulf Region

Among the world's established oil regi ns, the Arabian Gulf sector still shows the highest percentage annual increase in production. The total output from the Arabian Gulf fields for the years 1974, 1975 and 1976 are shown in Table 3.

Moreover, local consumption of petroleum products is relatively low. In the Arabian Gulf region not more than 5 per cent of the oil produced is consumed locally (see table 4).

Apart from the outstanding and attractive features of

(76) Source, Al-Hiti, op.cit., Ref. (43), at 301, p.247.

(77) The average age of oil fields is some 15-25 years. See Al-Hiti, ibid., p.247.

(78) Ibid., p.247.

Table No. 3(80)

Daily Output

1 unit equals 1000 barrels

Country	1974	1975	1976
U.A.E.	1700	1700	1900
Bahrain	670	670	610
Saudi Arabia	8500	7100	8600
Iraq	2000	2300	2300
Qatar	500	400	500
Kuwait	2500	2100	2200
Iran	6000	5400	5900
Total offtake of the region	21 870	19 610	22 010
Total offtake of the world	57 970	54 042	56 032
Percentage of the region's production	% 37.73	% 36.29	% 39.28

Table No. 4(81)

The Percentage of Consumed Oil In Relation to that Produced in the Arabian Gulf Region in 1973

Country	Percentage of consumption to the Produced Petroleum
Iraq	% 5.7
Kuwait	% 5.1
Saudi Arabia	% 1.8
Qatar	% 5.95
U.A.E.	% 2.84

(80) Source. Petroleum Relam Journal, Vol. 9, part 49, July 16, 1977, p.12; OPEC, The Third Statistical Report,p.8.

(81) International Petroleum Encyclopedia, 1973; Arabic Oil and Co-operation Journal, Part II, Vol. II, 1976, p.53; cited in Al-Hiti, op.cit., Ref. (43), at 301, p.251.

the oil industry of the Arabian Gulf and in addition to its huge reserves are an average production per well which is remarkably high and very low costs of production.(82)

c. Export of the Arabian Gulf Petroleum

Previous discussion has shown that the high percentage of annual production is not the only characteristic of the Arabian Gulf's petroleum. The total local consumption,

Table No. 5(83)

The Average Daily Export Figures For Oil From The Arabian Gulf During the Years 1974, 1975 and 1976

One unit equals 1000 barrels

Country	1974	1975	1976
U.A.E.	1700	1400	1800
Saudi Arabia	8500	7100	8300
Iraq	1800	2100	2100
Qatar	500	400	500
Kuwait	2400	2000	2100
Bahrain	423	414	415
Iran	5700	5000	5400
Total Exports	21 023	18 414	20 615
Percentage of exports in relation to the produced	%96.12	%93.90	%93.66

(82) Estimates of costs of production though obviously differing significantly, since they are based on widely different assumptions and methods, all agree in putting the Middle Eastern figures at only a fraction of those in other regions. See Issawi, Charles and Mohammed Yeganeh, "The Economics of Middle Eastern Oil", 1962, pp.89-102.

(83) Source. OPEC, The Third Statistical Report, pp. 10-11.

as has just been referred to, is less than 5 per cent of that produced. Hence, this easily gives the region the position of being the leading exporter of oil in the world market.

A quick glance at Table 5 shows that most of the oil produced in the region is exported as raw material to the demanding world.

However, suffice it to say that over 90% of the oil supplies for Japan are now met by imports from the Arabian Gulf.(84) Western Europe already satisfies 65 per cent of its oil needs from the Arabian Gulf area.(85) This obviously highlights again the rapidly increasing importance of the Arabian Gulf region in oil production and the sharp decline in the western hemisphere's share of production. It is also clear that in the coming decade the world will have to continue relying heavily on the Arabian Gulf region. This in turn has an affect on the question of the delimitation of marine boundaries between the interested States, as will be discussed in the following chapters.

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(84) Issawi, op.cit., Ref. (73), at 312, pp.17-18.

(85) Brewer, William, "Comments on the book 'The Persian Gulf States' written by Sir Rupert Hay", M.E.J., Vol. 14, 1960, p.103.

CHAPTER FOUR

THE DELIMITATION OF THE IRAQI TERRITORIAL SEA

Iraq, as mentioned earlier, is located at the head of the Arabian Gulf.(1) Thus, according to both the principles of the Geneva Convention of 1958 on the TSCZ, and international practice, it is entitled to sovereign rights over a belt of water adjacent to her coast, that is the territorial sea.

It should be made clear at the outset that neither Iraq, nor Kuwait have acceded to the Geneva Convention on the TSCZ. Iran, has signed the Convention but has not ratified it yet.(2) As yet, no bilateral agreement has been reached between the three political units on the delimitation of their respective offshore boundaries.(3) Such an argument assumes that it is on the basis of the general principles of international law that this question will be discussed. The chapter will be divided into two sections, dealing first of all with the legal boundaries of the Iraqi territorial sea, and secondly with the difficulties arising in the putting into practice of these boundaries. Claims and legislation of Iran and Kuwait will not be considered in depth, but will be referred to where and when the discussion so requires.

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(1) See above p. 288.

(2) El-Hakim, op.cit., Ref. (66), at 310, pp. 3, 64, 124.

(3) Al-Baharna, Husain M., "The Legal Status of the Arabian Gulf States", 1968, pp.261-306.

Section One

The Legal Boundaries of the Iraqi Territorial Sea

Iraq has a curved coastline and a very limited water-front of only 40 miles (64 km.) in width. Sandwiched between Iran, which borders the north eastern shore and the mouth of Shatt-al-Arab, and Kuwait to the west,[4] Iraqi territorial sea boundaries, it can be assumed, are eastern and western in addition to the outer limit which constitutes its southern boundary.

However, owing to conflicts between Iraq and her neighbours over land frontiers, Iraq's offshore boundaries have not been demarcated to date.

This section will be divided into three under the following headings:

(1) The outer boundary of the Iraqi territorial sea.
(2) The eastern boundary of the Iraqi territorial sea.
(3) The western boundary of the Iraqi territorial sea.

Subsection One

The Outer Boundary of the Iraqi Territorial Sea

In general, the location of the outer boundary of the territorial sea depends on the baseline from which it is measured. It is also affected, as was stated earlier, by the width of the territorial sea. It will be attempted, therefore, in this section to tackle these two questions in addition to the outer boundary of the Iraqi territorial sea.

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(4) El-Hakim, op.cit., Ref. (66), at 310, pp.156-158.

a. The Iraqi baseline

Even although there has been no unanimity with respect to a uniform formula for drawing baselines,(5) it is valuable to restate that the rules applicable to the construction of baselines are very well established.(6) It is generally recognized according to these rules, that the normal baseline from which the breadth of the territorial sea is measured is the low-water line.(7) In one of the well known World Court's decisions involving the question of baselines, the ICJ, in the Anglo-Norwegian Fisheries Case,(8) pointed clearly to the proposition that the principle of low-tide was well established. The Court explicitly held that:

> "For the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State..."

Having been approved by the Geneva Conference of 1958 on the Law of the Sea, this rule was incorporated in Article 3 of the Convention on the TSCZ.(9) It can be

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(5) The controversy is due partly to different tidal waters the degrees of which range between high-high and low-low water tides. For further details see Kassim, Anis F., "Conflicting Claims in the Persian Gulf", J. Law E. Dev., Vol. 4, No. 2, 1969, pp.316-317.

(6) See Colombos, op.cit., Ref. (4) at 9 , p.113; Smith, op.cit., Ref. (10) at 14, pp.9-14.

(7) The wide acceptance of the low-water mark principle is due to several factors. For further details see Kassim, ibid., p.317.

(8) ICJ Reports, 1951, p.16.

(9) See above p. 20.

concluded that the low-water line principle has been sanctioned by adjudication adopted by multilateral treaty and acted upon even by non-parties to the Geneva Convention. Moreover it is likely to be adopted by the unfolding UNCLOS III.(10)

The Iraqi baseline, according to the recognized rules, should thus be drawn along the Iraqi coast's low-water mark. The general absence of offshore islands beyond the coastal fringe eliminates one potential source of controversy. The region is perhaps, as regards the drawing of baselines, a simple situation in terms of technical problems. Accordingly, there is nothing to suggest a deviation from the general rule of application of either Articles 6, 8, 9 or 10.

The legislation of Iraq, in this regard, it is submitted wholly conforms to the established rules of international law. Both the Law No. 71 of 1958(11) and the Republican Ordinance No. 435 dated 15 November, 1958(12) refer to the low-water line with respect to the drawing of the Iraqi baseline.(13)

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(10) See Stevenson and Oxman, op.cit., Ref. (137), at 94 , p.771; see also Article 5 of the ICNT, U.N. Doc. A/CONF. 62/W.P. 10/Add. 1 p.21.

(11) Article 2. ST/LEG/SER, B/15 (1970) p.90.(Appendix IV).

(12) Article 2. Ibid., p.89-90. Reproduced as Appendix No.III to this thesis.

(13) The legislation of Kuwait is in conformity with the general rule of low-water mark. Article 2 of the Kuwaiti Law of 1967 sets up the baseline of the low-water mark of mainland, or the outer edge of elevations situated at a distance not exceeding 12 miles, and at the closing line of the Bay of Kuwait. Article 1, and 2 Appendix No.(VIII).Iran while adhering to the same principle as regards the legislation of her territorial sea, on the contrary adopted the high-water line when she signed the Geneva Convention on the Continental Shelf. Iran made two reservations when

Contd....

One problem could arise regarding the estuary of the Shatt al-Arab River which partially constitutes the eastern terminal of the Iraqi baseline. The application of Article 13 of the Geneva Convention on the TSCZ, which runs as follows, would provide the solution.

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."(14)

Accordingly, the construction of the Iraqi baseline across the mouth of the Shatt al-Arab River from the west eastwards requires fixing a point, opposite the western bank of the river, on the low-water mark line. A similar point on the eastern bank is fixed. These two points should be plotted on large-scale charts officially recognized by Iraq. A straight line would then be drawn between the two points. This line forms the Iraqi baseline across the mouth of the Shatt al-Arab running along its shore through points fixed with regard to the well established principles of international law. It is thus in accordance with the provisions of the Geneva Convention of 1958 on the TSCZ, particularly Article (13)

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(13) contd...
she signed the Geneva Convention on the Continental Shelf. Iran made two reservations when she acceded to the said Convention. The one which is pertinent reads as follows "b. Article 6: with respect to the phrase 'and unless another boundary line is justified by special circumstances' included in paragraphs 1 and 2 in this article, the Iranian Government accepts this phrase on the understanding that one method of determining the boundary line in special circumstances would be that of measurement from the high-water mark". This reservation is cited in Kassim, op.cit., Ref. (5), at 320, p.319.

(14) Brownlie, op.cit., Ref. (31), at 20, p.82.

which governs the construction of baselines across estuaries of rivers.

b. The Extent of the Iraqi Territorial Sea

Prior to 1958, Iraq had not drawn up her territorial sea exactly. The general rules recognized by public international law, according to an official Note sent from the Foreign Ministry of Iraq to the U.N., were applicable as to the regime, including the breadth of the Iraqi territorial sea.(15) In November of 1958, Iraq issued The Republican Ordinance No. 435 in which she declared that her territorial sea was 12 nautical miles in width.(16) In the same year, Iraq also pronounced, the same claim in the Law No. (71). Article (2) of the Law provides that:

> "The Iraqi territorial sea extends twelve nautical miles (a nautical mile is equivalent to 1852 metres) in the direction of the high sea, measured from the low-water mark following the sinuosities of the Iraqi coast".(17)

Again, the Iraqi enactment regarding her respective territorial sea breadth is in accordance with the prevailing rule on the subject. It is clearly evident, in spite of the failure of the international conferences

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(15) Note of February 2, 1956 from the Foreign Ministry of Iraq to the U.N. See ST/LEG/SER. B/6 1957 p.26.

(16) See Article 2 of the Republican Ordinance No. (435) dated 4 November 1958, Published ST/LEG/SER B/15 (1970) p.89 and reproduced in Appendix No. III to this thesis. The same breadth has been adopted by Kuwait in accordance with Article 1 of the Decree dated 17 December, 1967, Appendix No.VIII Iran also fixed her territorial sea at 12 nautical miles. See Appendix No. VI.

(17) Published in ST/LEG/SER B/15 (1970) p.90 and reproduced in Appendix No. VI to this thesis.

to establish a conventional rule in this respect, that the twelve mile limit has become a steadfast principle of international law.(18) Moreover, the twelve-mile rule has been regionally practised as an accepted limit for the territorial sea in this area. Not only have States bordering the Arabian Gulf officially delimited their respective territorial sea boundaries at twelve miles, but also most of the Middle Eastern States,(19) particularly the Arab States.(20) This width has gradually been developed in the area to meet local conditions and has won recognition from the political units in the region.

c. The Outer Boundary of the Iraqi Territorial Sea

Having outlined the general principles and the Iraqi legislation governing the drawing up of baselines and the width of territorial sea, it is then easy to delimit the Iraqi territorial sea. Although such work falls under the function of the admiralty, it is relevant here to refer in brief to the mode of construction of the outer boundary.

1. Any relevant number of prominent points on the Iraqi baseline must first be established on large-scale

(18) See above pp. 110 et seq.

(19) Al-Hakim, op.cit., Ref. (66), at 310, pp.9-10.

(20) Such as Egypt, Saudi Arabia, Syria, Yemen Arab Republic, Sudan and so forth. This is because, the Council of the League of Arab States recommended in March 1959 that all the Arab States should have adopted the 12-mile limit for territorial sea. This recommendation was made under resolution 1579 of March 26, 1959, adopted during the League's Thirty-First Session in Cairo.

charts officially recognized by Iraq. These points are to be on the low-water mark alongside the coast of Iraq from the west to the east, that is from where the Iraqi low-water mark meets that of Kuwait, to the final point on the boundary line in Shatt al-Arab between Iraq and Iran.

2. Then, use the width of 12-miles from each of these points to form swinging arcs. The line joining the points produced from the intersection of those arcs, will be the outer boundary of the Iraqi territorial sea.

Drawing the outer boundary of territorial sea, as mentioned above, conforms with article 6 of the Geneva Convention which runs as follows:

> "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."(21)

Ultimately, each point on the line constructed will be at a 12-mile distance (22) from the Iraqi baseline. Consequently, Iraqi legislation regarding baselines, the breadth of the territorial sea and establishing the outer boundary of territorial sea accords the general principles of international law as well as the Geneva Convention.

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(21) Brownlie, op.cit., Ref. (31), at 20, p.80.

(22) This limit is the respective width of the Iraqi Territorial Sea. See Article 2 of the Law No. 71 of 1958. Appendix No. IV.

Subsection Two

The Delimitation of the Eastern Boundary of the Iraqi Territorial Sea

The boundary line on the Shatt al-Arab River, which separates Iraq and Iran, constitutes the last section of the western Iraqi boundary line. Certainly drawing the boundary line of the territorial sea between the two countries depends on the precise placing of the last point on that line. It is, thus, of a great import to set out the boundary line between the two countries.

It will be our concern in this subsection to deal with the status of the Iraqi-Iranian boundary. This will be examined as follows:-

I. Facts Relating to the Iraqi-Iranian boundary line.

II. Facts Relating to the Boundary Line on the Shatt al-Arab.

III. The Crisis of April 1969.

IV. Conclusion. The Facts in the Light of Legal Principles.

I. Facts Relating to the Iraqi-Iranian Boundary Line

It is well known that prior to the First World War, Iraq was under the control of the Ottoman Empire.(23) Here, there is evidence to show that the border between Iran and the Ottoman Empire had been in existence intermittently for a period of no less than four hundred years beginning with the first Ottoman Conquest of Iraq in 1534 A.D. It had frequently been the cause of war, and almost continuously the subject of strife between the

(23) Khadduri, Majid, "Major Middle Eastern Problems in International Law", 1972, pp.3-6.

two parties. From about half-way through the seventeenth century the frontier settled down, however it was never defined beyond dispute. This left the frontier between Iran and the Ottoman Empire relatively stable, though still disputed. To settle the doubtful questions several subsequent frontier agreements such as those of 1639, 1746, and 1823 were concluded between the two parties. Owing to the ambiguity surrounding the texts of these agreements, the delimitation itself became the very source of prolonged disagreements resulting in the Treaty of Erzerum of 1847.(24) According to this treaty, the boundary line between Iran and the Ottoman Empire was held to run from Mount Arrarat to the head of the Arabian Gulf. As to the Shatt-al-Arab, the boundary between Turkey and Persia on the Shatt al-Arab(25) was the low-water line on the Persian side. This appears to mean that the navigable stream of the shatt was in Turkish hands.(26) Under Article 3 of the Treaty of 1847, a Committee to mark the borders on land was to be established. In effect, the post-war controversies and conflicts in which Turkey became involved retarded the process of demarcating the frontiers.

To find a final solution to the controversies between the two countries, eventually, a Protocol was signed by representatives of Britain, Russia, Persia and the

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(24) See Long, op.cit., Ref. (65), at 310, p.52.

(25) The Shatt al-Arab is a river made by the convergence of the Tigris and the Euphrates running for 150 miles or so down to the head of the Arabian Gulf, with the contribution of the Karun river. See Gressey, George B., "The Shatt al-Arab Basin", MEJ, Vol. 12, 1958, pp.448-449.

(26) Marlowe, op.cit., Ref. (2), at 288, pp.26 et seq.

Ottoman Empire at Constantinople on the 17th November, 1913. Under the terms of this protocol a delimitation Commission, which consisted of representatives of the four powers, was formed to carry out the Protocol of Constantinople. Consequently, the "Turco-Persio" boundaries were precisely delimited on the map and marked on land in 1914.(27)

However, during the war of 1914-1918, the Ottoman Empire invaded a succession of States, Iraq being one. Obviously, under the doctrine of State Succession "a successor State then succeeds not to the treaty as such but to the frontiers of its territory ...".(28) Iraq thus inherited, what had been the Turkish territory of Mesopotamia.(29)

As a result, the borders between Iraq and Iran were assumed to have been stabilised beyond dispute since they were well defined by the Treaty of Erzerum of 1847 and reinforced by the "Persio-Turco" Commission. While such

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(27) Al Katiffi, Dr. A. "Certain Legal Aspects of the Iranian Abrogation of the 1937 Agreement", 1969, p.9; Marlowe, op.cit., Ref. (2), at 288, p.26.

(28) Lester, A.P., "State Succession to Treaties in the Commonwealth", ICLQ, Vol. 12, 1963, p.492.

(29) Al-Katiffi, ibid., p.21; Marlowe, ibid., Lord McNair writes: "the general principle is that newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations, save is so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State". See McNair, op.cit., Ref. (33), at 203, p.601.

an argument is doubtless correct, the fact is that a certain number of frontier incidents were recorded. This conflict came to a head when the Iraqi Government appealed to the League of Nations under Article 11 paragraph (2) of the Covenant. The appeal was made on the 29th November, 1934.(30) It took the form of a request submitted in a letter dated 29 November, 1934, from the Iraqi Foreign Minister to the Secretary General of the League. The request was made as the Iranian Government had periodically been committing acts of aggression, while at the same time disapproving Iraqi proposals for peaceful and direct contact between the two parties.(31) An Iraqi overture which was made to the Council indicating that the question should have been referred to the PCIJ for an advisory opinion, was rejected by the Iranian Government.(32)

Finally, some signs of reason were shown in the relations between the two sides. The case was recalled at the request of Iraq just before the meeting of the Council at which it was to have been heard. Ultimately,

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(30) Hodson, H.V., "The Middle East: The Admission of Iraq to the Membership of the League of Nations and the Problem of Non-Arab Minorities", Surv. Int. Aff. 1934, pp.183-184.

(31) In an Appendix to this letter, the Iraqi Government gave an account of some of the more flagrant acts of aggression of which the Iranian Government were guilty. See the text of the letter and Appendix III in L.N.O.J., 1935, pp.196-197 and 208-215 respectively.

(32) Toynbee, Arnold J., assisted by Boulter, U.M., "The Middle East: The Controversies over the Frontier Between Iran (Persia)on the one side and Turkey and Iraq on the other; and the Four-Power Middle Eastern Pact of the 8th July, 1937, surv. int. aff., 1937, pp.796-797.

an agreement settling the boundary dispute was signed by the two parties in Tehran on the 4th July, 1937.(33)

It is needless here to analyse the provisions of the 1937 Treaty.(34) It should merely be noted that through this treaty the parties pledged mainly:

a. To forbear from any sort of interference in one another's interior affairs (Article 1).
b. To treat their common frontiers as immutable (Article 2).
c. To consult one another in all international matters that might affect their common interests (Article 3).
d. Not to commit any acts of aggression against one another (Article 4).
e. To bring any apparent threat or violation of Article (4) before the League Council, without prejudice to the exercising of their rights of self-defence.

The signing of this Treaty at Tehran on the 4th July was performed by the respective Foreign Ministers of the two States.

It is to be observed that there was a sustained awareness of the importance of achieving stability and finality in the settlement of the boundary dispute between Iraq and Iran in accordance with 1937 Treaty. It was clearly intended to define perennially the common boundary between the two parties.(35) This proposition is supported, as is shown below,(36) by the preamble to

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(33) Ibid., p.802.

(34) The full text of the Treaty is reproduced in ILM, Vol. 8, 1969, pp.478-479.

(35) This conclusion can be drawn from the terms of the treaty. See in particular the preamble ibid.

(36) See below pp. 343 et seq.

the treaty.

However, the committee which had been established in 1938 by mutual negotiation, to mark the boundary line on land by boundary posts, was suspended because of the retreat of the Iranian side. Iran, by acting in the same way as she had prior to the conclusion of the 1937 Treaty, once again threatened Iraqi sovereignty.(37)

II. Facts Relating to the Boundary Line in Shatt al-Arab

The regime in the Shatt al-Arab was governed by the terms of the Erzerum Treaty of 1847. Article 2(3) of the aforesaid treaty specifies that:

> "The Ottoman Government formally recognises the unrestricted sovereignty of the Persian Government over the city and port of Muhammara, the island of Khizr,(38) the anchorage, and the land on the eastern bank - that is to say, the left bank - of the Shatt al-Arab, which are in the possession of tribes recognised as belonging to Persia. Further, Persian vessels shall have the right to navigate freely without let or hindrance on the Shatt al-Arab from the mouth of the same to the point of contact of the frontiers of the two parties."(39)

Not only the above article but also the scholiums of it given by the U.K. and Russia(40) as mediating powers - show that the whole of the Shatt al-Arab with the exceptions of Muhammara and Khizr, were under the full jurisdiction of the Ottoman Empire. In the light of this fact even

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(37) Al-Katiffi, op.cit., Ref. (27) at 328, p.24.

(38) Now known as Abadan.

(39) The full text of the Treaty reproduced in the L.N.O.J., 1935, p.197-199.

(40) The full text of the above explanation reproduced in L.N.O.J., 1935, pp.199-200.

the left side, or the eastern bank of the river, was admitted both by Turkey and Persia to be under the sovereignty of the former.

As noted above, the Turkish-Persian boundary was again precisely defined by the Protocol of November 4, 1913. In terms of the provisions relevant to the Shatt al-Arab,(41) apart from the rights of Persia mentioned in Article 1 paragraphs (a,e), the Shatt al-Arab up to the normal low-tide line was once more subject to the sovereignty of Turkey. Moreover, the Boundary Delimitation

(41) The provisions relevant to the Shatt al-Arab are paragraphs (a) and (e) of Article 1 which provides in part:

"From this point the line ... shall follow the medium filum aquae of the Khaiyin Canal as far as the point where the latter joins the Shatt al-Arab, at the mount of the Nahr-Nazaileh. From this point the frontier shall follow the course of the Shatt al-Arab as far as the sea, leaving under Ottoman sovereignty the river and all the islands therein, subject to the following conditions and exceptions:

(a) The following shall belong to Persia: (1) the island of Muhalla and the two islands situate between the latter and the left bank of the Shatt al-Arab (Persian bank of Abadan); (2) the four islands between Shetait and Maawiyeh and the two islands opposite Mankuhi which are both dependencies of the island of Abadan; (3) any small islands now existing or that may be formed which are connected at low water with the island of Abadan or with Persian terra firma below Nahr-Nazaileh.

(e) The Sheikh of Mohammara shall continue to enjoy in conformity with the Ottoman laws his rights of ownership in Ottoman territory.

The frontier-line established in this declaration is shown in red on the map annexed hereto.

The parts of the frontier not detailed in the above-mentioned frontier-line shall be established on the basis of the principle of the status quo, in conformity with the stipulations of Article 3 of the Treaty of Erzerum". See L.N.O.J., 1935, pp.201-205.

Commission referred to in Article 2 of the 1913 Protocol, met many times to achieve its task.(42) Here again, the description of the frontier in the Shatt al-Arab was recorded in the Minutes of the Commission which did not materially differ in purport from the previous acts. Once more, the Shatt al-Arab, with the exceptions of Muhammara and Khizr, was entirely under the sovereignty of Iraq.(43)

However, by the beginning of the 1930s, Iran violated the sovereignty of Iraq over the Shatt al-Arab. She not only denied the binding force of those instruments but also refused to admit the competence of the Basrah Port Authorities, as noted above.(44) The question was referred to the League of Nations and at last, on September 15, 1937 a lasting settlement was achieved as the 1937 Treaty was concluded.(45) Not only the Protocol of 1913 and the Minutes of the Delimitation Commission of 1914 were deemed valid and binding but(46) the treaty also acknowledged the binding effect of the boundary line defined by those instruments with one sole exception. Articles 1 and 2 specify that:

Article (1) "The High Contracting Parties are agreed that, subject to the amendment for which Article 2 of the Present Treaty provides, the following documents shall be deemed valid and binding,

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(42) Article (2) of the Protocol provided that the frontier shall be demarcated on land by a delimitation Commission. See the text of the Article in L.N.O.J. 1935, p.205.

(43) The Proceedings of the Commission of 1914 annexed to the letter sent from the Iraqi Government to the L.N. "Secretary General" see L.N.O.J., 1935, p.207.

(44) See above p. 329

(45) The Preamble of the Treaty. See the full text which is produced in ILM, Vol.8, 1969, pp.478, 479.

that is to say:

1a) The Turco-Persian Delimitation Protocol signed at Constantinople, November 4th, 1913;

b) The Minutes of the meetings of the 1914 Frontier Delimitation Commission.

In virtue of the present Article, the frontier between the two States shall be as defined and traced by the Commission aforesaid, save in so far as otherwise provided in Article 2 hereinafter following."

Article (2) "At the extreme point of the island of Choteit 'being approximately latitude 30° 17' 25" North, longitude 48° 19' 28" East', the frontier shall run perpendicularly from low water mark to the thalweg of the Shatt-el-Arab, and shall follow the same as far as a point opposite the present Jetty No. 1 at Abadan 'being approximately latitude 30° 20' 8.4" North longitude 48° 16' 13" East. From this point, it shall return to low water mark, and follow the frontier line indicated in the 1914 Minutes."(47)

This appears to mean that according to the 1937 Treaty, the boundary line on the Shatt al-Arab runs, with only certain exceptions along the low-water mark of the eastern coastline of the river. The exceptions, from north to south are as follows: the port and anchorage of Muhammara above and below the confluence of the Karun river with the Shatt al-Arab, certain islands proximate to the eastern shore appertain to Iran. Just north of the No. 1 jetty at Abadan the boundary runs outwardly from the low-water line to the thalweg of the Shatt al-Arab, following it south-

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(46) Article (1), ibid.

(47) Ibid.

wards for about four miles and then retraces the low-water line to a point just north of the island of Choteit.

III. The Crisis of April 1969

On April 19, 1969, the Iranian Deputy Minister for Foreign Affairs declared the Unilateral termination of the Iraqi-Iranian Boundary Treaty of 1937, before the Iranian House of Senate.(48) The Iranian renunciation of the 1937 Treaty was carried out on the basis that:

> "The Government of Iran now has no choice but to expose the characteristic bad faith of the Government of Iraq in evading and refusing for more than thirty years to perform its obligations under the Treaty."

In the Iranian Government's view, "when the treaty between Iran and Iraq was concluded in 1937, the position of the two parties was unequal. Iraq was the protege of the imperialist power dominant in the region which enabled Baghdad to press Iran into accepting the iniquitous boundary provision".(49) Iran thus declared that she no longer regarded the provisions of the treaty of 1937 as binding upon her. The other grounds given for annulment were that the established principle of international law, that the two parties have equal rights, had not been observed in the case of the Shatt al-Arab.(50)

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(48) The full text of the statement concerning the abrogation of the 1937 Treaty reproduced in ILM, Vol. 8, 1969, pp. 481-486.

(49) Letter dated 1 May 1969, from the Permanent Representative of Iran addressed to the President of Security Council. Reproduced in ILM, Vol. 8, 1969, pp.489-492.

(50) The Iranian letter to the President of the U.N. Security Council, ibid., pp. 491, 492; The Statement of the Iranian Deputy Minister for Foreign Affairs, Ibid., p.484; Tahtinen, op.cit., Ref. (2), at 88, p.19.

Additionally, the Iranian Act of renunciation of the 1937 Treaty was simultaneous with massing "troops, naval and air force units all along the Iraqi borders".(51) The Iranian Government also committed flagrant acts of violation against Iraqi sovereignty in the Shatt al-Arab. Iranian merchant ships and ships of other nationalities protected by Persian vessels and the air force, approached the Shatt al-Arab river breaching the rules of navigation and flouting the orders of the competent authorities.(52)

Conclusion "The Facts in the Light of Legal Principles"

Needless to say, after examining the situation, the boundary line between Iraq and Iran on the Shatt al-Arab was found to be precisely delimited in such a way as to leave no room for dispute. It was laid down in the Erzerum Treaty of 1847, the 1913 Protocol, the 1914 Minutes of the Delimitation Commission and the 1937 Treaty. More important is that the latter admitted the validity of all the previous pertinent instruments and events. The above facts clearly reveal that the boundary line on the Shatt al-Arab had been fixed in binding legal acts, thus it remains to examine the incompatibility of the Iranian Acts with international law.

Before passing on to this investigation, it is firmly recognized in this connection that in principle, any treaty remains in force unless terminated in accordance with its

(51) Letter dated 29 April 1969 from the Acting Permanent Representative of Iraq addressed to the President of the Security Council. Reproduced in ILM, Vol. 8, 1969, pp.487-488.

(52) Abbas, Abbas Abbood, "The Crisis of the Shatt al-Arab" 1973, pp.72-73.

provisions or with the generally recognized rules of international law.(53) Article 42(2) of the 1969 Vienna Convention on the Law of Treaties provides that:

> "2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."(54)

It is pertinent to note that most of the recent treaties contain an internal means or mode of bringing them, or their operation to an end. Parties to a treaty often make a provision therein (a) that the treaty is to be in operation for a specified period, or (b) that the treaty will be deemed to be terminated or that the parties will be deemed to be entitled to denounce or withdraw from the operation of the treaty with the occurrence of a certain event or on the fulfilment of certain conditions.(55) Such treaties are terminated by the application of the provisions of the treaty itself. This would seem to be tantamount to saying that the termination or withdrawal is carried out in the light of mutual consent of the contracting parties.(56)

However, the termination of or withdrawal from the operation of a treaty may not be provided for in the treaty itself. It is a firmly recognized principle of international law that parties to a treaty may later agree

(53) YBILC, 1966, Vol. II, pp.1-50.
(54) Vienna Convention on the Law of Treaties.
(55) McNair, op.cit., Ref. (33), at 203, p.515.
(56) YBILC, 1963, Vol. II, pp.199-200.

to do either of these things at any time during the period of the treaty. In this connection, it may be quoted from a passage by Judge Read in the case of the International Status of South-West Africa,(57) Judge Read stated that:

> "The second ground is based upon a general Principle of Law recognized by civilized nations. Any legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination..."(58)

It may be observed that this rule has been acknowledged as a general principle of international law. The Declaration of London of 1871, as well as state practice, support the impossibility of the unilateral termination of a treaty unless so provided for within the treaty. This principle becomes more evident in treaties of peace and treaties fixing a territorial boundary.(59) The principle was also reiterated in a resolution of the Council of the League of Nations of April 17, 1935 which asserted that

> "No state can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, except as a result of the consent of the contracting parties by means of an amicable understanding."(60)

It appears that this rule has also acquired the recognition of the international community, to the extent

(57) ICJ Reports, 1950, p.128.

(58) ICJ Reports, 1950, Separate opinion of Judge Read, p.167.

(59) YBILC, 1963, Vol. II, pp.200-201.

(60) See YBILC, 1963, Vol. II, pp.200-201.

that it is incorporated in the 1969 Vienna Convention on the Law of Treaties. Article 54 runs as follows:

> "The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting States."(61)

In practice, this principle has been generally observed. Otherwise, it would be easy for States to disown their obligations. Surely, this lack of responsibility would in turn affect the confidence of interchange between the members of the international community, which is the most effectual factor for peace.(62) It is to be noted that the question of respecting obligations is given much weight in the Charter of the United Nations which provides that:

> "to establish conditions under which justice and respect for the obligations arising from treaties..."(63)

There is also Article 2(2) of the Charter which states that:

> "2. All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present charter."(64)

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(61) Vienna Convention on the Law of Treaties.
(62) Whiteman, op.cit., Ref. (5) at 9, Vol. 3, pp.434 et seq.
(63) Charter of the United Nations, the Preamble.
(64) Ibid.

The conclusion to be drawn is as follows: the termination of a treaty in principle, may take place as a result of the happening of an event or under certain conditions in accordance with the provisions of the treaty itself, or at any time by the mutual consent of the parties dehors the treaty.

It remains to examine treaties including no provision regarding their termination. In principle, such treaties are incapable of being terminated unless they exhibit either express or tacit animus or designation of the parties to do so.(65) More important in connection with the question under consideration is that even when tacit intent is reached it is not accepted as a means of allowing termination of treaty obligations in two cases:

1) when it is categorically provided that a treaty is to subsist validly; and
2) treaties of peace and those fixing territorial boundaries.(66) This appears to mean that those treaties by their very character preclude the possibility that the contracting parties contemplated any right of unilateral denunciation or withdrawal on the part of any of them.

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(65) Vienna Convention on The Law of Treaties. Article 56.

(66) It is disputed where a treaty is silent as to the period of its duration or as to whether the parties to it may in any circumstances terminate or denounce it or withdraw from it. There are two schools of thought concerning this question. On the one hand, some consider that where the treaty itself is silent on the point, it is to be presumed that no such right exists, since the parties themselves would not have made express provision for it. On the other hand there are those who take the view that the mere absence of a specific provision of a right of termination in the treaty should not be interpreted to mean that the right is thereby taken away. See Al-Katiffi, op.cit., Ref. (27) at 328, pp.25 et seq.

The preceding discussion, has been dealing with cases of termination of a treaty in certain circumstances when there is either a provision in the treaty for such a possibility or an agreement between the parties outwith the treaty. Admittedly, these general principles are subject to exceptions where the unilateral denunciation or withdrawal of an individual party at will is admitted. In short, the right of any individual party to terminate the treaty without first obtaining the consent of the other party is recognized in two cases:

1. When a material breach of a treaty by one of the parties to it is committed. One is accordingly entitled to assume that the violation of an agreement by one party gives the right to the other party to invoke such a breach as grounds for the termination of the treaty. This rule has gained the recognition of the international community and is codified in Article 60 of the Vienna Convention of 1969 on the Law of Treaties. It runs in part as follows:

> "1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part..."(67)

2. Quite apart from the previous case, it is accepted as a doctrine of customary international law that a party to a treaty may claim the right to terminate it or suspend its operation unilaterally, on the grounds that there has been a fundamental change of circumstances from those

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(67) Vienna Convention on the Law of Treaties.

existing at the time of the conclusion of the treaty. This notion which is often called the doctrine of clausula rebus sic stantibus, has been codified in the Convention on the Law of Treaties. Article 62 of this Convention provides in part that:

> "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."(68)

It cannot be denied that the principles considered are not only supported by the majority of writers and international tribunals but are now also embodied in the Vienna Convention. However, after a study of all the principles with regard to the validity of the Iranian abrogation of the 1937 Treaty, it is submitted that the Iranian denunciation appears to be null and void. There seems to be no doubt that the 1937 Treaty cannot be considered obsolete for the following reasons:

1. The 1937 Treaty contains no clause for fixing either its duration, the date of its termination or any precondition or event which could bring about its termination. It does not provide the right to denounce or

(68) Ibid.

withdraw from the treaty. On the contrary, the object of the agreement of 1937 as can be deduced from its preamble, was to achieve eternal stability of the long-standing frontier question and to put an end to the tension between the two States.(69) There is evidence to suggest that it is always advisable to examine the preamble to boundary treaties as a prelude to understanding the tenor of their contents.(70) The value of the preamble is illustrated very well by the Island of Palmas arbitration. It is necessary first to point out that the agreement relating to the arbitration of the differences in respect of sovereignty over that island was signed by the United States of America and the Netherlands on January 23, 1925.(71) The preamble to this agreement refers to the parties desire,

> "to terminate in accordance with the principles of international law and any applicable treaty provisions the differences which have arisen and now subsist between them..."(72)

In his award of April 4, 1928,(73) the Arbitrator, Max Huber, expressly referred to the terms of this preamble which he regarded as:

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(69) In the preamble of the treaty the parties cited that (... sincerely desirous of strengthening the bonds of brotherly friendship and good understanding between the two States, and of settling definitively the question of the frontier between the two States have decided to conclude the present Treaty...) op.cit., Ref. (34), at 330.

(70) Fitzmaurice, G.G., "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" BYBIL, Vol. 28, 1951 pp. 24-25.

(71) Cited in AJIL, Vol. 22, 1928, pp.868 et seq.

(72) Ibid., p.868.

(73) Ibid., pp.867-912.

> "the evident will of the parties that the arbitral award shall not conclude by a non liquet, but shall in any event decide that the island forms a part of the territory of one or the other of two litigant powers."(74)

2. Certainly, the main object of all proceedings leading to the settlement of boundary disputes, including boundary treaties, is to achieve stability and finality. In particular, this primary objective, was the intention of the parties to the 1937 Treaty.(75) Further evidence in support of this proposition is afforded by the wording of a crucial Article of the Treaty. Article 3 provides in part that:

> "upon the signature of the present Treaty, the High Contracting Parties shall appoint forthwith a Commission to erect frontier marks at the points determined by the Commission to which Article 1, paragraph (b) of the present Treaty relates and to erect such further marks as it shall deem desire."(76)

Plainly, the intention behind this provision was simply to rule out any subsequent controversy. In the light of this provision the parties can be presumed to have fully intended to definitively establish a visible frontier line and to have taken all the necessary steps to achieve this end. This ratio, it is submitted, was

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(74) Ibid., p.911.

(75) The contracting States declared their desire to settle definitively the question of the frontier between them. See the Preamble of the Treaty. op.cit., Ref. (34), at 330.

(76) Ibid.

amongst the grounds on which the ICJ based its decision in the Case of Temple Preah Vihear.(77) It was taken by the Court as evidence leading to the conclusion that the parties intended finality. Having asserted that the cardinal objectives of frontier agreements, in general, are to encompass "stability and finality", on this question, the ICJ stated the following:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, ... be called in question."(78)

Yet, the Court took special note of the preamble to the treaty of 1907 which recited that the parties were desirous "of ensuring the final regulation of all questions relating to the common frontiers of Indo-China and Siam".(79) This was construed as expressing an intention to put an end to the state of tension in the relations between the two parties and to achieve boundary stability "on a basis of certainty and finality".(80) The Court went on to say:

> "A further token of the same object is to be found in the desire, of which the documentation contains ample evidence, and which was evinced by both parties, for natural and visible frontiers. Even if, as the Court stated earlier, this is not in itself a reason for holding that

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(77) ICJ Reports, 1962, p.6.
(78) ICJ Reports, 1962, p.34.
(79) Ibid., p.35.
(80) Ibid., p.35.

the frontier must follow a natural and visible line, it does support the view that the parties wanted certainty and finality by means of natural and visible lines."(81)

3. As regards the so-called Iraqi breach of the treaty of 1937 upon which it is particularly relied for terminating the treaty or suspending its operation in whole or in part, it should be observed that it is inconsistent with the general principles of international law for the following reasons:

a. Iraq in fact has never violated any of the provisions of the 1937 Treaty. Having participated in the Mixed Boundary Commission, Iraq acted upon her own obligation under the agreement. It is to be noted that the work of this Commission was suspended by the withdrawal of the Iranian side in 1940 at the request of its Government.(82) Therefore, if any importance is to be attached to the Iranian claim, it would be in Iraq's favour not against her.

b. The second reason lies in the fact that the right of a party to terminate a treaty on account of a breach cannot affect any right or status resulting from the terms of the treaty. It cannot affect a status quo ante to which the treaty put an end.

c. To merely use the breach as a ground for terminating the agreement is not sufficient in itself to regard the entire agreement as annuled. Such action if objected to by the other party is subject to adjudication

(81) Ibid., p.35.

(82) Al-Katiffi, op.cit., Ref. (27) at 328, pp.33 et seq.

according to peaceful means provided for in Article 33 of the Charter of the United Nations.(83)

d. The exercising of the right to terminate or withdraw from a treaty requires compliance with procedural aspects. Among the extent of and the conditions for the exercising of this right is the instrument declaring the termination, which must be signed by a body who has authority to take the action of termination or is entitled to do so. The Iranian abrogation of the 1937 treaty is lacking in this requirement.

4. Finally using a change in conditions as a basis for the termination of a treaty, once again, is not sufficient in itself. Obviously, if viewed so broadly, it may be considered that the doctrine is likely to be invoked whenever a party finds itself in a position where the fulfilment of the obligation under the treaty is either inconvenient or onerous.(84)

The Iranian abrogation of the 1937 Treaty it is submitted, appears to be ineffectual. Although, the existence in international law of the principle of rebus sic stantibus is recognized, the need to confine its scope within narrow limits by regulating the conditions under

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(83) Charter of the U.N. Article 33.

(84) See Brierly, James Leslie, "The Law of Nations: An Introduction to the International Law of Peace" 6 ed; 1963, pp.332-336; Kelsen, op.cit., Ref. (230), at 123, (Principles of International Law) pp.497, 498, and"Law of Treaties, Introductory Comment, AJIL, Supp. 1935(2), pp.1096-1126; Lissitzyn, Olivier J., "Treaties and Changéd Circumstances (Rebus sic stantibus) AJIL, Vol. 61, 1967, pp.895-922; Garner, J.W., "The Doctrine of Rebus Sic Stantibus and the Termination of Treaties", AJIL, Vol. 21, 1927, pp. 509-516.

which it may be invoked is nevertheless emphasized. The possible termination of treaties by reason of changed circumstances is recognized only within narrow and well defined confines.

In the Judgment of 7 June, 1932, in the Case of the Free Zones of Upper Savoy and the District of Gex,(85) the PCIJ, notwithstanding admitting the rebus sic stantibus principle, asserted that only a radical change of circumstances could be considered. Further, while upholding that certain changes had taken place during the period of more than a century, the Court considered that those changes had no bearing on the whole body of circumstances.(86)

Similarly, although in the Fisheries Jurisdiction Case(87) the ICJ recognized explicitly that

> "changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty,"(88)

it did confirm certain conditions which may be regarded as a delimitation of its scope. In the words of the Court:

> "International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has

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(85) PCIJ Series A/B No. 46 pp. 96-238 (1932).

(86) Ibid.

(87) Fisheries Jurisdiction Case, U.K. v. Iceland, ICJ Reports, 1973, p.2; See also Fisheries Jurisdiction Case Federal Republic of Germany v. Iceland, ICJ Reports, 1973, p.49.

(88) Ibid., para. 32, p.17; para. 32, p.61 respectively

> resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking a termination or suspension of the treaty ..."(89)

The Court went on to stipulate:

> "the change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken."(90)

Furthermore, the doctrine of rebus sic stantibus never operates by the mere claim of the State concerned. Such a claim if disputed, is subject to examination by some competent body in order to ascertain the merits required for its application. In the case of the Fisheries jurisdiction, just referred to, the Court confirmed this view stating that:

> " ... the doctrine never operates so as to extinguish a treaty automatically or to allow an unchallengeable unilateral denunciation by one party; it only operates to confer a right to call for termination and, if that call is disputed, to submit the dispute to some organ or body with power to determine whether the conditions for the operation of the doctrine are present."(91)

Before drawing the discussion of the question under consideration to a close, it would be pertinent to mention that although international law allows the termination of a treaty in the event of some fundamental changes in

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(89) Ibid., para 36, p.18; para 36, p.63 respectively.
(90) Ibid., para. 43, p.21; para. 43, p.65.
(91) Ibid., para. 44, p.21.

conditions, it equally recognizes that in cases of treaties fixing frontiers, there can be no question of release from obligations. The Central American Court of Justice, for example, has taken this stand in the dispute referred to it between Costa Rica and Nicaragua. The Court held that the treaty in question

> "has wholly preserved its binding force up to the present....owing to the very nature of its stipulations, which are permanent in character."(92)

This appears to mean that this Court refused to apply the clause of changed circumstances to the boundary treaty. There is a good reason why this should be so. Otherwise, the rule instead of being an instrument of peaceful change, might become a source of dangerous fiction.(93)

The principle that treaties establishing boundaries are outwith the scope of the concept of rebus sic stantibus has been firmly recognized by the international community. It has been embodied in Article 62(2) of the Vienna Convention on the Law of Treaties which provides in part that:

> "2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary...."(94)

5. One final point deserves particular attention. Namely that even if the termination of a treaty was

(92) Cited in Hackworth, G.H., "Digest of International Law", Vol. 5, 1943, p.298.

(93) See YBILC, 1957, Vol. II, pp.56-57, 60-63; YBILC, 1963, Vol. II, pp.207-210, 80-84.

(94) Vienna Convention on the Law of Treaties.

accepted as it is carried out in accordance with the principles of international law, this would not affect the validity or the existence of any rights or legal situations brought about by the execution of the treaty prior to its termination or indeed from the past performance of any of its provisions when it was in force.(95) This principle has gained the approval of the international community. It is embodied in Article 70 of the 1969 Convention on the Law of Treaties which provides that:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
> (a).....
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."(96)

To sum up, the legal status created by executed clauses, territorial settlements of all kinds and boundary agreements subsists even after the valid termination of a treaty.(97)

6. Beyond this, the clear fact that a prerequisite procedural act is required for the validity of termination. There is evidence to suggest that the party intending to terminate the treaty must notify the other.(98) The Special Rapporteur to the ILC in 1957 stated that:

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(95) YBILC, 1957, Vol. II, pp. 16, 35, 67-68.
(96) Vienna Convention on the Law of Treaties.
(97) YBILC, 1957, Vol. II, pp.16, 35, 67-68.
(98) YBILC, 1963, Vol. II, p.214.

> "... a declaration of termination which is not officially communicated to the other party has no effect .... if relations are bad, governments ..... to communicate with each other even through a third party."(99)

A similar clause was incorporated in the 1963 report of the Special Rapporteur, Waldock, to the ILC.(100) Eventually, this principle has been codified in Article 69 of the Convention on the Law of Treaties which stipulates that the termination, withdrawing from, or suspending of the operation of the treaty could only be done through an instrument communicated to the other parties to the treaty and issued by the party affecting the termination or suspension.(101)

There is yet another stipulation. The right of any individual party to terminate the treaty, even when it is in conformity with international law, has to be expressed before the date of termination. Article 56(2) of the Convention on the Law of Treaties states that at least one year's notice must be given prior to the date of termination.(102)

On the basis of our examination of the aspects of the validity of termination treaties, and taking into account that the language of the preamble of the 1937 Treaty used the past tense to refer to agreements already concluded,

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(99) See Comments of Special Rapporteur to the ILC in 1957, Secont Report on the Law of Treaties, YBILC, 1957, Vol. II, pp.45-69.

(100) YBILC, 1963, Vol. II, p.86.

(101) Vienna Convention on the Law of Treaties, Article 65.

(102) Ibid., Article 56(2).

clearly it would seem to support that the Iranian abrogation of the 1937 Treaty is inconsistent with the principles, of international law in the area of treaty laws. Although it is not our concern to deal with the legal consequences of the 1937 Treaty, it does remain to conclude that:

1. The agreement of 1937 could not be regarded as obsolete and was binding upon the parties. Unilateral termination on the part of the Iranian Government would have no legal effect, since the agreement could only be terminated by mutual consent.
2. As far as the status of the Shatt al-Arab is coneerned, it was wholly under the sovereignty of Iraq.

However, "in view of the sincere willingness of the two parties ...to reachieve an ultimate and permanent settlement of all outstanding questions between the two countries", the crisis thus brought about was eventually settled by convening a "Treaty on International Borders and Good Neighbourly Relations" in June 1975.(103) According to Article 2 of this Treaty, international borders on the Shatt al-Arab are those demarcated in accordance with

> "the principles and pursuant to the provisions of Protocol for the demarcation of river borders and supplements thereto, appended with this treaty."

Article (1) of the Protocol on the Demarcation of Iraq-Iran Water Borders annexed to the 1975 Treaty provides that:

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(103) See the Preamble of "IRAN-IRAQ Treaty on International Borders and Good Neighbourly Relations" of June 13, 1975 published in the "Baghdad Observer" paper Nos. 2240-41 June 23 and 24 1975.

> "The two contracting parties confirm and realise that the demarcation of international water borders between Iraq and Iran has been conducted in accordance with Thalweg line."(104)

However, it is reported that Iraq on October 1, 1979 has denounced the 1975 Agreement.(105) This appears to mean that this treaty came to an end. From that time on, as a result of this denouncement, the situation is as it had been up to 1975, namely the entire Shatt al-Arab estuary is under the sovereignty of Iraq.

IV. The Drawing of the Eastern Boundary of the Iraqi Territorial Sea

Drawing lateral boundaries, if one applies the Geneva Convention,(106) is chiefly technical in nature, and should not present great difficulties. Thus, once the precise position of the ultimate point on the border line between the neighbouring States is well defined, the construction of the lateral line should not involve any issues of principles. Looking in particular to the boundary line between Iraq and Iran, the general absence of offshore islands beyond the coastal fringe eliminates one potential source of controversy.

According to Article 12 of the TSCZ Convention of 1958, the marine boundary line between Iraq and Iran is the equidistance line. This line can be drawn up on points on

(104) The Protocol is published in "Baghdad Observer", ibid.

(105) See The International Herald Tribune, 30084, October 2, 1979.

(106) The acceptance of certain rules in delimiting narrow zones of the sea between lateral States, such as the territorial sea, does not necessarily imply or follow the acceptance of the same States to the same rules

the baselines of the two countries. The process of determining marine boundaries between neighbouring States has been treated thoroughly by numerous experts.(107) This method involves selecting points on the baseline of Iraq a, b and c from M (the ultimate point on the eastern bank of Shatt al-Arab), to the west. Also, the points on the baseline of Iran are a', b', and c' from M to the east. The boundary line is drawn between the two countries in the following way. A certain point on the water, the same distance from a and a' is chosen by the courbe tengeante method. This point is the first one on the boundary line and let it be called X. A line is drawn between M and X. This line constitutes the first part of the boundary line on the territorial sea. Other points on water equidistant from b, c and b', c' on the low-water marks of both Iraq and Iran are then selected by the courbe tengeante method. This operation is repeated to obtain new points on water, until a point at a distance of 12 miles(108) is reached. Then, by drawing a line connecting those points chosen on the water with M, the equidistance line between Iraq and Iran is established.

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(106) contd...
as in large submarine areas far off the coast. See ICJ, North Sea Cases, Pleadings, 1968, Vol. 1, p.407.

(107) See e.g., Boggs, op.cit., Ref. (13), at 14, pp. 240-266; Knight, op.cit., Ref. (1), at 8, pp.257-258; Whiteman, op.cit., Ref. (5), at 9, Vol. 4, pp.323-343.

(108) This distance is the respective width of the Iraqi and Iranian territorial seas according to their laws. The Iraqi law No. 71 of 1958 (Article (2) and Article (3) of the Iranian Act of April 12, 1959. See Appendices No.IV and No.VI respectively.

Subsection Three

The Delimitation of the Western Boundary of the Iraqi Territorial Sea

The western boundary of the Iraqi territorial sea represents part of the marine boundary line between Iraq and Kuwait in the Arabian Gulf. As noted above[109] the land frontier is essential as the ultimate point on that line is vital to the issue in question. Our task in this subsection is to ascertain where precisely the last point on the Iraqi-Kuwaiti boundary line lies. This in turn requires us to touch upon the legal status of this boundary. Thereafter, an attempt will be made to fix the western boundary of the Iraqi territorial sea.

I. Facts Relating to the Iraqi-Kuwaiti Border Line

Formerly, Turkey was sovereign over what is now Kuwait. In the early 1890s this status was not debated. Effective Turkish control and administrative authority was exercised over Kuwait. The ruler of Kuwait, who was allowed limited, administrative authority, used to be appointed by Turkish Central Government and was made officially subordinate to the Basra Wilaya.[110]

Owing to extensive British interests in the Arabian Gulf,[111] it was the British hope to bring this territory

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(109) See above p. 326.

(110) The Wilaya is the governor. See Longrigg, Stephen Hemsley, "Iraq 1900 to 1950", 1953, pp.265-266.

(111) The primary British aim in the area was to make the route to India secure and prevent the establishment of a strategic position by another power which could threaten the approaches to India.

under their influence.(112) Various steps were taken to this end. This was particularly apparent when the Sheikh of Kuwait asked for British protection. He made an overture to Britain indicating that a sort of protectorate relationship between himself and the British Government might prove expedient.(113)

Britain, however, was inclined to maintain a reserved attitude as she had every reason to foster amicable relations with the Ottoman Empire, which in turn had a wide range of interests in keeping Kuwait under her power.

Thus, the Kuwaiti Ruler's request to Britain was refused at first.

In the late 1890s, the situation was to change radically. Kuwait became a serious concern for British diplomacy, with the intrusion of European diplomatic conflicts into the Arabian Gulf.(114) There was an important challenge to continued British existence in the area.

Russia wanted to arrest British influence in the region and subjugate the whole of Asia. France, also,

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(112) Firstly, Kuwait was a fair harbour; secondly, it was a possible railway terminus for the Baghdad railroad project; thirdly, it was a trade-route crossing point; and finally, it would allow the exclusion of Russian or any other foreign influence. See Busch, Briton Cooper, "Britain and the Persian Gulf, 1894-1914", 1967, p.105.

(113) Monroe, Elizabeth "The Shaikhdom of Kuwait 1890s", Int. Aff., Vol. 30, 1954, pp.227-272; Busch, Briton Cooper, "Britain and the Status of Kuwait 1896-1899", M.E.J., Vol. 21, 1967, pp. 187-189; and ibid., pp. 100-101.

(114) Busch, op.cit., Ref. (113) above, pp.187-198; and op.cit., Ref. (112) above , pp.101-102.

succeeded in concluding an agreement with the Sultan of Muscat. Germany fostered her friendly relationship with the Ottoman Empire in order to enter and then sway the Arabian Gulf area.(115) Additionally, having been alarmed about German and Russian Railway plans to utilise Kuwait as a terminal for their Middle Eastern road projects, Britain took charge of Kuwaiti defence and foreign affairs.(116) Having arranged for a protectorate regime over the Sheikhdom, she therefore drafted a bond with all haste and in secrecy on January 23, 1899.(117) By this bond, the Sheikh bound himself, his heirs and successors,(118) not to enter into relations with, or cede, sell, lease, mortgage or give for occupation or for any other purpose any portion of his territory to the governments or subjects of any other power unless the previous consent of her Majesty's Government had been obtained.(119) Britain, by this Bond, had a definite foothold and preserved her position in the Arabian Gulf in general and in particular Kuwait. It was the first time the so-called Kuwaiti

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(115) Kumar, Ravinder, "The Records of the Government of India on the Berlin-Baghdad Railway Question", His. J. Vol. 5, 1962, p.76.

(116) Busch, op.cit., Ref. (113), at 357, p.187.

(117) The Turks were rumoured to have had knowledge of the secret agreement. Britain denied the conclusion of this Bond for when asked by the Ottoman Empire. Busch, op.cit., Ref. (112), at 357, pp.111-113.

(118) For a consideration of Rs. 15,000 (£1,000). See Busch, op.cit., Ref.(113),at 357, p.197.

(119) Busch, ibid., p.197; Liebesny, Herbert Liebesny "Administration and Legal Development in Arabia: The Persian Gulf Principalities", M.E.J., Vol. 10, 1956, p.33.

territory issue was raised.(120)

By the turn of this century, British interests in the region were at risk of being challenged by foreign powers. An important threat to Britain's position was the increasing involvement of Germany in the area. Kuwait was surely to be selected as the terminal point of the railway line which Germany planned to establish to connect east and west. Britain was aware of the likelihood of this new threat to her influence in the region. Having intended to preserve if not to enhance her position, Britain therefore sought to arrest this challenge. The solution would be a declaration of Kuwaiti independence. Meanwhile, she wished to avoid any direct clash with the Turkish Government.

Hence, more diplomatic statements were called for.(121) Having opposed at the outset the participation in the construction of the Baghdad Railway, Britain realised that if the line was built by Germany alone, as it indeed would be, then her final position with regard to it would be a very unenviable one. She was very conscious of the fact that effectual power in the area would pass to Germany soon after the construction of the line. Thus, she abandoned this negative approach as far as the Baghdad Railway was concerned and decided to associate herself with the project at the earliest opportunity. Otherwise, she would have cause to regret her exclusion from a scheme

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(120) Busch, op.cit., Ref. (113), at 357, pp.197-198; and op.cit., Ref. (112), at 357, pp.112-113.

(121) Busch, op.cit., Ref. (112), at 357, pp.188-189.

so significant for the balance of power in the region.(122) On the other hand Germany was aware that the execution of the railroad project without any semblance of political or financial support from Britain was in fact impossible.(123) Therefore, in the years to follow, Anglo-Ottoman and Anglo-German negotiations on the Baghdad Railway were initiated. Consequently, the parties concerned drew up a treaty in 1913 according to which Kuwait was to be an autonomous Qada(124) under Turkish domination, with the Sheikh as Qaimaqam.(125) By this treaty, the territory of Kuwait proper was to be that of a circle drawn with a radius running from Kuwait Town to the northern tip of Warba Island. An outer circle was also drawn within which the tribes were to be considered subordinate to Kuwait and the Turks were neither to post garrisons nor to make administrative changes. Although never ratified on account of the outbreak of the First World War, this treaty is historically considered the first instrument purporting to determine the so-called Kuwaiti Territory boundaries.(126)

It can thus be concluded that the status of the Kuwaiti boundaries was a subject of long discussion prior to the eruption of the First World War and even after it.

(122) The history of the Baghdad railroad in Kumar, op. cit., Ref. (115), at 358, pp.70-79.

(123) Germany, at first, succeeded in gaining the support of France to provide a financial guarantee for the railway. See Kumar, ibid., pp.70-

(124) A city or province comes in second place as a matter of importance.

(125) The Governor of the Qada.

(126) Hay, op.cit., Ref. (68), at 311, pp.98-99; and op. cit., Ref. (4), at 288, p.435.

Shortly after the war, the name Kuwait again arose. Britain wished to reserve her power in Kuwait. Several further steps therefore were taken towards delimiting definitely the borders of Kuwait.(127) In April 1923, the British Representative in Baghdad, Sir Percy Cox, addressed a letter to the British Political Resident in Kuwait asking him to inform the Ruler of Kuwait of the British Government's recognition of the Iraqi-Kuwaiti boundaries, as they were previously claimed by the ruler himself.(128)

Thus far, it is clear that the Iraqi-Kuwaiti boundaries had not been validly delimited. It is the view of some writers that in 1932 Iraq recognized the boundaries mentioned in the 1913 Treaty, when the Iraqi State came into being.(129) In a letter dated July 21, 1932 to the British Representative in Kuwait, Sir Francis Humphreys, the Iraqi Prime Minister admitted the land frontier between

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(127) The British Representative in Iraq, Sir Percy Cox managed in 1922, in cooperation with H.R.B. Dickson, when the latter was one of the political captains in Iraq, to conclude Al-Uqair Conference which ended in the delimitation of the Iraqi-Najid and the Saudia-Kuwaiti boundaries. There was no indication of the Kuwaiti-Iraqi boundaries in this Conference. See, Dickson, H.R.P., "Kuwait and Her Neighbours", 1956, pp.262-280.

(128) The British Representative Sir Percy Cox wrote, in his letter to the Political Resident that "it is, in so far as it goes, identical with the frontier indicated by the Green Line of the Anglo-Turkish Agreement of July 29th 1913, but there seems no necessity to make special allusion to that document in your communication to the Sheikh...". See ibid., p.280.

(129) Hay, op.cit., Ref. (4), at 288, p.435.

Iraq and Kuwait to be as it had been determined in the 1913 unratified treaty. This letter was accepted by the Ruler of Kuwait in a letter dated August 10, 1932.(130) This status of the Iraqi-Kuwaiti boundaries remained until the Second World War and thenceforth 1963 when the representatives of Iraq and Kuwait declared on October 4, the recognition of Iraq, the independence of the State of Kuwait and its complete sovereignty within the boundaries indicated in the letter of the Prime Minister of Iraq dated July 21, 1932.(131)

II. Conclusion "The Facts in the Light of Legal Principles"

Apart from the aforementioned instruments, no other legal act to determine the Iraqi-Kuwaiti land frontiers has come to pass. These instruments it is submitted may lack a practical binding force. Undoubtedly, States usually attach much weight to their frontier declarations and treaties. Accordingly, such an instrument should be concluded expressly and explicitly. As regards the 1913 Treaty, irrespective of other factors which are outwith the scope of this work, it had never been ratified.(132)

As far as the Iraqi Prime Minister's letter to the British Representative is concerned, it relied upon the 1913 non-ratified treaty. On the other hand, it can hardly be proper to depend on such an act to design

(130) Hay, op.cit., Ref. (68), at 311, p.98; Al-Baharna, op.cit., Ref. (3), at 318, pp.256 et seq.

(131) Middle East Economic Survey, A weekly review of news and views on Middle East Oil, published by the Middle East Research and Publishing Centre, Beirut, No. 49, 11 October and No. 50, 18 October, 1963.

(132) Hay, op.cit., Ref. (68), at 311, p.98.

international boundaries, since demands required by international law in such acts have not been met.

The Iraqi Prime Minister's letter, owing to the non-existence of both international and constitutional law prerequisites, once again lacks the authority of a legally binding rule. Such a private letter, if it were regarded to delimit the Iraqi-Kuwaiti boundaries, widens at least in the writer's view, the effect of the text far beyond its own terms. It reflected only the personal outlook of the Prime Minister himself, as it did not exhaust the constitutional prerequisites, namely non dat qui non habet.

Finally, the fact that States have drawn up a declaration or a treaty does not mean per se that they have acted upon it. One might as well suggest that States may require further time to consider the effects of the agreement before finally committing themselves. Clearly, many constitutions require subsequent legislative approval of certain kinds of agreements by a specified organ of the State and boundary agreements surely fall within this category.

Accordingly, agreements of this sort do not come into effect unless the required procedure for approval and ratification is completed.(133)

After this clarification, it is to be noted that the 1963 Declaration has neither been authoritatively issued nor ratified by the legislative power. Additionally, it, by its terms, did not do any more than recognize the status quo as it had been, and did not determine what the status

(133) See below, pp. 366 et seq.

quo was. It recognized the Iraqi-Kuwaiti boundaries as they had been referred to in the letter of the Iraqi Prime Minister which in itself was of no binding effect not having been framed in accordance with the respective constitutional processes. Moreover, neither the Prime Minister's letter nor the 1963 Declaration met the international law prerequisites. It is submitted that predominant opinion and practice support the view that a legal act determining frontiers has to define clearly the border line, its markers and physical features.(134) This submission is confirmed by examination of international practice for a number of frontier treaties have defined definitely and accurately the boundaries between the States concerned. In support of this it could be relied upon the Belgian-Netherlands Boundary Convention of 1843 which delimited accurately in Article 3 the boundaries between these two countries.(135) In addition to the Belgian-Netherlands Convention, other frontier agreements almost without exception contain similar clauses. The British-Ethiopian Frontier Agreement of December 6, 1907,(136) the Protocol of Peace, Friendship and Boundaries between Ecuador and Peru,(137) and the United States-Mexican

(134) Bishop, William W. Jr., "Interpretation of Netherlands-Belgian Boundary Convention - Status quo - Proof of mistake - acquisition of sovereignty in derogation of treaty," AJIL, Vol. 53, 1959, pp. 937-943.

(135) See Article 3, cited in Whiteman, op.cit., Ref. (5) at 9 , Vol. 3, p.627.

(136) See Whiteman, ibid., pp.661-668.

(137) Article 8 of the Protocol of 29 June, 1942, cited in ibid., p.678.

Convention of August 29, 1963,(138) have all defined the boundaries between the States concerned definitely and distinctly. Article 1(a,b) and Article 2 of the Agreement for the Delimitation of Boundaries between the Hashimite Kingdom of Jordon and the Kingdom of Saudi Arabia are similar in purport.(139) Also, the provisions of the Italian Peace Treaty of 1947 were of such a nature that there could be no doubt about the frontiers affected by it.(140)

The preceding agreements include all the relevant instances. They point with clarity to the proposition that State practice has applied and honoured the practice of defining the boundaries accurately in frontier agreements. Otherwise, certainty, which is the chief aim of such treaties, would not be achieved. As has been supported by the ICJ, frontier agreements obviously seek immutability. In the Case Concerning the Temple of Preah Vihear,(141) the ICJ maintained that:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality."(142)

Furthermore, as well as being state practice, writers are also of the opinion that subsequent approval is

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(138) Cited in ibid., p.690.

(139) The full text of the Agreement is cited in the M.E.J. Vol. 22, 1968, pp.346-347.

(140) See for example Articles 2, 3, 6, 11 cited in Fitzmaurice, G.G., "The Juridical Clauses of the Peace Treaties", Hague Recueil, Vol. 73, 1948, II, p.280.

(141) Cambodia v. Thailand, ICJ Reports, 1962, pp. 2-146.

(142) Ibid., p.34.

essential to the validity of a treaty. Halleck, for instance favours this view. He wrote:

> "... under the positive law of nations, ratification by the State in whose name the treaty is made, by its duly authorized minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification, even where this pre-requisite is not reserved by the express terms of the treaty itself."(143)

Oppenheim is also of the same opinion. He states that:

> "Although a treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorised representatives, its binding force is, as a rule, suspended till ratification is given."(144)

He goes on:

> "It is now a universally recognized customary rule of international law that treaties regularly require ratification, even if this is not expressly stipulated."(145)

Similarly, other leading authorities not only express the same view but discuss the question at length, citing a number of other authorities in support of the question. According to the view of the writers, even if the right of ratification is not expressly reserved, it is nevertheless to be read into the treaty as it exists as a general

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(143) Cited in Fitzmaurice, G.G., "Do Treaties Need Ratification?", BYBIL, Vol. 15, 1934, p.122.

(144) Oppenheim, op.cit., Ref. (262), at 137, p.813.

(145) Ibid., p.815.

principle of law.(146)

Not only the weight of authority is in favour of the necessity for ratification, but also general practice of States invariably requires ratification.(147) For example, Article 5 of the Agreement for the Delimitation of Boundaries between the Hashimite Kingdom of Jordan and the Kingdom of Saudi Arabia, previously mentioned, provides that:

> "This agreement will be ratified according to the constitutional procedures in each of the contracting Kingdoms."(148)

Turning to international adjudication, the same conclusion may also be drawn from judgments of the international tribunal. Lord Stowell, in his judgement in the Eliza Ann Case(149) stated on March 9th, 1813 that:

> "According to the practice now prevailing, a subsequent ratification is essentially necessary, and a strong confirmation of the truth of this position is, that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of subsequent ratification."(150)

Here, again there is evidence that, in general, agreements are subject to ratification. This has been confirmed by the ICJ in the International Commission of

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(146) Fitzmaurice, op.cit., Ref. (143), at 366, p.124.

(147) YBILC, 1962, Vol. II, p.171.

(148) The Full Text is cited in M.E.J., Vol. 22, 1968, pp. 346-348.

(149) (1815) Dod, 244-251.

(150) Ibid., at 248.

the ODER Case. The Court approved the contention of the Polish Government that the "Barcelona Convention" was not binding upon her since she had not ratified it. Then, the Court admitted that:

> "The expression to draw up 'etablir' a convention is perhaps not entirely without ambiguity; but it would be hardly justifiable to deduce from a somewhat ill-chosen expression an intention to derogate from a rule of international law so important as that relating to the ratification of conventions...." (151)

The Court concluded that

> "even having regard to Article 338 of the Treaty of Versailles, it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that Article independently of ratification."(152)

The question therefore rests on whether or not a treaty signed by plenipotentiaries needs ratification to be effective and valid. In the abstract, actions carried through by those who are rightly authorized, are incumbent upon the principle. However, it is now well established by later usage of States, that a treaty even if signed by plenipotentiaries, requires ratification.(153)

The conclusion is that there has been no formal act by which Iraq has given her final acceptance to any of the aforementioned instruments or intimated this acceptance to Kuwait. Seen from the constitutional point of view,

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(151) PCIJ Series A, No. 23, p.20 (1929).
(152) Ibid., p.21.
(153) See U.N. Doc. A/5209, YBILC, 1962, Vol. II, p.171.

the statements referred to are totally devoid of any legally binding effect. Contrary to the principles of international law, they have not defined in detail the exact frontier line between the two countries.(154) Adopting provisions in a broad sense leads only to the most serious hostilities. Therefore, whilst it is our desire to show every consideration for the views put forward to conclude that a boundary line between Iraq and Kuwait has been established, it would however seem, for the reasons explained, that in the absence of precisely accepted and well defined principles of delimitation in a treaty in force it would be dangerous to jump to such a conclusion. It would consequently appear that the earlier documents have only a slight and inclusive value, if indeed any. Their role is confined only to declaring the desire of the parties to find a conclusive solution. They are thus of a purely rhetorical character.

The Drawing of the Western Boundary of the Iraqi Territorial Sea

Unquestionably, the placing of the ultimate point on the land frontier between Iraq and Kuwait has enormous relevance in determining the maritime boundaries between them. It has just previously been indicated that as yet the frontiers between the two countries have not officially been fixed.

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(154) The chief steps in fixing a boundary line can be summarized in four stages: (1) a political decision on the allocation of the boundary line; (2) the definition of a boundary in an agreement; (3) the demarcation or an actual laying down of the boundary line; (4) the subsequent day-to-day administration. See Bishop, op.cit., Ref. (2), at 8 , p.284.

In this position it would be necessary to presume the location of such a point. Then the process which was explained, for constructing, the equidistance line between Iraqi and Iranian territorial seas, is to be applied.(155)

Section Two

The Problems of Delimiting the Iraqi Territorial Sea Boundaries

In general, the formation of the Arabian Gulf is such that major problems and sometimes formidable obstacles to the delimitation of marine boundaries are created. For example, we may note near the mouth of the Shatt al-Arab river, the existence of much precipitated silt carried down by the outwash of sandy soil to form a large body of solid ground. The amount of silt carried down the Shatt al-Arab is estimated to be about 35 million cubic metres per year.(156) This natural phenomenon may create a problem in that the territories of Iraq and Iran may gradually lose ground by reason of accretion. Also, the location of the Iraqi baseline is constantly and materially being affected by accretion. These problems therefore must be considered.

Subsection One

The Legal Status of Areas Created or Diminished by Accretion

Iraq occupies the land of ancient Mesopotamia, an area of some 171,000 sq. miles between two rivers, the Tigris

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(155) See above pp. 354, 355.

(156) Al-Mitoori, op.cit., Ref. (42), at 301, p.41; El-Hakim, op.cit., Ref. (66), at 310, p.10.

and the Euphrates. The Shatt al-Arab, one of the longest rivers in the world, is the confluence of these twin rivers with tributary of the Karun river in the southern part of Iraq near the head of the Arabian Gulf. The point of convergence of the Tigris and the Euphrates used to be at the city of Qurna, but in the last quarter of the 19th century, there were apparent changes in the course of the Euphrates causing it to come together with the Tigris a short distance farther on at Karmat Ali.(157) The Shatt al-Arab, which flows on as a single stream to the Arabian Gulf,has an overall length of 2,200 miles, placing it among the sixteen longest rivers in the world.(158) The three tributaries of the Shatt al-Arab carry large amounts of silt. The mean annual volume of sediment deposited by the Shatt al-Arab is estimated at approximately 500 thousand tons.(159) It follows then, that the Shatt al-Arab river is building new land at the head of the Arabian Gulf.(160)

Dealing with this particular point, it may be noted

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(157) See Al-Mitoori, op.cit., Ref. (42), at 301, p.36.

(158) Gressey, George B., "Geographical Review, The Shatt al-Arab Basin", M.E.J., Vol. 12, 1958, p.448.

(159) Wilson, Sir Arnold T., "The Delta of the Shatt al-Arab and Proposals for Dredging the Bar", Geoj, Vol. 65, 1925, pp.232, 233.

(160) In the earlier centuries the Shatt al-Arab built up the land further inland. See Gressey, op.cit., Ref. (158), at 371, p. 449. However, slowly, but nevertheless continuously, great territorial changes have occurred. The distance between the two rivers, the Tigris and the Euphrates, has been estimated to be between 7 and 25 miles. According to Pliny, (23-79 A.B.) the Euphrates had in ancient times emptied its waters into the sea through its own estuary. See Wilson, ibid., p.225.

at the outset that rules governing accretion are well established. They raise only a few small problems in theory. Yet, in practice they have created boundary controversies.(161)

In general, it is recognized that when a State owns the bank of a river, on which accretion takes place, the new land is deemed to be part of the territory of that State. Accordingly, if a river builds up the shore with sediment, the riparian State has exclusive rights to the new land. It follows that such alluvial deposits or other additions are subject to the littoral State's jurisdiction.(162)

Turning first of all to what has been written on the subject, there is an overwhelming consensus of opinion amongst writers that where accretion adds ground, the new land belongs to the riparian State. According to Professor Sultan, this mode of acquiring ownership was drawn from private law to be included in international law, on the grounds that territory of State was an integral part of the absolute and private property of the sovereign.(163) Accretion and new land formations, whether natural or man-made, are assimilated to old ones. Additions are considered to be part of the State which possesses the coast of the river and are thus subject to its sovereignty irrespective of whether or not the State concerned has made any declaration or claim. Strictly speaking therefore,

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(161) Greig, D.W. "International Law" 2nd ed., 1976, p.157.

(162) Ibid., at 157.

(163) Sultan, Hamed, "International Law in Time of Peace" 1st ed., 1962, pp.716-717.

appendages such as deltas, islands, or even sandbanks should be attributed to the littoral State. Similarly, this concept covers the artificial extensions of man-made constructions. Thus, the general rule of accretion is applicable to physical changes to the shore, which take place by its protrusion out into the sea.(164)

Professor Kanim asserts that the slow deposition of soil as a river fills up, is subject to the adjoining state's jurisdiction, whether or not it was so declared or any action was taken in this regard.

Lands emerging within territorial seas or occurring at shorelines or mouths of rivers, appertain to the coastal State. In the view of Professor Kanim, who shares the belief of Professor Sultan, this rule covers any artificial additions that the coastal State may build on to its harbours as protection from the waves from its territorial sea. (165)

Amongst others, Summers, Oppenheim and O'Connell state that according to the principles of the law of Nations, additional territory arising in rivers and within the limits of national jurisdiction, are attached to the adjoining States.(166) This concept, De Vattel argues, has its origins in Roman Law. It has been transferred from the Roman Law rule of accessio cedit principali. It

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(164) Ibid.

(165) Kanim, Dr. M.H., "The Principles of Public International Law", 1965, p.313.

(166) Oppenheim, op.cit., Ref. (262), at 137, pp.515 et seq.; O'Connell, op.cit., Ref. (200), at 116, p.192; and op.cit., Ref. (5), at 54, pp.428-429; Summers, Lionel M., "The International Law of Peace", 1972, p.37.

follows that additions accrue to the territory of the State next to the river as a matter of legal status.(167)

Additional support for the preceding principle may be found in international adjudications. Turning to the World Court, we note at the outset that the ICJ has not had an opportunity to pronounce upon the question of accretion. International tribunals, other than the World Court, almost without exception apply the general principle on accretion. In the Anna Case,(168) the question arose as to what was to be deemed the shore, since there were a number of small mud islands. The facts of the case, in short, were that an American ship "The Anna" was captured by a British Privateer near the mouth of the Mississippi River. The site of capture was more than three miles from the mainland, but no more than two miles from the alluvial islands composed of earth and trees brought down by the Mississippi River and located on the western shore of its principle mouth.

The U.S. claimed that the vessel be restored due to the fact that it was seized within the American territorial sea, and thus was within her jurisdiction. Lord Stowell held that the islands were "the natural appendages of the coast on which they border and from which indeed they are formed" and that "whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the

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(167) De Vattel, E., "The Law of Nations or the Principles of Natural Law", Vol. 3, Translation of the Edition of 1758, by Charles G. Fenwick, Washington, 1916, pp. 102 et seq.

(168) U.S. v. U.K., (1805) 5C. Rob. 373 - 385.

soil".

He accordingly released the ship to its American owners, as territorial protection extended to the waters of the islands which he described as forming "a kind of portico to the mainland".(169)

The case of The Secretary of State for India in Council v. Sri Raja Chellikani Rama Rao and others(170) in 1916, acknowledged that land additions are to be deemed part of the territory of the State bordering the river or the sea. What happened in this case was that islands had been formed near the mouth or delta of the River Godaveri. It was held that

> "... do not doubt that the general law, as already stated, is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands, formed in the sea, in the estuary of mouth of the Godaveri River, is in the British Crown."(171)

In addition, by virtue of Article 38(1) of the Statute of the ICJ, a solution might be sought for in municipal law, namely "the general principles of law recognized by civilized nations".(172)

At the municipal level, the rule that additions be considered part of the territory of the State possessing the river, prevails. Cases discussed and argued by the

(169) Ibid., 385.

(170) 32 T.L.R., 1915-1916, 652-655.

(171) 32 T.L.R., ibid.

(172) Today it is generally admitted that rules of law accepted by civilized nations constitute part of international law. See ICJ Pleadings, 1968, Vol. 1, p.392.

U.S. Supreme Court abound with instances pertinent to the question.(173)

For example, a dispute arose betweenthe State of Nebraska and the State of Iowa in 1891, and the problem was referred to the U.S. Supreme Court. After putting forward the case, the Court proceeded to state that if the banks or the shore of a river are extended or changed by the gradual process known as accretion, then it can be firmly settled that the additional ground is held by the riparian State.(174) The Court then, went on to say that:

> "if a territory which terminates on a river..., that is to say, every gradual increase of soil, every addition which the current of the river may take to its bank on that side, is an addition to that territory."(175)

Another Judgment decided by the U.S. Supreme Court supported the principle that natural land accretions formed by silt can only be thought of as accretions to the portion of the State next to the river. In the Case of the State of Louisiana v. the State of Mississippi, the U.S. Supreme Court held that accretions attached to a coastal State formed part of its territory.(176)

From the foregoing, it appears clear that natural formations built up by a river belong ipso facto to the State owning the bank of the river regardless of any special

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(173) New Orleans v. United States, 10 Pet. 662 (1836); Missouri v. Nebraska, 196 U.S. 23(1904); Oklahoma v. Texas, 260 U.S. 606 (1923).

(174) Nebraska v. Iowa, 143 U.S. 359-370, (1891).

(175) 143 U.S. 365 (1891).

(176) Louisiana v. Mississippi, 282 U.S. 458-467, (1930).

process which has to be gone through.(177)

It follows that the delta pushed seawards by the Shatt al-Arab, estimated at the rate of about 2 miles a century,(178) is governed by the preceding rule. Yet, the entire Shatt al-Arab is under the sovereignty of Iraq.(179) It follows that the new land emerging by reason of silt deposited by the Shatt al-Arab, forms part of Iraqi territory. Additionally, Iraq has erected an artificial port within her territorial sea. In response to the ever increasing demand for Iraqi oil, a deep harbour has been built at Kohral-Amya in order to facilitate the anchorage and loading of huge oil tankers. This artificial formation, in the light of the above propositions, is also an integral part of Iraqi territory.

Subsection Two

The Seaward Extension of the Iraqi Baseline

As stated earlier, the Shatt al-Arab is a great river discharging the constituents of a great mud flat. Its annual deposits are some 35 million cubic metres.(180)

The extensive sedimentary deposits of the Shatt al-Arab obviously affect the location of the water-mark of the Iraqi shore. The Iraqi baseline is moving gradually but continuously seawards, due to slow and orderly accretion. The alterations to the Iraqi baseline, in the

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(177) ABU Hayf, Ali Sadiq, "Public International Law", 1964-1965, p.389.

(178) Encyclopedia Britannica, William Benton, Publisher, 1970,, Vol. 12, p.527.

(179) See above, pp. 331-336.

(180) See El-Hakim, op.cit., Ref. (66), at 310, p.10.

course of time, by the deposit of alluvium from the Shatt al-Arab, presents a problem since the location of the baseline is the corner stone in delimiting the limits of coastal jurisdiction.(181) This question is of vital concern to Iraq, which is located on the inner part of the Arabian Gulf with a sharp frontage of some 40 miles.(182) The line across the mouth of the Shatt al-Arab constitutes part of the Iraqi baseline. Under these circumstances, it is necessary to ascertain whether or not the alluvial formations will automatically affect the placing of the Iraqi baseline.

Although it would indeed be convenient to say that the Geneva Convention on the (TSCZ) embodies solutions to almost all of the problems relating to drawing baselines, this is not quite the case. It provides at the outset the generally accepted rule that baselines from which the territorial sea is measured are always the line of water-mark following the curve of the coastline.(183) However, the language of the sort contained in Article 3 of the Convention on the (TSCZ) gives no evidence that it covers the problem in question.

Article 4 permits a coastal State to deviate from the general principle provided for in Article 3, and claim in certain circumstances the right to delimit its territorial sea according to the straight baseline rule, for example, when the shore is "deeply indented and cut into, or if

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(181) See above p.11.

(182) See above pp.289 et seq.

(183) Article 3 of the Convention on the TSCZ.

there is a fringe of islands along the coast in its immediate vicinity."(184) This rule again is inapplicable in the present situation. It is formulated in the light of the Judgment of the ICJ in the Fisheries Case which was referred to earlier.(185)

Another provision, seemingly pertinent to the subject, offers no assistance in this respect. Article 11 provides a solution for cases where the low-tide elevation is located within or outwith the respective limit of the territorial sea of the State concerned.

However, if it is intended to discover the rule calling for a solution, it should be sought for elsewhere within the Convention. Perhaps the only general Article coming near to the point, it is submitted, is Article 13 inasmuch as it concerns the drawing of baselines across the mouth of rivers. It runs as follows:

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."(186)

In summarizing, it is desirable to make clear the following points:

a. The normal baseline is the low-water mark.

b. The exceptional baseline where coasts are deeply indented or fringed with islands is the straight baseline from point to point.

c. The only proviso close to the establishment of the

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(184) See Article 4 of the Convention on the TSCZ.

(185) See above pp. 16 et seq.

(186) Brownlie, op.cit., Ref. (31), at 20, p.82.

baseline across the mouth of the Shatt al-Arab River is that of Article 13. Its text does not clearly indicate where the baseline is to be drawn in the case of continuous accretion. The application of a rule of such broad terms is surely to be invoked in all cases of drawing baselines across the mouth of rivers. That is to say, the text is very broad indeed, and language of this kind, in the absence of any convincing evidence to the contrary, leaves no doubt that wherever the mouth of the river is, then the aforementioned provision is applicable. Consequently, the baseline will automatically follow the alteration to the mouth of the river and coincide with it throughout the passing of time.

The Convention's provisions relating to the delimitation of marine boundaries between opposite and adjacent States, contain no particular clause to cover this situation. The clause inserted in Article 12, namely the "special circumstances" principle, does not help either. In dealing with this clause, one only has to look at the numerous interpretations which have been advanced from time to time, to realize the vagueness of this term.(187) For example, the ambiguities to be considered are the conditions to be prescribed and the question of authoritative determination of what conditions apply in a given case.

In the absence of a particular proviso therefore, Article 13, due to its encyclopedic character, must cover

(187) See above pp. 211 et seq.

the case of the Shatt al-Arab. It follows that the Iraqi baseline, according to Article 13 of the Geneva Convention, is being pushed gradually towards the sea by the accretion of silt deposited by the Shatt al-Arab river.(188)

As there is no particular pre-existing proviso, other than Article 13, situations where a bargaining advantage can be gained, are anticipated. The probability that this process will be acknowledged by only one side in a dispute, may safely be predicted. However, the need to observe this point in any subsequent negotiations between Iraq and Iran on delimiting maritime boundaries, seems indispensable. It would be safer to include a specific clause in any future bilateral treaty between the two countries in order to provide for adjustment to the baseline.

It is submitted that the changing of the baseline across the mouth of the Shatt al-Arab should not automatically take place on account of alterations to the shores. Automatic changes in the baseline following alterations to the shores of the river must be rejected to avoid the chaos which might ensue if spontaneous adjustment was deemed to occur when any such alteration took place.(189)

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(188) This certainly will effect the limits of the Iraqi maritime boundaries which in turn creates other sorts of problems. Admittedly, there are no general principles of international law applicable to alterations of rivers and their consequences since each change possesses its own particular character due to its concrete circumstances. However that may be, it is suggested that the same proposition as will be considered to be applied as regards alterations of baselines, is to be applies in alterations of marine boundaries.

(189) Even though the alteration is of a limited character since any petty extension of the baseline affects substantially the width of areas appertain to the States concerned.

It would appear more desirable to bring about an adjustment to the baseline at intervals.

In view of these factors, and since Article 13 of the TSCZ Convention is devoted to laying down in very general terms the principles applicable to such situations, one would strongly hope for the incorporation of an article providing for a particular solution.

Recommendation

It is submitted that it would seem appropriate to include the following provision in any future agreement between Iraq and Iran.

1. The baseline across the mouth of the Shatt al-Arab acknowledged in accordance with the principle laid down in Article ( ), will constitute the respective baseline from which the marine boundaries of the contracting States will be measured.
2. a. The line fixed in accordance with the stipulations of the previous paragraph, shall coincide with subsequent gradual and natural changes in the mouth of the Shatt al-Arab.

   b. Artificial changes which may be made by agreement between the competent authorities of the contracting States, are subject to the rule referred to in paragraph 2(a) in so far as these changes are admitted to by the said authorities.
3. The position of the mouth of the Shatt al-Arab shall be surveyed and determined every (..) years, and the location of the baseline across the said river shall, if necessary, be adjusted as defined in paragraph (2).

4. When the baseline across the mouth of the Shatt al-Arab has been surveyed, it will still constitute the conventional baseline irrespective of whatever changes the shores of the Shatt al-Arab may have undergone in intervals between one verification and the next.

CHAPTER FIVE

THE DELIMITATION OF THE IRAQI CONTINENTAL SHELF

As shown in chapter two, the rights over the continental shelf to which the adjacent State is entitled arise ipso facto and ab initio.(1) That is to say, the rights of the littoral State are exclusive, and the State concerned is not required either to issue any express declaration, or to take any formal or unequivocal action in order to acquire these rights.(2) Any proclamation to claim sovereign rights over the continental shelf, therefore, cannot create rights that already exist, nor validate what is unlawful; and such a declaration will, conspicuously, be only of a declaratory character.(3)

A preliminary remark, however, must be made in respect of this point. The numerous natural resources of the seabed and subsoil are too well known to require much clarification. In such a case, delimiting offshore areas, in general, has become of imperative necessity. If international conflicts are to be avoided, and the

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(1) See chapter two.

(2) The Truman Proclamation, op.cit., Ref. (283), at 144; Article 2(3) of the Geneva Convention on the Continental Shelf of 1958; The ICJ pointed out in the North Sea Continental Shelf Cases "... the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here 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". ICJ Reports, 1969, para. 19, p.22.

(3) See above pp. 139-153.

continental shelf areas to be well explored and exploited, definite boundaries will have to be drawn between those areas of adjoining States.(4)

In addition to the aforementioned, the question of drawing a boundary for the continental shelf between neighbouring States either opposite or adjacent to each other, is of further vital concern in the Arabian Gulf. Here, problems sui generis arise which cannot be solved satisfactorily by the application of the methods developed for drawing maritime boundaries in normal geographical situations.(5) The Arabian Gulf, first of all, (as has been indicated earlier) is comparatively shallow,(6) so that it would be fair to say that though it is wholly continental shelf within the meaning of article (1) of the 1958 Convention,(7) no shelf formation in the technical or geological sense exists there. Another complexity arises from islands, elevations and other similar features which are not only numerous, crowded and scattered throughout the gulf but also are commonly the subject of

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(4) Grisel, op.cit., Ref. (48), at 209, p.562; Liebesny, Herbert J., "Legislation on the Seabed and Territorial Waters of the Persian Gulf" M.E.J., Vol. 1, 1950, pp.94-95.

(5) Young, op.cit., Ref. (260), at 136, pp.236-237. The author states that "... submarine areas in shallow seas or gulfs - such as the Baltic, the Persian Gulf, and the Gulf of Paria - present perhaps the most difficult situation of all".

(6) The depth of the waters of the Arabian Gulf, rarely exceeds 50 fathoms (100 mile). See El-Hakim, op.cit., Ref. (66), at 310, p.122.

(7) Ibid., p.58. The Arabian Gulf, it is believed, has no continental shelf in either the geographical or geological senses. It has been considered as merely a flooded part of the continent. Auguste, op.cit., Ref. (4), at 1 , p.31.

disputed sovereighty.[8] Finally and most significantly, the large number of proven and probable petroleum deposits are one of the effectual reasons for the difficulty in the delimitation of maritime boundaries process.[9] As will be shown,[10] conflicting claims over submarine boundaries in the Arabian Gulf have in many cases first arisen as a result of the overlapping of offshore oil concession areas. Briefly, in some instances concessionaires refused to proceed with drilling operations in overlapping areas until some agreement or understanding on the delimitation of boundaries was reached. Presumably, this was because they were reluctant to invest substantial amounts of money in exploration in areas which may subsequently be contested. Consequently, it has become clear that possession of a few miles of submarine area could make the difference between owning or not owning a profitable oil field.[11]

For the foregoing, and primarily as a result of the discovery of oil there, most of the local governments have shown interest in the issue of submarine boundaries. It may be added to these arguments, that the problem at hand, is even more serious for Iraq which has a particular problem caused, as will be discussed later,[12] by the

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(8) Gutteridge, op.cit., Ref. (254), at 133, pp.103-104; El-Hakim, op.cit., Ref. (66), at 310, p.123.

(9) El-Hakim, op.cit., Ref. (66), at 310, p.122.

(10) See below pp. 434 et seq.

(11) El-Hakim, ibid., p.122.

(12) See below, pp. 389 et seq.

special configuration and short extent of her coastline, while at the same time having overriding interests in her adjacent sea.(13)

In any event, it will be on this that the present chapter will concentrate primarily. It will be divided into two sections. The delimitation of the Iraqi continental shelf's boundaries will be the subject of the following section. Also, since the determination of boundaries between the continental shelves of adjacent States gives rise to difficult problems and major disputes, the second section will be devoted to certain possible difficulties in this respect.

Section One

The Delimitation of the Iraqi Continental Shelf

As has been sufficiently demonstrated, the Geneva Convention, as well as the rules of customary law, vest in Iraq exclusive sovereign rights over her continental shelf for the limited purposes of exploration and exploitation. Obviously, the attribution of such exclusive jurisdiction requires the delimitation of boundaries between the different submarine areas appertaining to Iraq, Kuwait and Iran. It may be observed that the importance of such partitioning of the seabed and subsoil is self-evident, but one point deserves particular attention. It is necessary to recall that the bed of the Arabian Gulf is wholly continental shelf in the legal sense because of its shallowness.(14) Thus, there is no

(13) Al-Muhana, op.cit., Ref. (18), at 6, pp.240-242.

(14) See above pp. 292 et seq.; See also Article (1) of the Geneva Convention of 1958 on the Continental Shelf.

outer limit of the continental shelf appertaining to Iraq, since it will inevitably meet the boundaries of both Kuwait and Iran.

After this general clarification, we shall attempt to discuss the subject in the following two subsections, which, it is expected, will cover the question:

Subsection One: Claims and Legislation of Iraq to the Continental Shelf Area.

Subsection Two: What are the Rules of Law Applicable to the Delimitation of the Continental Shelf Between Iraq and Her Neighbours?

Subsection One

The Continental Shelf Legislation and Claims of Iraq

It might be useful, at the outset, to point out that prior to 1949, no national legislation relating to the submarine areas, as far as concerns the practice of the Arabian Gulf States is known to exist.(15) Admittedly, an era of legislation and claims was initiated by the discovery of enormous oil deposits lying under the seabed and subsoil.(16)

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(15) Auguste, op.cit., Ref. (4), at 1, p.57.

(16) The first Arabian Gulf State to enact legislation as to the seabed resources was Iran. An Act was approved by the Iranian Council of Ministers in 1949 and was passed as a law on June 18, 1955. See Article 2 of this legislation published in ST/LEG/SER.B/16(1974) p.151 and reproduced as Appendix No. (V) to this thesis. See also Al-Baharna, op.cit., Ref. (3), at 318, pp. 280-281; Auguste, op.cit., Ref. (4), at 1, p.79. Some writers consider Saudi Arabia which asserted, by a Royal Decree dated May 28, 1949, its jurisdiction and control over the seabed and subsoil of the area contiguous to its coast, as the first

Contd....

As for Iraq, the first actual claim made by the Iraqi Government over the continental shelf was the "Official Proclamation" issued on November 23, 1957, in which Iraq declared that "all the natural resources" lying in the seabed and subsoil outside the territorial sea "are the property of Iraq".(17)

It may be noted that the Proclamation was drawn up so as to conform with the rules of international law. Therefore, having referred to the fact that Iraq has exclusive general jurisdiction over such resources, the Proclamation confirmed that its sole aim was the exercise of rights established by international practice. Moreover, it made clear that nothing contained therein would affect the rules set up regarding freedom of navigation and fishing in the aforementioned sea zone.(18)

Before proceeding further, it might be of significance to state that Iraq was motivated to issue the aforementioned declaration by the increased Iranian interest in the offshore zone.(19) This appeared clearly when an agreement was concluded between the National Iranian Oil Company (NIOC) and Agip-Minerarie (SIRIP) on August 24, 1957, in which the area of concession was defined so as

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(16) contd...
State in this respect. See El-Hakim, op.cit., Ref. (66), at 310, p.47. For the text of the Saudi Arabian Decree, see AJIL, Vol. 43, 1949, Supplement Section of Documents (separately paged and indexed) p.154. As regards, Kuwait, A Proclamation was issued on June 12, 1949 published in ST/LEG/SER.B1 (1951) p.26 and reproduced as Appendix No. (VII) to this thesis.

(17) Published in ST/LEG/SER. B/15 (1970), pp.368-369 and reproduced as Appendix No. (1) to this thesis; see also the Official Gazette No. 4069 of 27.11.1957.

(18) Appendix No. (1).

(19) El-Hakim, op.cit., Ref. (66), at 310, p.53.

to include "a zone of the continental shelf located in the northern part of the (Arabian) Gulf...".(20)

In the light of the above facts, and influenced by bids laid at Iran's feet in 1958 by a number of oil companies,(21) it is not surprising to find the Iraqi Government being motivated to promulgate a supplementary Proclamation concerning her continental shelf. Having asserted the statement which had been set down by the Iraqi Government in 1957, the new instrument re-stated that the sovereignty of Iraq extended to the territorial sea and the seabed and subsoil.(22) Moreover, it asserted that works and constructions, as have been or will be undertaken in the area defined in the Proclamation, fell under the "sovereignty"(23) of Iraq and that the taking up of such works and constructions is authorisable only to the relevant Iraqi authorities or to other parties authorized by the Iraqi Government. Having reaffirmed the adherence of the Iraqi State to the general principles of international law pertinent to the question, the Proclamation went on to declare the non-recognition of the Iraqi Government of any statement, notification, legislation or plan concerning territorial waters or contiguous waters issued by any neighbouring country contravening the

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(20) Article 3 of the agreement cited in Petroleum Legislation, Basic Oil Laws and Concession Contracts - Middle East, Vol. 1, 1959, Iran D-1.

(21) El-Hakim, op.cit., Ref. (66), at 310, p.53.

(22) The Proclamation published in ST/LEG/SER. B/15 (1970) p.369 and reproduced in Appendix No. II to this thesis; or the Official Gazette No. 4128 dated 10.4.1958.

(23) See below p.391; see also Appendix No.(11).

contents of this proclamation.

Comment

From analysis of the preceding excerpts, the following may be deduced:

1. The legislation follows international practice in establishing the rights of the Iraqi State to the submarine areas contiguous to the Iraqi territorial sea.
2. The rights which have been established are that "the natural resources existing on the seabed and the subsoil are the property of Iraq" and that they are subject to her "exclusive general jurisdiction" and power of disposition as provided for in this legislation.
3. While the rights asserted in the proclamation of November 23, 1957 relate merely to the "natural resources" (as did the Truman Proclamation) the supplementary proclamation claims full sovereignty over the seabed and subsoil to the same extent that Iraq has over the territorial sea and airspace over it.(24)
4. The wording of the legislation indicates that there was an awareness of the particular geological and geographical facts. Contrary to the Iranian law, it avoids using the term "continental shelf". Instead, the term "seabed and subsoil" is used which stands to reason since there is no shelf in the geographical sense.

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(24) It has been stated however, that the difference between the two versions, appears to be slight since any control of the submarine resources will necessarily involve control of the subsea area as such. See Liebesny, op.cit., Ref. (4), at 385, p.94; see above p. 147.

5. The legislation deals only with the subsoil and seabed. It confers exclusive jurisdiction and control on the Iraqi Government and carries that jurisdiction and control to the farthest extent that the subsoil and seabed appertain to Iraq. It makes clear that the status as high seas of the overlying waters of that area, and the right to navigation and fishing therein, are not affected.
6. The outer limit of the legislation's applicability is not definitely specified. It appears to reach out to whatever extent will meet the Kuwaiti and Iranian continental shelves. This, indeed, shows an awareness of the particular situation of the Arabian Gulf presenting a special case in which, because of its shallowness, its submarine areas form a single continental shelf which must be divided up among the surrounding coastal States.

The Delimitation of the Lateral Boundaries of the Iraqi Continental Shelf

The extent to which Iraq, as opposed to other neighbouring States, can validly assert jurisdiction and control over natural resources underlying the seabed adjacent to her coast, is not precisely apportioned in the aforementioned legislation. It implies a certain spatial extension of the areas under control, but by no means provides any method for its lateral demarcation. It may be argued that the supplementary Proclamation of 10 April, 1958, implies a certain mode of delimitation by referring

to the equidistance method.(25) Thus, it seems reasonable to accept, as a demarcation line between the continental shelves of Iraq, Kuwait and Iran (as the case may be), the prolongation of the line of demarcation of the territorial sea between the nations concerned. As an argument, such an interpretation must be strongly opposed (for reasons which will be discussed later).(26) Additionally, it may be observed that there is no obligation on the part of Iraq to accept the equidistance method as a conventional rule since it has been provided for in the 1958 Geneva Convention on the Continental Shelf. It must be admitted that, despite being so carefully drawn up and clearly containing large elements of progressive development and codification in the area of the law of the continental shelf, the Geneva Convention of 1958 can still present some ambiguities and offers no recognized definite solution to some difficulties. Amongst those problems, and perhaps the most complicated one, is the question of dividing up the continental shelf among various nations sharing a common shore.(27) In particular, the equidistance method may produce, albeit not necessarily, an appropriate boundary line of the continental shelf between adjacent States under normal geographical circumstances. On the other hand, there are enough cases where the application of this method would lead to an inequitable result that cannot be recognized, as will be discussed later.(28)

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(25) See the Proclamation of April 10, 1958 Appendix No. (11).

(26) See below pp. 395 et seq.

(27) Grisel, op.cit., Ref. (48), at 209, p.562.

(28) See below pp. 397 et seq.

It may be added, to the shortcomings of the equidistance method, which have been previously illustrated,(29) that this method, as laid down in the context of the Iraqi statement, is immediately followed by a demonstrative provision indicating the adherence of Iraq to the prescribed principles of international law which deny the binding character of the equidistance criterion on its own.(30) Therefore, it must be mentioned, for reasons which will later be stated, that what is meant by the equidistance method in the context of the Iraqi Proclamation is that the application of the equidistance rule is accepted in the sense recognized by international law. It appears sound to suggest that, if this term is interpreted in accordance with the ordinary meaning to be given to the terms of acts in their context,(31) it can find an application only under the conditions recognized by international law, namely when it will lead to equitable apportionment as will soon be discussed.

(29) See above pp. 226-232.

(30) It may not be disputed that the equidistance rule on its own has not been established as the only general rule in delimiting marine boundaries. Not only had the ICJ taken this view but even the Court of Arbitration in the Anglo-French Continental Shelf Case seems to have approved it. The fact which was repeatedly affirmed by the latter court was that Article 6 did not provide two rules, equidistance and special circumstances, but only one single rule equidistance-special circumstances. The distinction between the equidistance and equidistance-special circumstances is clear and does not need any further clarification. See below pp. 424 et seq.

(31) International Acts must be interpreted as a whole, and their meanings are not to be determined merely upon particular phrases which if detached from the context may be interpreted in a sense contrary to that which was intended. See the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Cases (second phase) ICJ Reports, 1950, pp.220-264 at ; the Polish Postal Service in Danzig Case, PCIJ, Series B, No. 11, p.39. (1925).

Subsection Two

What Are the Rules of Law Applicable to the Delimitation of the Continental Shelf Between Iraq and Her Neighbours?

Having examined the legislation of Iraq concerning her jurisdiction over the Continental Shelf adjacent to her coast, our remaining task is to specify the principles to be employed to divide up the continental shelf area between Iraq, Kuwait and Iran.(32)

Before taking up this question, it might be convenient to recall that the Iraqi coastline due to its concavity and recession takes almost the form of a rectangle. It runs from the Kuwaiti boundary to the west and then turns in an eastern direction towards the point on the coast where the Iranian coast begins.(33)

This being the case, an immediate problem would then arise: namely, the delimitation of submarine boundaries between Iraq and her neighbours, strictly on the basis of the equidistance line, faces a difficult situation. Clearly, the effect of the use of the equidistance line, if it were applied strictly, would be to pull the line dividing maritime belts inwards in the direction of the land.(34)

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(32) The location of Iraq, Kuwait and Iran coupled with the fact that the Arabian Gulf is wholly a single continental shelf, suggests as noted earlier that there would be no probability of an outer limit of the continental shelf. It follows that this is not the occasion, nor is there need here for an examination of the rules on the outer limit of the continental shelf. It is sufficient for present purposes to consider the rules on delimitation between neighbouring States.

(33) See above pp. 326-354.

(34) Young, op.cit., Ref. (381), at 173, p.737.

Therefore, if it were determined in accordance with the aforementioned principle, ignoring this particular configuration, the lateral boundaries would inevitably meet the Kuwaiti and Iranian boundaries at a relatively short distance. In plain terms, such delimitation would ad summam reduce the Iraqi apportionment of continental shelf.(35)

In these circumstances, it would seem that any attempt to divide the continental shelf boundaries between Iraq and her neighbours, without regard to certain factors, would lead to an inequitable solution. Yet, it is necessary to make the attempt taking into account this particular situation in order to militate in favour of a large apportionment to Iraq.

Having described this, if we are to discover the principles which have to be applied in dividing up the continental shelf between Iraq and her neighbours, it may be useful to divide the argument into two principle parts. In the first part, the question of whether Iraq is under an obligation to accept the equidistance method will be examined, and, in the second part, an attempt will be made to specify the rules applicable in connection with this.

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(35) The application of the equidistance method met this difficult situation in the case of the Federal Republic of Germany whose coast's configuration is almost similar to that of Iraq. For the purpose of imagining Iraq's share of the continental shelf, if it would be defined according to the strict equidistance method, it is worth referring to the argument of Professor Jaenicke before the ICJ in the North Sea Cases, ICJ Pleadings, p.12.

I. Is Iraq Under An Obligation To Accept The Equidistance Method On Its Own?

It should be pointed out before proceeding that as Iraq has not signed the Continental Shelf Convention, then strictly speaking, the equidistance method mentioned in Article (6) of the Geneva Convention may not be invoked against her.

It is generally recognized, as a principle of international law, that treaties, whether multilateral or bilateral, can neither impose obligations nor modify legal rights for non-party States, in general, without their consent.(37)

In the Island of Palmas Case,(38) for instance, Judge Huber said:

> "It appears further to be evident that treaties concluded by Spain with third powers recognizing her sovereignty over the Philippines could not be binding upon the Netherlands."

Further on, Judge Huber went on to say:

> "The inchoate title of Netherlands could not have been modified by a treaty concluded between third powers."

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(37) Despite the fact that the majority of writers on international law are in agreement that a right may be conferred on a third state without its assent, is a concept accepted by the majority of modern legal systems, there is still much controversy regarding the effect of such stipulations. For further details see Aréchaga, Eduardo Jiménez De, "Treaty Stipulations in Favour of Third States", AJIL, Vol. 50, 1956, pp.340-341; see also the Vienna Convention on the Law of Treaties of 1969, Part II, Section 4, Article 34.

(38) 1928 Reports of International Arbitral Awards, Vol. II, p.831.

Similarly, in the Free Zones of Upper Savoy and the District of Gex,(39) the PCIJ held that Article 435 of the Treaty of Versailles was not binding upon Switzerland who was not a party to the treaty, except to the extent to which that country accepted it.(40)

A similar attitude was taken by the PCIJ in the Status of Eastern Carelia Case.(41)

By now it seems clear that the doctrine that a State is not bound by anything that it has not consented to, is a very well established principle of international law. This principle has gained the recognition of the international community and is codified in the Vienna Convention of 1969 on the Law of Treaties.(42) It may be conceded that an individual State is bound by a rule adduced in a treaty although it has not previously consented to that treaty. That is to say when a general rule of customary international law is built up by the common practice of States. This principle has also gained the acceptance of the international community and is provided for in the Vienna Convention.(43)

The above arguments speak for themselves. It is an accepted principle of international law that multilateral treaties, or particular provisions in them could have an effect upon non-parties only if they accept them or when

(39) PCIJ, Series A No. 22 pp.5-51 (1932)

(40) Ibid., p.17.

(41) PCIJ, Series B, No. 5, pp. 7-29 (1923).

(42) See Article 34 of the Vienna Convention on the Law of Treaties.

(43) Article 38, Vienna Convention on the Law of Treaties.

the treaty or a provision passed into rules of customary law.(44)

However, to say that is not to exclude the possibility of arguing that Iraq is obliged to accept the equidistance method,(45) on the strength of two reasons. No doubt, it could be argued that the equidistance method is binding on Iraq as it represents a customary rule of international law. On the other hand, it may be contended that Iraq has recognized the general applicability of the said method. The next discussion will be devoted to these two points.

a. The Alleged Customary International Character of the Equidistance Method

At the outset, it should be remembered that the merits as well as the inherent weaknesses of the equidistance method in ensuring an equitable apportionment of maritime areas between neighbouring States have been well demonstrated in chapter three, and therefore need not be repeated here.(46) It may suffice to say that the rule of equidistance does not contain the flexibility needed to accommodate the infinite variety of geographical situations

(44) Customary international law rules by their very nature have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any of them in its own favour. See Riesenfeld, Stefan A. "The Neo-Positivist Concept of International Law" AJIL, Vol. 59, 1965, pp.321-335 at 323; Baxter, R.R. "Multilateral Treaties as Evidence of Customary International Law", BYBIL, Vol. 41, 1965-1966, pp. 288-300.

(45) Wherever the equidistance method is referred to, hereinafter, the equidistance boundary line, strictly speaking, is meant.

(46) See above, chapter three, pp. 214-232.

throughout the world.

It is true that no established method for the determination of continental shelf boundaries of a State vis-a-vis another State has yet to be regarded as appropriate in all cases. Nations sharing a common shelf have only occasionally attempted to delimit their maritime boundaries. In those occasional cases a number of methods have been employed, in which particular geographical features have been taken into account, and they have only a little, if any, general applicability.(47) Moreover, using one method rather than another in each case has been by agreement between the interested States. It may be noted that no single principle has required attainment of the delimitation by using any particular method with any degree of uniformity.(48)

However, the argument of Professor Jaenicke before the ICJ may be cited against the alleged customary international character of the equidistance method. Having referred to the recommendations of the Committee of experts which first proposed the equidistance method in 1953, Professor Jaenicke concluded that the application of the said method was intended to be on the condition that it would yield an equitable result and that otherwise that method would lose its raison d'être.(49)

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(47) Padwa, op.cit., Ref. (51), at 210, p.629.

(48) Ibid., p.629. The absence of a general principle of delimitation has given a number of writers pause to employ this fact as a piece of evidence demonstrating that the notion of the continental shelf has not become part of international law. See for example, Waldock, op.cit., Ref. (264), at 137, p.115.

(49) The Committee had pointed out that wherever the

Contd.....

It may be added that in the North Sea Continental Shelf Cases, the World Court outlined that an examination of the history of the drafting of Article (6) of the Continental Shelf Convention revealed that at no time was the equidistance method an inherent necessity of the continental shelf doctrine. The Court was quite specific in saying that, in contrast, the history of the Article had always been dominated by two main concepts. Firstly, that "no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement 'or by reference to arbitration'; and secondly, that it should be affected on equitable principles."(50) The equidistance technique, in the Court's words "was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata."(51) Then the Court confirmed that the ILC, having failed to establish any of the possibilities it examined, turned to a Commission of Experts. Consequently, it adopted the method of equidistance

> "On basis of recommendations of this group which was not made up of lawyers, and its recommendations were thus presumably based on considerations of practical convenience and cartography."(52)

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(49) contd...
equidistance method would not lead to equitable apportionment the division of maritime boundaries should then be determined by negotiation. See ICJ, Pleadings, Vol. II, pp.13 et seq.

(50) ICJ Reports, 1969, para. 55, pp.35-36.

(51) ICJ Reports, 1969, para. 62, p.38.

(52) ICJ Reports, 1969, para. 53, p.35.

The Court of Arbitration in the Anglo-French Case seems to agree with the ICJ in this respect. Although the former Court adhered to the applicability of Article 6, in a limited sense, between France and the U.K., as both were parties to the Geneva Convention, nevertheless it tended to reduce the weight to be given to the equidistance rule. The Court noted that the rule of equidistance had never been adopted by the Convention as a rule on its own. The attitude of the Court is evident in its consideration of the equidistance-special circumstances as only one rule.(53) This is a tacit admission, it is submitted, of the fact that it was the firm belief of the Court that the equidistance rule on its own was not a general rule of customary international law.

In addition, another important fact supports the view that it cannot be contended that the equidistance method is a rule of customary international law. This brings us to examine whether the Continental Shelf Convention, or to be more specific Article 6(2), intended to be declaratory of existing customary international law, or has become so subsequently.

For this question to be discussed, it is first of all significant to consider the structure of the Conventions on the law of the sea as a whole. Examining the language of the preambles of the five Conventions of the law of the sea, one can easily infer that only the Convention on the high seas is to any great extent declaratory of existing

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(53) See above pp. 264 et seq.

international law.(54) The following two clauses have been incorporated in the latter Convention while not referred to in the four others:

> "Desiring to codify the rules of international law relating to the high seas,
>
> Recognizing that the UNCLOS, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law."(55)

It may be observed that the eagerness and strong desire to adopt almost similar, and in substance even identical principles, in drafting the provisions of the Conventions rather than the inconsistent and non-uniform preambles, leads one to believe that the different language of the preambles was designated after careful thought.(56)

In looking at the equidistance clause, as it is expressed in the context of Article 6 of the Continental Shelf Convention to decide whether it can be recognized as customary international law, it is necessary to observe the origin of the Article as well as State practice since the Geneva Conference of 1958. The Court, in the North Sea Cases concluded that "the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of

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(54) Baxter, op.cit., Ref. (44), at 399, p.286.
(55) The preamble of the Convention.
(56) Baxter, op.cit., Ref. (44), at 399, p.288.

continental shelf areas between adjacent States...".[57] In the Court's opinion, there were several reasons why the rule mentioned in Article 6 was not of a "norm-creating character". One was that the principle of equidistance was given secondary place to an obligation to affect delimitation by agreement. Secondly, the provision was further clouded by permitting the reference to another boundary line because of "special circumstances". Finally, the Court was also troubled by the fact that the provision sheds no light in determining what constitutes "special circumstances". Even the Court of Arbitration did not oppose this view. The corollary of the argument, that the equidistance and special circumstances were not two rules but two aspects of one rule, is that the equidistance rule solely is only half of one rule.

To the foregoing, it may be added that the most convincing argument against the alleged customary law character of the rule contained in Article 6(2) of the Continental Shelf Convention, is the fact that by article 12 of the Convention, reservations are allowed to all articles of the Convention other than to Articles 1, 2 and 3. Article 12 provides that:

> "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 inclusive.
>
> 2. Any contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a

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(57) ICJ Reports, 1969, para. 81, p.45.

Communication to that effect addressed to the Secretary-General of the United Nations."[58]

Clearly, permitting reservations to be made to articles other than 1, 2 and 3, and in view of the reservations that actually have been made,[59] it seems impossible to avoid the conclusion that a provision of a Convention[60] (whose application may be excluded by a State ratifying or acceding to the Convention), cannot be invoked opposing a State which has not signed the Convention such as Iraq under the title of customary law.[61] The ICJ found the Convention divided between the first three articles and the rest. In the Court's view, that division corresponded to a manifest intent to have the first three articles express general principles of international law in contrast to the rest. The ease with which reservations can be made to the latter group of articles suggests that they do not create norms of law binding upon all States. Consequently, the Court drew from this fact the conclusion that any rule from which a State could unilaterally withdraw did not rise to the level of being a legal rule of general validity.

Having discussed extensively the lack of customary law status of the equidistance method up to the time of the Geneva Convention on the continental shelf, there is

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(58) Brownlie, op.cit., Ref. (31), at 20 , p.110.

(59) See the reservations referred to in the Argument of Professor Jaenicke before the ICJ, Pleadings, 1968, Vol. II, p.16.

(60) Ibid. at 17.

(61) Ibid.

still the question of the status of the equidistance method following the Convention of 1958. In connection with this question it is useful to once more refer to the attitude of the ICJ in the North Sea Cases. State practice subsequent to the conclusion of the Convention, in the Court's view, is insufficient to promote the method of equidistance to become accepted as a customary rule. This contention was based on the premise, in the words of the Court:

> "these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context."(62)

Further evidence regarding this may be found in Judge Ammoun's separate opinion. The statistics cited by Judge Ammoun demonstrate that only 39 out of 140 States had become parties to the Convention. The amount of State practice by non-parties which had been submitted by Denmark and the Netherlands was thus very small (63) in relation to the approximately 100 States not bound by the Convention. The Court found that this amount of practice far from satisfied the requirements that it laid down:

> "... state practice, including that of States whose interests are specially affected, should

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(62) ICJ Reports, 1969, para. 75, p.43.

(63) Denmark and the Netherlands had been able to adduce 15 instances of the application of the principle of equidistance. See Baxter, R.R., "Treaties and Custom", Hague Recueil, Vol. 129, 1970, I, p.64.

> have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."(64)

It remains to refer very briefly to the discussion of the Court of Arbitration in the Anglo-French Continental Shelf Case,(65) as it is hoped to consider the relevant part in greater detail.(66)

It might be contended that the Court of Arbitration held that the rule expressed in Article 6 was a rule of general law of no less effect and content than the rule of customary law set out in the North Sea Cases.

This, it is submitted, is not a reasonable basis upon which the customary character of the equidistance rule can be founded. No doubt, the Court of Arbitration intended to, and actually did, confirm that the rule provided for in Article 6 is a general rule of international law. However, the actual language of the decision clearly reveals that it was not, strictly speaking, the equidistance method which was meant by the Court of Arbitration. It must be evident to any one reading parts of the decision (as will be discussed later)(67) that it is not purely and simply the equidistance method which is meant by the Court, rather the equidistance-special circumstances as one rule, and this is obviously

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(64) ICJ, 1969, Reports, para. 74, p.43.

(65) Decision, Ref. (20), at 198; Decision of 14 March 1978, Ref. (24), at 200.

(66) See below pp. 420 et seq.

(67) See below p. 424.

not the same as the former.(68) Surely, as the Court of Arbitration repeatedly affirmed, there is no equidistance principle on its own: it is - and always has been - equidistance coupled with special circumstances. Moreover, the Court was quite specific in deciding that the use or non-use of the equidistance rule or any other method in the particular case was affected by the equatibility of the consequences which such a use would lead to.

b. The Alleged Recognition by Iraq of the General Applicability of the Equidistance Method

Having reached the conclusion that the equidistance method is not a rule of customary law, another important point particularly deserves to be discussed here. The clause set out in the Iraqi Proclamation of April 10, 1958, (Appendix No. II), namely the "equidistance", may be invoked as a basis to induce the consent of Iraq to deliberately associate herself with this method. This contention might be considered as having shown that Iraq herself had found the principle of equidistance acceptable and interpreted it as a contribution to the justification of the binding power of the equidistance method.

In order to answer this contention, some observations are worth special mention:

1. A careful reading of the Iraqi Declaration would reveal that when the equidistance method was referred to, Iraq asserted her adherence meanwhile, to the general principles of international law. In effect, the "equidistance" clause was deliberately and immediately

(68) See above p. 264.

followed by the clause "general principles of international law". Thus, it may be confidently asserted that not even a single piece of evidence in the declaration could be regarded as recognition of acceptance of the equidistance method being solely and strictly applied for the delimitation of the Iraqi continental shelf.

2. The equidistance method indeed is in clear contradiction to certain basic principles of international law. The ICJ,(69) disregarded the equidistance method as a rule of law, because "... if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed .... have from the beginning reflected the opinio juris in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned and that such an agreement must be arrived at in accordance with equitable principles".(70)

3. Such an interpretation of Iraq's conduct in declaring the equidistance method so as to exploit this action to infer the inconsistencies in her attitude towards the said rule, cannot succeed. Neither can it weaken her position in this regard, since when Iraq issued her declaration, she could not have known that it would be gone to the extent of interpreting the declaration in such a way as to reduce the importance of the clause

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(69) ICJ, 1969, Reports, para. 85, p.46.

(70) Ibid.

"general principles of international law", to in reality nothing. Moreover, at that time the Iraqi Government could still expect to come to an amicable agreement with her neighbours on the delimitation of the continental shelf.

If it was asked why Iraq has not opposed the equidistance method, it could be answered that the attitude on the part of Iraq regarding the delimitation of the continental shelf as expressed by her proclamation has not been changed. The declaration although drafted with meticulous safeguards did not seem to have intended to consider the equidistance rule as the sole method for delimitation. There is, in fact, a difference between employing the equidistance method for the delimitation of a continental shelf boundary and the equidistance principle as a rule being mentioned in the context of Article 6. It is respectfully submitted that Article 6 of the Geneva Convention prescribes the application of the equidistance method only under the conditions it stipulates, that is in the absence of agreement and special circumstances. To demonstrate this, it may be sufficient at present to quote the following passage from the decision of the Court of Arbitration and elaborate on this point later.

> "... if the Channel Islands region is excluded as falling under the French reservation, the Court considers that Article 6 is applicable, in principle ... between the parties... This does not, however, mean that the Court considers the

rules of customary law discussed in the judgment in the North Sea Continental Shelf cases to be inapplicable in the present case. As already pointed out, the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule..."(71)

4. The fact that Iraq refers to the equidistance method in her Proclamation, could not be exploited per se to assume her recognition of the equidistance method as an expression of a customary international law. This might be proved by the North Sea Continental Shelf Cases. Although Germany not only expressly declared her acceptance of the equidistance method, as Iraq might assume to have done, and also positively participated in the drafting of the Convention becoming one of the signatory states, she was considered under no obligation by the Court. It may be contended that; if Iraq were considered to be obliged to accept the equidistance method, since it was mentioned in her declaration then evidently this obligation could not be more strict that for States which have signed the Convention.

5. The argument that Iraq first regarded Article 6(2) as a workable solution for the boundary problem, when she declared her rights in the continental shelf, might be rejected because of the latter conduct of Iraq. It is quite understandable that Iraq later hesitated in acceding to the Convention when it became apparent that her conduct might be interpreted in such a restrictive

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(71) Decision, para. 75, p.50.

manner. Even more important in this connection is the attitude of Iraq in the UNCLOS III.(72)

II. The Rules Applicable to the Delimitation of the Iraqi Continental Shelf Boundaries

In view of the arguments put forward earlier, it is widely thought that any norm for the delimitation of maritime boundaries must contain the highest possible degree of pliability. Only such a norm seems to serve the purpose of accommodating the infinite diversity of coastlines.(73)

Attention must be drawn to the fact that a series of international acts reveal an awareness of the problems involved. It may be inferred that, most frequently, the proclamations have been issued from the very beginning when claims to exclusive rights over the continental shelf were beginning to be made, showing that the principle of equitable solution based on mutual agreement, has been regarded as the paramount principle governing the delimitation of the continental shelf.(74) Among examples, is the Truman Proclamation, which in the view of the World's Court, "must be considered as having propounded the rules of law in this field".(75) In the terms of the said Proclamation, "In cases where the continental shelf extends

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(72) See above p. 267.

(73) Hudson was of this opinion. See his views in the YBILC 1951, p.287; see also the views of Fitzmaurice YBILC, 1956, Vol. 1, p.152.

(74) See Padwa, op.cit., Ref. (51), at 210, p.624. It is worth stating that it is generally recognized that the principles of law accepted by civilized nations constitute part of international law. Article (38) of the Statute of the ICJ.

(75) ICJ Reports, 1969, para. 86, p.47.

to the shores of another, or is shared with an adjacent State, the boundary shall be determined by the U.S. and the State concerned in accordance with equitable principles".(76) Another striking example is to be found in the Saudi Arabian Decree of 1949. According to its terms, the boundaries "will be determined in accordance with equitable principles by our Government in agreements with other States".(77) Following this trend, the legislation of Kuwait,(78) which refers, with regard to the delimitation of the Kuwaiti continental shelf areas in the Arabian Gulf, to the principle of equity and justice. Iran also proclaimed that "if differences of opinion arise over the limits of the Iranian continental shelf, these differences shall be solved in conformity with the rules of equity".(79)

Provisions similar in meaning, although with slight variation in wording have been incorporated in other proclamations. Several Latin American Acts refer to the term "conditions of reciprocity". The Proclamation of Costa Rica declares that "... treaties to be concluded in recognition of legitimate rights of other countries".(80)

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(76) The Truman Proclamation, op.cit., Ref. (283) at 144.

(77) Royal Pronouncement of 28 May, 1949 referred to in the North Sea Continental Shelf Cases, ICJ Pleadings, Vol. 1, p.31.

(78) Proclamation of 12 June, 1949, Appendix No. VII

(79) Decree of May 1949 referred to in the North Sea Continental Shelf Cases, ICJ Pleadings, Vol. 1, p.31 and Act of 18 June 1955, Appendix No. V.

(80) Padwa, op.cit., Ref. (51), at 210, p.630. Other examples are also; the Proclamation of Sultan of Bahrain of 5 June 1949; the Sheikh of Qatar of 8 June 1949; Article 2 of the Declaration of the two Houses of Parliament of Nicaragua of 28 May 1949. Cited in the North Sea Continental Shelf Cases, ICJ Pleadings, 1968, Vol. 1, p.31.

Having briefly referred to some prime examples of acts drawn up for demarcation purposes, it is very interesting to note that, in all of the above-mentioned examples, the great emphasis in these acts is that the boundaries should be delimited in accordance with the principle of equitable apportionment. It is also relevant to note that those claims were not objected to by other States, and that therefore, those claims can be said to have been tacitly accepted.

In the light of the foregoing, it can be submitted that these acts, on the one hand reflect the inconvenience of any sole method of delimitation, and reveal the weakness of unqualified unilateral action with respect to the delimitation of parts of the continental shelf shared by other States; on the other hand, it would be fair to say that those claims constitute a general principle of law authorising recourse to equity praeter legem for a better implementation of the principles or rules of law.

Moreover, in the records of the ILC which discussed the possible methods for dividing up the continental shelf between States sharing a common continental shelf, there is no indication that at any time any of the Commission's members supposed it was incumbent upon them to adopt a rule of equidistance.(81) On the contrary, their preoccupation was to reach a criterion which would ensure equity. This might easily be inferred from examining the attitudes of a number of the Commission's members from the report of the Rapporteur J.P.A. Francois, submitted to

(81) ICJ Reports, 1969, para. 49, p.33.

the Commission in its 1951 Session. On the question of delimitation of the continental shelf, the Rapporteur proposed that an agreement be reached between the parties concerned or failing agreement, that the boundary be drawn by extending the boundary line of their territorial sea.(82) Having sustained the first part of the proposal, the Commission strongly opposed the second. In this respect, the Chairman of that Session, J.L. Brierly, argued that:

> "the allotment should be made by agreements between the States concerned or by an amicable arbitration, not by means of hard and fast rules.(83) ... Any rule which the Commission laid down was bound to be arbitrary."(84)

Another member of the Commission, Sh. Hsu hoped that the second part of the proposal would be replaced by the following:

> "... or failing agreement, by arbitration on a fair and equitable basis."(85)

Discussion by the Commission during its 1953 Session also touched upon the question under consideration. Here again, the equidistance rule was considered inappropriate, and suggestions were made to the effect that the delimiting of boundaries between adjacent States should have been left to be established exclusively by agreement between the interested States.(86)

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(82) YBILC, 1951, Vol. II, pp.75 et seq. and p.102.

(83) In the early stages, it was suggested that where an agreement could not be reached, the States concerned were under an obligation to submit the dispute to compulsory arbitration. YBILC, 1951, Vol. II, p.143. This question will be dealt with in section two below, pp.

(84) YBILC, 1951, Vol. I, p.288.

(85) YBILC, 1951, Vol. I, p.289.

(86) See for example the view of the Soviet Member, YBILC, 1953, Vol. 1, p.128.

In seeking to find an appropriate solution, direct mention concerning the equidistance method entered upon the scene in the course of the deliberation of a committee of experts, appointed in 1953.(87) It is worth stating that the Committee designed a very narrow range of application for this rule. This might easily be inferred from the Committee's comment that it was "important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf."(87)

A careful reading of the comment made by the Committee of experts will reveal that the equidistance method was conceived primarily for the demarcation of the territorial sea of the coastal States. The comment, which speaks for itself, can only mean that the use of the equidistance method for the apportionment of the continental shelf was referred to as no more than a mere possibility, and could not even tacitly prescribe a mandate for the use of this method in all situations.(89)

It may be added that the concept of equity must have been in the minds of those who supported the adoption of the "special circumstances" clause, though the Convention on the Continental Shelf makes no explicit reference either to equity or equitable principles. The decision of the

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(87) The North Sea Continental Shelf Cases, ICJ Pleadings, 1968, Vol. II, p.52.

(88) YBILC, 1953, Vol. II, p.79.

(89) The North Sea Continental Shelf Cases, ICJ Pleadings, ibid., p.57.

Court of Arbitration in the Anglo-French Continental Shelf Case, may strengthen the validity of this observation as will be considered in greater detail later.(90)

From the foregoing, it appears beyond reasonable doubt, that the ILC tried to specify a criterion which would always lead to an equitable apportionment.

The same trend may have been supported by the Geneva Conference of 1958 on the Law of the Sea, when the question was again put before the Fourth Committee of the Conference. It was suggested by a number of delegates that the apportionment of a common shelf would be made in such a way as to lead to equitable results.(91)

To the foregoing, it may be added again, that well known authorities are against the restrictive application of the equidistance method or any other geometric rule, unless it leads to equitable results. Sir Hersch Lauterpacht, for instance, points out that:

> "As adumbrated in the various proclamations, the delimitation can properly be effected by reference to equitable consideration, and any formula based on a system of median and lateral lines ought to be no more than the starting point in search for an equitable solution."(92)

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(90) See below pp. 428-429.

(91) The Venezuelan Delegate, for example, stated that "... that failure to make due provision for special circumstances such as were frequently imposed by geography could not result in a solution which would be fair to all States" UNCLOS I, Official Records, Vol. VI: Fourth Committee (Continental Shelf), p.92, similar points were raised by the delegates of the U.K. ibid., p.93, the Italian ibid., p.93.

(92) Lauterpacht, op.cit., Ref. (238), at 127, p.410.

The same logical opinion is supported by others such as Leo J. Bouchez who states:

> "In the exploitation of resources of the subsoil the local circumstances must be taken into consideration for the establishment of an equitable apportionment."(93)

Along this line, Professors McDougal and Burke argue that:

> "The major Community policy at stake with respect to the boundary problems of adjacent and opposing States is that of achieving equitable apportionment, thereby avoiding disputes arising out of insistence by one or both States on a method of delimitation which does not respect the interest of the other."(94)

Shalowitz, another authority sharing the same belief concerning lateral boundaries, goes on to mention that:

> "In delimiting such boundaries, the objective is to apportion the sea area in such manner as will be equitable to both States."(95)

On turning now to international adjudication, precedents and analogies are already at hand. As noted above, experience of the North Sea Cases has shown that the Court has taken the view that Article (6) is not of the norm-creating character. Therefore, the Court asserted that there was no obligation on Germany to be bound by the sole equidistance method. The ICJ repeatedly stated that the parties concerned were "free to agree upon

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(93) Bouchez, Leo J., "The Regime of Bays in International Law", 1964, p.198.

(94) McDougal and Burke, op.cit., Ref. (1), at 11, p.428.

(95) Shalowitz, op.cit., Ref. (21), at 199, Vol. 2, 1964, p.384.

one method rather than another or different methods if they so prefer". In the words of the Court, the point in the process of apportionment is "to seek not one method of delimitation but one goal".(96)

It would seem, at this point that the North Sea Continental Shelf Cases are good illustrations of the fact that, on the whole, the only rule should be one which seeks an equitable solution.

It is submitted, that there can be no doubt, that the judgment of the ICJ in the North Sea Cases, although in strict law it concerns only a special boundary question in the North Sea and has the force of res judicata only as between parties to the case, nevertheless it can, by its authority, exert great influence on the settlement of many still unsolved boundary problems all over the world.(97) It would thus appear that these recommendations support Iraq in determining her share in the continental shelf area. Setting aside matters of legal notions which were pointed out in the Judgment, there are several other sufficient grounds which make the position of Iraq almost similar to that of Germany. That is to say:

1. The concavity of the German coastline which would have been the main cause of the inequitable division of the continental shelf, if it were to be determined in accordance with the strict equidistance line, is similar to that of Iraq.

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(96) ICJ Reports, 1969, para. 92, p.50.

(97) See Brown, op.cit., Ref. (4) at 193, p.189; and op. cit., Ref. (181), at 254, p.9; see also the separate opinion of Judge Padilla Nervo, ICJ Reports, 1969, p.99.

2. A quick glance at a map of Iraq (figure 2) shows that the Iraqi coastline, sandwiched between that of Iran and Kuwait, is not only at the concave head of the Arabian Gulf but rather at the most concave part of it.(98)
3. The waters of the Arabian Gulf are shallow, like the waters of the North Sea, and its bottom may be regarded as continental shelf wholly.(99)
4. The proven and the possible natural resources in the Arabian Gulf, necessitate an equal division of the marine area. It is fairly evident that possession of a few miles of submarine area would make the difference between owning and not owning a profitable oilfield.(100)

However, further judicial evidence supporting the principle of equity concerning the allotment of areas of the continental shelf is to be found in the decision of the Court of Arbitration in the Anglo-French Continental Shelf Case.

Although there is no space to dwell in detail upon the aforementioned case, which is a subject of study in itself,(101) nevertheless a brief general examination of certain aspects, in so far as it may be relevant to the determination of the Iraqi continental shelf, seems worthwhile.

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(98) See the argument of Sir Humphrey Waldock before the ICJ in which he maintained that "Iraq is in an infinitely more disadvantageous position than the Federal Republic", ICJ Pleadings, 1968, Vol. II, p.114.

(99) See above pp. 293.

(100) El-Hakim, op.cit., Ref. (66), at 310, p.122.

(101) For further details see the Comprehensive Articles written by Professor E.D. Brown, op.cit., Ref. (191), at 257, pp.463-530, and op.cit., Ref. (190), at 257. pp. 304-327; see above pp.256-265.

Briefly, having been inspired by a genuine desire to settle their dispute concerning the course of the continental shelf boundary, in the arbitration area, France and the U.K. entered into an Arbitration Agreement[102] on July 10, 1975.[103]

France contended that the Continental Shelf Convention, specifically Article (6), could not be applied in the present situation between the parties. She invoked certain reservations which she had made to the Convention on the Continental Shelf. Those reservations in the French view negated the operation of the Convention since they have not been accepted by the U.K.[104] In addition, France argued that the Geneva Convention "had been rendered obsolete" by rules of customary law developed in the course of time.[105] The French Government maintained that:

> "the recent development of customary law, which was stimulated particularly by the work of the United Nations, the reactions on the part of Governments to this work, the discussions and negotiations at the Third Conference on the Law of the Sea, and the endorsement of this development in the practice of States with respect to economic zones and fishing zones of 200 miles, have rendered the 1958 Conventions obsolete."[106]

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(102) This was in accordance with the general obligation of all States to resolve their differences by recourse to peaceful means. Article 2(3) of the Charter of the United Nations.

(103) Arbitration Agreement of July 10, 1975, United Kingdom-France, (1975), U.K.T.S., No. 137, (Cmnd. 6280); see ibid., pp.256-265.

(104) Those reservations had never been accepted by the U.K. Brown, op.cit., Ref.(191), at 257, p.467.

(105) Decision, pp.10-12, 16-18.

(106) Decision, p.16.

Accordingly, in such a case, France contended that, the delimitation was to be settled by resorting to the principles set forth by the ICJ in the North Sea Cases. In the French Government's view, the rules to be applied in the present case were:

> "the rules of international law applicable in this matter between the parties are the rules of customary law, as stated in particular by the International Court of Justice in the North Sea Continental Shelf Cases and confirmed by the subsequent practice of States and the work of the Third Conference on the Law of the Sea."(107)

On the other hand, the U.K. approved the application of the provisions of the Shelf Convention on the basis that there were substantial grounds for regarding them as principles of general international law. A more specific reason for this attitude was the U.K.'s view that both she and France were parties to the Convention.(108) It follows from what has been said, that it was reasonable to infer that resorting to the principles set down in the North Sea Cases was not appropriate.(109)

It will be observed that the Court of Arbitration acknowledged that:

> "both the importance of the evolution of the Law of the Sea which is now in progress and the possibility that a development in customary

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(107) Ibid., pp. 11, 16.

(108) Decision, pp. 12-5, 18-21, Colson, op.cit., Ref. (20) at 198, pp. 98, 99.

(109) Decision, ibid.; Colson, ibid., p.103.

> 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."(110)

The fact that this particular excerpt was employed for substituting the recent development of the Law of the Sea, is not sufficient ground to lead one to assume that the Court has recognized that the Geneva Convention on the Continental Shelf "has been rendered obsolete". On the contrary, the Court confirmed that:

> "neither the records 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 a treaty in force."(111)

While it is correct to say the foregoing, nevertheless, the Court meanwhile asserted that this was no reason for ignoring that it:

> "regards itself as debarred from taking any account in these proceedings of recent developments in customary law. On the contrary, the Court has no doubt that it should take due account of the evolution of the Law of the Sea in so far as this may be relevant in the context of the present case."(112)

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(110) Decision, para. 47, p.40.

(111) Id.

(112) Id, para. 48, p.40. Professor Brown rightly remarked that taking account of recent developments by the Court would surely depend upon the extent to which the alleged rules "had emerged from their formative stage of development and had come to be accepted as new norms of international customary law", Brown, op.cit., Ref. (191), at 257, p.469, and op.cit., Ref. (99) at 44 , Part 1, p.198.

Then the Court went on specifically to hold:

> "the provisions of Article 6 do not define the condition for the application of the equidistance-special circumstances rule, and the rules of customary law have the same object - the delimitation of the boundary in accordance with equitable principles. In the view of this Court, therefore, the rules of customary law are a relevant and even essential means both for interpreting and completing the provisions of Article 6."(113)

It is clear from the above that the Court regarded the Geneva Convention in substance and within certain limits, to be in conformity with the rules of general international law regarding the delimitation of the continental shelf laid down in the North Sea Cases.

Another passage from the decision of the Court can, and it does, cause one to believe the above inference. The Court observed that:

> "Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and 'special circumstances' as two separate rules. The rule there stated in each of the two cases is a single one, a combined equidistance-special circumstances rule".(114)

It seems reasonable to draw the conclusion, from the passage just cited, that the Court denied that Article 6 of the Geneva Convention renders two rules - an equidistance rule and a special circumstances rule. Instead, one may accept without reservation that the present Court is of

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(113) Decision, paragraph 75, p.50.

(114) Id, para. 68, p.48.

the view that Article 6 links equidistance and special circumstances, in a single combined formula.

Exactly the same point emerged from Professor Briggs' view. In his declaration which he appended to the decision of the Court, he referred to:

> "The view that Article 6 is expressive of customary international law - a view already held by some Judges of the International Court of Justice in 1969 in the North Sea Continental Shelf Cases - has been substantially strengthened by the subsequent practice of States, which has been elaborately analyzed by Counsel in this Arbitration."(115)

It may be useful, in order to end the discussion, to state that the same conclusion in purport, with only slight differences in wording, had been arrived at seven years earlier. In a work published in 1971, Professor Brown, in the course of his analysis of the ICJ's Judgment, in the North Sea Continental Shelf Cases stated that:

> "In the writer's view, the record surveyed above amply verifies that in the course of a development over nearly a quarter of a century, the rules expressed in Article 6(2) of the Geneva Convention on the Continental Shelf have attained the Status of international customary law. Two points must be emphasised. First, in view of the fact that both the German pleadings and the Court's Judgment concentrated on the question whether the evidence sufficed to prove the equidistance rule, it is necessary to emphasise that Article 6(2) contains three elements - agreement, equidistance and special circumstances. It is submitted that the

(115) Id, p.125.

> latter two elements have now been accepted in State practice as being the rules the application of which will ensure that, failing agreement between the parties, a delimitation will be carried out in accordance with the 'equitable principles' referred to in the Truman Proclamation.
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> Secondly, the assertion is not that state practice since 1958 'or 1964, when the Convention entered into force ' has transformed the conventional rules of international customary law but rather that, as a result of a process of refinement and consolidation of which the conclusion of the Convention was a part, the fundamental but vague notions of agreement and equity expressed in the Truman Proclamation were transformed into at least relatively more precise rules.
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> Prima facie, the difference between this conclusion and the Court's Judgment may seem slight. It is submitted, however, that the concept of special circumstances is much more limited in scope and less open to arbitrary concretisation than the general principle of equity as interpreted by the Court."(116)

It is not proposed to analyse this matter except in so far as it relates to the delimitation of the Iraqi continental shelf. It is quite correct to agree with Professor Brown's view that "Article 6(2) contains three elements namely, agreement, equidistance and special circumstances.(117) Even more evident, the difference between Professor Brown's conclusion and that of the ICJ's

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(116) Brown, op.cit., Ref. (338), at 158, pp.61-62; and op.cit., Ref. (181), at 254, p.12.

(117) Ibid., Ref. (338), at 158, pp.61-62.

may seem slight.(118) It remains to decide, as the Court of Arbitration did, that the latter two elements expressed in Article 6(2) are not separate rules but "a single one, a combined equidistance-special circumstance rule".(119)

There is a further point which needs to be dealt with. It is correct to say that the concept of special circumstances "is much more limited in scope and less open to arbitrary concretisation than the principle of equity as interpreted by the Court".(120) Yet, if this statement was intended to mean that the concept of special circumstances is preferable to that of equity, it is submitted with the utmost respect that this argument is not so readily accepted. In connection with this question, it may be suggested that the concept of what constitutes equity, although wide, is not a limitless one.(121) It is more important to recall that the Court of Arbitration appears to give strong backing to the judgment of the ICJ in the recognition of the status of the concept of equity in delimiting marine boundaries since it repeatedly stressed that the delimitation of the continental shelf would be carried out in accordance with equitable principles. The Court of Arbitration, in its decision, did not exclude the applicability of customary rules set forth in the North Sea Cases as to the delimitation of the continental shelf, in favour of the equidistance-

(118) Ibid.

(119) Decision, para. 68, p.48.

(120) Brown, op.cit., Ref. (191) at 257, p.486, and op.cit., Ref. (190) at 257, p.308.

(121) See above pp. 264, 265.

special circumstance rule. It should be stressed that on the contrary, the Court observed that the rules of customary law were applicable to the case. The applicability of the equidistance-special circumstances rule was, in the Court's view drawn from the fact that it led to the same results as would be arrived at if the former rule were applied. Therefore, it appears that any limitation of factors would be inconvenient as it would cause other factors to be ignored, which may have been worth taking into account when settling the boundaries of the continental shelf. It would be reasonable to suggest that the concept of equity is much more convenient, since each situation has to be met in the light of its merits and no limitation imposed on factors should be taken into consideration. To support the foregoing, some passages of the Court of Arbitration's decision may be cited. If these passages are understood correctly, then differences as to the continental shelf boundaries are to be settled equitably under the combined equidistance-special circumstances criterion in the same manner as under the rules of customary law. In the words of the Court:

> "The equidistance-special circumstances rule and the rules of customary law have the same object - the delimitation of the boundary <u>in accordance with equitable principles</u>. In the view of this Court, therefore, the rules of customary law are relevant and even essential means both for interpreting and completing the provisions of Article 6."(122)

(122) Decision, para. 75, p.50.

Further it is pointed out:

> "... this Court considers that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles."(123)

Conclusion

In view of the arguments put forward, the following conclusions are submitted:

1. The methods of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured, (equidistance method), is not by itself a rule of customary international law. The absence of any reference to the declaratory force of the provision and the negative inference to be drawn from the history of the Convention as it was being drafted, would have been sufficient in themselves to deny declaratory force to the provision. Thus, it still cannot bind to non-parties, among them Iraq, since this does not result in an equitable division of the parts of the continental shelf between Iraq and her neighbours.

(123) Id, para. 97, pp.59-60.

2. It would seem reasonable to suggest that the record of the ILC, opinions of those concerned, state practice, the intention of the parties to both the Geneva Conference and the UNCLOS III,(124) and international adjudications, provide strong evidence to the effect that the dividing up of the continental shelf between Iraq, Kuwait and Iran has to be settled in the light of equitable principles. This notion while adopted from various sources(125) rests upon one foundation.
3. Agreement is deemed to be regarded the major and most appropriate rule by which boundaries of the areas of any continental shelf can be settled. It is the key to the whole matter because it is strikingly evident, as the Court of Arbitration has described, that this notion is of "general character and applicable to a delimitation under Article 6 no less than under customary law".(126)
4. In any event, it would be proper, for reasons previously suggested, to uncover evidence which parties ought to take into account as a basis in the delimitation of the continental shelf between Iraq, Kuwait and Iran as the case may be. The area of the countries concerned, their population and population density, relevant

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(124) It must be noted that the work of the UNCLOS III is workable only to the extent that it may be considered as an indication of the attitudes of States rather than as a law since it has not been enacted and is still under consideration.

(125) Namely if one were to regard the delimitation, in accordance with the Principles of customary law or according to the conventional rule (equidistance-special circumstances).

(126) Decision, para. 77, p.51.

political, geographical, geological and economic factors, related considerations of security and topography, and even the relations with neighbours may not be overlooked.(127)

Recommendation

For all of the above reasons therefore, it is respectfully suggested that:

a. Iraq should declare explicitly her intention that the equidistance method is applicable in dividing her continental shelf vis-a-vis her neighbours, only in so far as it is recognized by international law. Coupled with earlier references on which this view is based, the fact that only such a solution, as proposed by the Proclamation of 10 April, 1958, could be regarded as substantial grounds for this conclusion. Such a step is recommended to remove any legal uncertainty in the interpretation of Iraq's conduct in this respect not as a change in her attitude.

b. Iraq, in any future negotiation, will refuse to divide up her continental shelf boundaries with Kuwait and Iran on the basis of the equidistance method (alone). She has to regard herself as not bound by the rules embodied in Article 6 of the 1958 Geneva Convention, to which she is not a party, and in respect of which is res inter alios acta alteri nocere non debet, except to the extent to which these rules correspond to the principles of customary law.

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(127) ICJ Reports, 1969, dissenting opinion of Judge Koretsky, p. 155.

The solution suggested above, it seems, is supported by the fact that Iraq and both her neighbours, Kuwait and Iran, have maintained, by some means, their adherence to the principle of equity and to the general principles of international law.(128) This consensus adopted by the parties should clearly provide a sound foundation for the practical working out of various particular problems concerning delimitation of offshore areas between Iraq, Kuwait and Iran.

Section Two

The Problems of the Delimitation of the Continental Shelf Boundaries Between Iraq and Her Neighbours

On the assumption that the establishing of marine boundaries is in the abstract, quite easily done, particular situations may, nevertheless cause practical complications.(129) That is to say, even if the rules set forth previously on delimitation of the continental shelf boundaries were recognized by nations concerned, major problems would be likely to arise.(130)

It may be seen that, if the above observation is true in general, it is especially so in the Arabian Gulf. Here, a number of factors may contribute to the existence of legal problems of considerable importance.(131) Clearly,

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(128) Appendix No. II, Appendix No.V and Appendix No.VII

(129) Young, op.cit., Ref. (128), at 233, p.517.

(130) See the dissenting opinion of Judge Sørenson, ICJ Reports, 1969, p.256.

(131) Momtaz, Par Djamchid, "Les Problems de la Délimitation du Plateau Continental du Golfe Persique a Travers les Accords de Delimitation en Vigueur," Asian-African Legal Consultative Committee, Commemorative Volume, New Delhi, 1976, pp.75 et seq.

the continental shelves, in general, frequently form, from the stand-point of the petroleum geologist, a favourable environment for the sediment, in which oil or any other mineral is found.(132) Therefore, it must be stressed that the Arabian Gulf, as noted earlier, appears to fit in with this supposition.(133) Further, it is convenient to bear in mind that the Arabian Gulf is not merely an oil pool covered by water; rather it has been for centuries, and still is, one of the world's most important routes connecting east and west. Thus, strategic position, navigation and exploitation of submarine resources, the main uses of the sea, may well give rise to offshore boundary questions. However, not all offshore boundary disputes originate in this way. The shallowness of the Arabian Gulf, and the mutability of the Iraqi baseline, as well as her irregular coastline, all raise legal problems of considerable interest and complexity.

Several pertinent difficulties may, however, arise. Three may be cited because of their importance. Firstly, a difficulty arises if the boundary line on the continental shelf cuts across a common deposit of petroleum or similar liquid mineral.(134) Secondly, there is the possibility of overlapping,(135) and thirdly there is the question of

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(132) Auguste, op.cit., Ref. (4), at 1, p.37.

(133) Kassim, op.cit., Ref. (5), at 320, p.329; YBILC, 1950, Vol. 1, p.214.

(134) Hereinafter is referred to as a "common oil deposit".

(135) It is worth noting that almost all the writers link the problem of overlapping with the question of common oil deposit, considering them as one problem. It is respectfully submitted that although, the two questions may very often concur, the opposite, at least in the writer's view, is closer to the truth. The existence of a common oil deposit does not

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whether recognized offshore boundaries are to be regarded as immutably fixed or whether they may be subject to reasonable relocation in accordance with any alteration to the baselines which may occur. As the latter problem is closely related to the problem of the mutability of the baseline and was considered above,[136] it will be excluded here. Therefore, the first two problems are our concern in the following two subsections.

Subsection One

The Problems Raised by the Existence of a Common Oil Deposit

I. The Problem

A common oil (or any other mineral) deposit is defined as a single structure situated on land or offshore, underlying the territory of two or more States, and which is totally, or partially, exploitable from either side of the boundary line.[137] In dealing with this point, the ICJ described the problem in the North Sea Continental Shelf Cases[138] as follows:

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(135) contd...
necessarily have any connection with the question of overlapping. A common oil deposit might possibly exist although there was no overlapping or one may even be discovered after the establishment of the continental shelf boundaries between the nations concerned. On the other hand the problem of overlapping might occur although there was no common deposit.

(136) See above pp. 377 et seq.

(137) Onorato, William T., "Apportionment of an International Common Petroleum Deposit", ICLQ, Vol. 17, 1968, p.85; Woodliffe, J.C., "International Unitisation of an Offshore Gas Field", ICLQ, Vol. 26, 1977, p.339.

(138) ICJ Reports, 1969, p.3.

> "It frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned."(139)

Having stated this, an immediate question would then have to be discussed briefly. Mention must be made that States, undoubtedly have exclusive rights over their land territory and territorial sea as well as their soil and subsoil to an unlimited depth.(140) Additionally, States have also exclusive jurisdiction over the sea bed and subsoil of the continental shelf for limited purposes of exploration and exploitation. It follows that unless the consent of the State concerned is obtained, no one has the right to explore or exploit the resources there, no matter whether the deposit has been discovered, or the interested State is able, or intends to exploit it.(141) These principles are obviously directly inspired by the fundamental notions of "territorial sovereignty, sovereign rights and territorial integrity".(142) It is of course a general principle of international law that sovereignty

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(139) Ibid., para. 97, p.51.

(140) See Oppenheim, op.cit., Ref. (262), at 137, pp. 417 et seq. This is clearly indicated in a number of boundary agreements. See for instance, Austria-Czechoslovakia Treaty and Annexes of December 12, 1928, Art. 4, CVIII LNTS, p.9; German Democratic Republic-Poland Agreement of July 6, (1950), Article 2, UNTS, Vol. 319, p.93; Soviet Union-Czechoslovakia, Agreement of November 30, 1965, Article 1, UNTS, Vol. 266, p.243.

(141) Lagoni, Rainer, "Oil and Gas Deposits Across National Frontiers", AJIL, Vol. 73, 1979, p.216.

(142) Ibid., p.215.

of a State extends to the frontiers, and sovereign rights to the dividing line of the continental shelf. Therefore, a common oil deposit must be divided among the superjacent States, each of which is entitled to exploit the part which lies under its soil and subsoil.

Unlike hard mineral deposits, which can conceivably be divided(143) into independent units,(144) deposits of a fluid character, (liquid or gaseous),(145) shared by two or more States cannot be divided between the nations concerned. It must be recognized that one cannot tell in advance, the precise amount of shared natural gas or petroleum which underlies the territory or the continental shelf of neighbouring States. It is also suggested that, even if mining operations were conducted on one side of the boundary line, it would still adversely affect production costs or reserves on the other, and perhaps

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(143) It is easier to solve the problem if the mineral is not liquid, e.g. the treaty of 17 May, 1939, between Germany and the Netherlands whereby a border line between coal deposits was recognized independently of the frontier between the two States concerned. See Mouton, op.cit., Ref. (258), at 135, p.421.

(144) Even in cases of common hard mineral deposits, it must be conceded that there are certain cases where cooperation is also reached between the nations concerned. E.g. Articles 2 and 3 of the Belgian-Netherlands Treaty of October 23, 1950 fixing a mining boundary between the coal mines along the Meuse, UNTS, Vol. 136, p.40; Article 3 of the Netherlands-Federal German Republic of January 18, 1952, fixing a mining boundary between coal fields to the east of the Netherlands-Germany Frontier, 179 UNTS, Vol. 179, p.156. However, cooperation in these cases is limited to matters of common interest. Furthermore, it is not required by international law but rather is stipulated for practical considerations. See Lagoni, op.cit., Ref. (141) at 435, p.213.

(145) Petroleum is not the only mineral to be found in the continental shelf. Other minerals have been found and there are likely to be still more. See Auguste, op.cit., Ref. (4) at 1 , p.38.

even cause the entire wastage of the deposit, although these operations may otherwise be legal.

In the light of the foregoing, it is likely that other States cannot extract the minerals from their part of the deposit, even if the first State has extracted only that portion initially situated in its territory or continental shelf.(146)

It may be argued that, as a principle of international law, material damage to other State's territory as regards extraterritorial environmental effects, especially air and water pollution, gives rise to State responsibility. Accordingly, as Mr. Lagoni rightly suggested, this is equally applicable to the extraterritorial effects of mining operations.(147)

It is true that the principles of sovereignty and territorial integrity would be violated by mining through the boundary line into that part of a common deposit on the territory or continental shelf of a neighbouring State.(148) But it is equally true that it is difficult, if not impossible, for reasons relating to oil and gas to establish violations of the principles of territorial sovereignty.(149)

Therefore, serious problems of conflict are undoubtedly

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(146) In an attempt to avoid problems of this sort, some States have agreed to establish a "security zone" parallel to the dividing line on the continental shelf. However, this solution did not successfully solve the problem. See further Lagoni, op.cit., Ref. (141), at 435, p.217.

(147) Ibid., p.217.

(148) Ibid., pp. 216-217.

(149) These deposits are characterized by a complicated "equilibrium of rock pressure, gas pressure and underlying water pressure", ibid., p.217.

conceivable and these types of problems may consequently account for international disputes.(150) Obviously, it would be very difficult, due to the substantial economical interests of such deposits to solve the problem under consideration.

One point should perhaps be clarified at this stage. The problem of apportioning international common oil deposits may appear, prima facia, to be a little theoretical, since only very few international common deposits were discovered in the past. Yet, it would now seem to have a bearing on practice and is hence not merely a hypothetical question. International law is abundant in agreements of this sort which we shall discuss more fully later.(151) There are also a number of examples of "international deposits" upon which agreements have not yet been reached. Amongst these the Murchison oilfield and the Brae oilfield which are believed to straddle both sides of the boundary line between the continental shelf area of Britain and Norway,(152) the Statfjord oilfield which is thought to cross the boundary line between the British and Norwegian continental shelves,(153) and the natural gas field Wustrow which extends across the boundary line between the Federal Republic of Germany and

(150) See Judge Tanaka's dissenting opinion, ICJ Reports, 1969, p.172.

(151) For example the agreement between the U.K. and Norway relating to the exploitation of the "Frigg Field" Reservoir and the transmission of Gas therefrom to the U.K. U.K.T.S. No. 1, 1976, Cmnd. 6491.

(152) Onorato, William T., "Apportionment of an International Common Petroleum Deposit", ICLQ, Vol. 26, 1977, p.324; Lagoni, op.cit., Ref. (141), at 435, p.219.

(153) Onorato, ibid., p.324.

the German Democratic Republic.(154)

Even if we assume that the existence of such common fields are as yet very slight, it is still necessary to assert that the results of exploration and drilling under the seabed of the Arabian Gulf in general permit the conclusion that the Arabian Gulf is considered to possess appreciable amounts of petroleum.(155) It follows that the delimitation of the seabed between bordering States in the Arabian Gulf, will inevitably have to be cut by separate boundary lines. Pools of oil will surely be found to cross such boundary lines or to be close to them so that they may be exploited by way of directional drilling by neighbouring States.(156)

In the light of the preceding argument, it would be correct to assert that it is more likely that a field of petroleum beneath the seabed may extend across the boundary line dividing the continental shelves(157) which

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(154) Lagoni, op.cit., Ref. (141) at 435, p.219.

(155) Kassim, op.cit., Ref. (5), at 320, p.329.

(156) Momtaz, op.cit., Ref. (131), at 432, p.77; Onorato, op.cit., Ref. (137), at 434, p.85; Kassim, op.cit., Ref. (5) at 320, p.329.

(157) In relation to owners or producers within one national area, the problem of apportioning a common oil deposit appears to be more easily solved by municipal legislation. The 1964 British regulations which authorize the Minister of power to require unified development scheme in any locality where this appears, may be considered as a very good example in this case. See the Petroleum (Production) (Continental Shelf and Territorial Sea) Regulations Reproduced in the ILM, Vol. 3, 1964, p.621. Paragraph (19) of the Schedule No. 2 annexed to the aforementioned act provides in part:

"(1) ... the Minister shall consider that it is in the national interest in order to secure the maximum ultimate recovery of petroleum and in order to avoid unnecessary competitive drilling that the oil field should be worked and developed as a unit

contd.....

appertain to Iraq or any of her neighbours.

However, attention must now be turned to the nature and extent of rights which may be asserted by the nations concerned. Here, it may be asked, how and according to what principles shall a common petroleum deposit be apportioned?(158)

Although the problem of apportioning an international common oil deposit is not a new one, the rules for its solution remain undetermined, and the principles followed in practice are variable. Therefore, it can be stated with confidence that no general principle of a mandatory nature appears to have been publicly adopted.(159) It will be to this that the next discussion will be devoted.

II. The Possible Solutions

From the outset, it must be admitted that the matter of which law to apply, is a difficult problem to solve satisfactorily. To say this is not to argue the non-

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(157) contd...
in co-operation by all persons including the Licensee whose licences extend to or include any part thereof the following provisions of this clause shall apply.
(2) Upon being so required by notice in writing by the Minister the Licensee shall co-operate with such other persons, being persons holding licences under the Act of 1934 or that Act as applied by the Act of 1964 in respect of any part or parts of the oil field ... as may be specified in the said notice in the preparation of a scheme... for the working and development of the oil field as a unit by the Licensee and the other Licensees in cooperation and shall, jointly with the other Licensees, submit such scheme for the approval of the Minister".

(158) Woodliffe, op.cit., Ref. (137), at 434, pp.338-339.

(159) Momtaz, op.cit., Ref. (131), at 432, p.77.

existence of answers to this question. Indeed, three types of rules are advanced in the literature of international law to solve the problem.

The first rule, as put forward by certain authors, was the prior appropriation rule.(160) It may be noted in the writings of those who adhere to this rule that they regard it as the parallel in international law to the rule of capture in municipal law.(161) However, this rule simply provides that the first State to set out extracting and developing the common oil field gains priority over all subsequent exploiting States.(162)

Clearly, this pattern would in practice induce unnecessary competitive drilling on either side of the

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(160) Morris, op.cit., Ref. (4), at 9 , pp.205-210, 214.

(161) Ibid., p.206. Although the issue does not fall within the scope of this work, nevertheless, it is worthwhile to concede that the rule of unregulated production or unrestricted capture governed the exploitation of oil fields at one time. A detailed look at municipal petroleum laws and adjudication would reveal that the aforementioned rule was widely used at first due to a meagre knowledge of the nature of oil. See for the early beliefs about the nature of oil, Nanda, Ved P. and Kenneth R. Stiles, "Offshore Oil Spills: An Evaluation of Recent United States Responses", San Diego Law Rev. Vol. 7, 1970, p.522; Onorato, op.cit., Ref.(137), at 434, p.90. As for cases see Westmoreland & C. Nat. Gas Co. v. Dewitt (1899) 130 Pa. 235; Hammonds v. Central Ky. Gas Co. (1934)255 Ky. 685; Trinidad Asphalt Co. v. Ambard (1899) Ac. 594; Upo Naing v. Burma Oil Co. Ltd. (1929) L.R.16 Ind. App. 140. However, as time goes on fundamental knowledge about the natural state of oil has been advanced. Eventually, it appears that earlier understandings in this regard were founded on a mistaken basis as it was proven that oil was a static and exhaustible resource. Thus, the earlier rule of unrestricted capture has been replaced, as will be discussed later by regulations which provide for unqualified unilateral exploitation of common petroleum deposit. See also, Jacobs, John C.,"Unit Operation of Oil and Gas Field", YLJ, Vol. 57, 1947-1948, p.1207-1224.

(162) Morris, op.cit., Ref. (4) at 9 , pp.207 et seq.

dividing line and in turn this would certainly cause the uneconomic exploitation or even perhaps the wastage of the common deposit.(163)

A second solution to the problem of common deposit suggested by Juraj Andrassy, although not based on the prior appropriation rule, leads to similar effects. From Andrassy's point of view, the rule of sovereignty over the subsoil to the common deposit, would be applied in the absence of any agreement to regulate the development of the common deposit.(164)

The aforementioned solution, as Mr. Lagoni correctly remarked, can lead to competitive drilling.(165)

Based on the"unity of deposit"concept, it is also suggested, according to another view, that it would not be advisable to divide up a common offshore field by an international boundary line. That is to say, it would be dangerous to divide up reserves which straddle international boundaries on a continental shelf amongst several nations.(166) Accordingly, this approach simply advances the diversion or bisection of dividing lines of an offshore field from its initially supposed location. If the pool of oil is subsequently discovered, after the establishment of the continental shelf boundaries, in the light of the principles of delimitation agreed upon, those boundary lines would be subject to alteration.(167)

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(163) Lagoni, op.cit., Ref. (141) at 435, p.219.

(164) Ibid., p.220.

(165) For further details see Lagoni, op.cit., Ref. (141) at 435, p.220.

(166) Onorato, op.cit., Ref. (137), at 434, p.86; Mouton, op.cit., Ref.(258), at 135, p.421.

(167) Onorato, op.cit., Ref.(152), at 438, p.325.

In this respect, it must be mentioned that practical considerations are invoked to justify this approach, as it is quite difficult, if not impossible, to draw up a line within which submarine development may be permitted and beyond which it may not. Additionally, one important fact is that even if the other State is allowed to drill just outside that limit, it is more likely that such drilling is liable to change the conditions of exploitation of substances within that limit.(168)

In addition to the reasons stated above, it is also suggested that the legal basis of this approach may be noted in the clause inserted in Article (6) of the Geneva Convention on the Continental Shelf, namely, the "special circumstances" clause. That is to say, the existence of an oil field constitutes special circumstances which justify deviation from the boundary line as it should be.(169)

Clearly, this approach appears to raise more problems than it solves. Nations, it is submitted, presumably attach more importance to boundary questions than to problems of common resources. Thus, they possibly sacrifice their interests in common resources in order to retain their legal positions on the international frontiers. It is to be noted that the "unity of deposit" in the context previously mentioned has been disputed. Nor has it been accepted as prevailing, as will soon be discussed.

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(168) See Mouton, op.cit., Ref. (258), at 135, p.421. The author states that "two concessionaires should not tap the same pool, or, in a descriptive parable: never two straws in one glass". id., p.421.

(169) Padwa, op.cit., Ref. (51), at 210, p.645.

Finally, a completely different and, perhaps, more reasonable and practical approach now widely prevails. Amongst other writers on international law,(170) Onorato later explained the inconvenience of unilaterally developing and exploiting a common deposit. He further propounded a solution requiring the co-operative development of an international deposit.(171)

With the above tracing of the steps in regard to some of the literature developments involved - others will be left for later consideration - it now remains to proceed to consider the principles involved in the case of a common offshore field. Here, the more general question must be posed as to what the current applicable rule is, if any, for the apportionment of common deposits of liquid minerals?

In reply to this question, it should be made clear at the outset that the primary sources of international law, as any text book on the subject will report, are treaty and custom.

In dealing with such an argument, one has first to examine whether or not there is any conventional rule pertinent to the subject. It would be fair to say that the Geneva Convention of 1958 on the continental shelf offers no assistance in this respect. Nor has there been

(170) Examples, Woodliffe, op.cit., Ref. (137), at 434, pp.339 et seq.; Lagoni, op.cit., Ref.(141), at 435, p.220.

(171) Onorato, op.cit., Ref.(152), at 438, p.327; and his earlier view, op.cit., Ref.(137) at 434,p.101 in which he advanced that there had been no established rule in the exclusion of any other. The most that can be said, he stressed was no party in interest could "proceed unilaterally with exploitation procedures," ibid., p.101.

any international multilateral treaty in force.(172)

III. Is There Any Customary Rule on the Topic?

Having said this, our remaining task is to ascertain whether any customary rule on the topic is in existence.

In this connection, the question can almost always be answered in the affirmative according to the majority of writers. Mr. Onorato, for instance, argues that the most pertinent policy securing the best exploitation of common oil fields and offering the greatest benefits for all nations concerned would appear to consist of co-operative and non competitive exploitation of common petroleum sources. There are sufficient grounds, he maintains, which necessarily constitute a rule of customary law requiring such an exploitation for a common oil field.(173)

It is hardly possible, for reasons which will be discussed later, to concur with this view. The fact that the existence of customary rule depends on certain elements, makes it necessary to consider the arguments that have been advanced from which the establishment of the cooperative rule has been derived. In this connection, it would be fair to say that the grounds which have been invoked for the purpose of concluding the establishment of the customary character of the said rule, seem to rely on one or two considerations. To find a legal basis for deriving this solution, it has been suggested to refer to "institutions of international and private law" relating

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(172) Terr, op.cit., Ref. (435), at 190, p.67.

(173) Onorato, op.cit., Ref. (137), at 434, pp.88 et seq.; and op.cit., Ref. (152), at 438, pp.329 et seq.

either closely or by analogy to the matter.(174)

It is contended that, as there is no multilateral convention in(175) force on the topic or any clear customary rule pertinent to the subject, one must examine private law in the same manner as the ICJ does in such a situation.(176) Then, it is pointed out that municipal law of almost all producing countries do require "co-relative and non-competitive" exploitation of their common petroleum deposits.(177) Accordingly, it is argued that it must be evident to any one who reads the text of the "Petroleum Code of Columbia Decree 1056 of April 20, 1953" that parties sharing a common oil field are obliged to "adopt a unitised plan of development" under which competition is not allowed and co-operation is required.(178) A further example is cited to furnish a firm ground on which to consolidate this trend. The law of Hydrocarbons of Venezuela is also referred to as good evidence to indicate the prevailing precited tendency on the municipal level.(179) Having reached the conclusion that the rule which requires co-operative planning in exploiting a common oil field, is dominant in municipal law, Onorato selected the same doctrine and applied it to international petroleum deposits by analogy.

(174) Onorato, op.cit., Ref.(152), at 438, pp.324-337.

(175) There are remarkably a number of bilateral agreements as will be discussed later. See below pp.452 et seq.

(176) Statute of the ICJ, Article 38, paragraph 1, Clause C.

(177) For further details see Onorato, op.cit., Ref. (137) at 434, pp.91-92.

(178) Ibid., p.92.

(179) Ibid., p.93.

A more important part of the reason,heavily relied upon in adopting this view, is the fact that there are a series of precedents on the international law level for co-operative development and exploitation of international resources. Coupled with earlier references to municipal law, the fact that, in almost all cases where limited natural resources, like petroleum, which possesses the same physical character, have to be divided up among the nations concerned, it could be regarded a legal foundation on which to rest this tendency.(180) Among the cases which according to the above mentioned view are along these lines, is the area of fisheries. Several agreements, it is argued, have been reached between the States concerned on specific means for co-operative exploitation of commercial fish stock.(181) For the purpose of strengthening this trend, examples in the field of non-navigational use of rivers are also invoked. Here again, it is contended, a share control, development and use of international rivers that cross borders, have not been the subject of any controversy.(182)

It may be added that Onorato, amongst others, has also drawn attention to materials more directly connected to the question under consideration. To demonstrate the contention that the pattern of state practice requires cooperation in apportioning an international common oil

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(180) See the Memorial of the Federal Republic of Germany, ICJ Pleadings, 1968, Vol. 1, p.34; Onorato, op.cit., Ref.(137) at 434, p.101; and Ref.(152) at 438, pp. 330-331.

(181) See the examples cited in Onorato, op.cit., Ref.(137) at 434, p. 94.

(182) Examples are also referred to in Onorato, op.cit., Ref.(137), at 434, pp.95-96; ICJ Pleadings, 1968, the Memorial of the Federal Republic of Germany, Vol. 1, p.34.

deposit between neighbouring States, Onorato refers to a number of agreements. These agreements which provide for cooperation in exploiting and developing international common oil deposits, serve, he feels, as a basis for his contention.

Evaluation

It is submitted that it is correct to say, for reasons which will be discussed later, that the unilateral exploitation of an international offshore field is inconvenient and must thus be solved by agreement between the nations concerned. However, it is not possible to infer that "cooperative exploitation" as a rule of customary law implied, understood, or resulted from the above contentions. This suggestion is amply confirmed by certain justifications related to this matter.

There is no more reasonable inference to support this submission than that Mr. Onorato himself recognized. In stating his case, however, Mr. Onorato expressly pointed out that the instances of State practice he cited are rare. These instances, he asserts, are not sufficient to prove that the concept of cooperative development, as a rule of law, imposes obligations on the nations concerned, but rather is only a trend.(183)

However, although this may be correct, it is not intended to rest this view merely on one argument of logic.

The substantial grounds on which the rejection of the trend claiming the construction of the cooperative rule

(183) Onorato, op.cit., Ref. (137), at 434, p.99.

are based, on both principles of international law and practice of States.

Consequently, it is necessary to examine the contentions cited as proof of the customary character of the cooperative rule.

It is proposed to begin with the allegations which rest on domestic legislation. Without pausing to consider the value attributed to the municipal legislation in connection with the establishment of a rule of international law, it will suffice to reject this consideration as a pertinent piece of evidence in this respect. This argument, it may be noted, is not admissible and that the laws cited purely domestic instruments unknown to other governments. It may be argued that Article 36(2C) of the Statute of the International Court of Justice permits recourse to national legislation. However, while such an argument is undoubtedly logically correct, it is submitted that what is clear from the language used in the aforesaid Article is that the allowance to resort to municipal legislation is only in the absence of international practice. Indeed, there is international practice and States have shown on a number of occasions that they are keenly aware of the problem but treated it, as will be discussed later in different approaches.

As for precedents in international law to regulate the exploitation of resources other than oil but possessing the same character, it is proposed to ask the question whether these precedents serve to confirm this opinion?

The answer to such a question could only be, it is submitted, in the negative. Striking evidence is to be

found in the famous Lotus Case [184] for example. While referring to several conventions cited by the French side, and dealing with policing of the seas, the PCIJ confirmed that a rule of customary law should not be derived therefrom. Among the reasons for which the court dismissed those treaties was the fact that they had dealt with the policing of the high seas. Thus, it was unsuitable to apply them in the case before the court which dealt with the common-law offence of manslaughter.[185] That is to say further examination of the judgment discloses the Court's disapproval of the deduction of a rule of customary law from the treaties cited by France. The reason was obvious enough: whereas the Lotus Case dealt with the question of jurisdiction as to a collision which occurred on the high seas, the Conventions cited related to matters which although connected with high seas,were of a particular nature such as slave trade and fisheries. It follows in the court's view that no deduction could be made from them to conclude the existence of a rule of international law related to the case before it. In the words of the court:

> "... it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas and not to common-law offences."

In another case, it was similarly stated that "the large number of extradition treaties" cited in the pleadings by the Colombian Agent could "have no bearing" on the

(184) PCIJ Reports, Ser. A, No. 10, (1927).
(185) Ibid., pp. 4, 27.

question in the case. In the Asylum Case,[186] one of the arguments put forward by the court was that the treaties cited concerned extradition while the case was in fact related to asylum.[187]

It now remains to examine the agreements closely relating to exploitation of international offshore fields upon which this view particularly relies. Whilst it is true that provisions in treaties, whether bilateral or multilateral, may form an international customary law, it is equally true that not every variety of treaty can give rise to a rule of customary law. The fact that the establishment of custom depends on the existence of two elements, namely usage (repeated practice) and opinio juris (psychological element),[188] makes it necessary to consider the existence of these requirements.

To demonstrate this it is necessary to first examine briefly the status of existing international agreements which have been relied upon. For purposes of convenience and clarification, these agreements may be divided into two categories: those which deal with common oil fields which have already been discovered, or with common deposits which may be discovered in the future.

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(186) ICJ Reports, 1950, p.266.

(187) Ibid., pp. 275, 277.

(188) Briggs, op.cit., Ref. (219), at 121, pp.728-731; Bishop, op.cit., Ref. (2), at 8, pp.220-230. This means that the usage must amount to the exercise of the "subjective" right of those who practise it.

a. Agreements Dealing With Previously Discovered Common Deposits

It has been observed that one of the grounds relied upon above, to confirm that a customary rule for the cooperative development of a common oil field has been established is the fact that a number of agreements contemplating the problem prescribed cooperative exploitation. It is respectfully submitted that these treaties are too inconsistent, as will be observed, to yield any clear rule of customary law. It is to be noted that when a rule is alleged to have been a rule of custom, anyone asserting the rule must adduce a qualitative articulation of the rule and also a quantitative element. Quite apart from the first element, the ordinary sense of the word 'custom' is something that has repeated itself. It must thus be ascertained whether, prima facie, such an element exists, by examining the agreements cited to support the view claiming the existence of customary law.

With regard to the agreement of 22 February, 1958 between the Kingdom of Saudi Arabia and the Government of Bahrain,(189) it can hardly be believed that it had been ever intended to be a cooperation agreement.(190) This seems clear from the inference of the second clause of the agreement which provides in part that:

> "... This area cited and defined above shall be in the part falling to the Kingdom of Saudi

(189) Agreement Concerning the Delimitation of the Continental Shelf in the "Persian Gulf" Between the Shaykhdom of Bahrain and the Kingdom of Saudi Arabia, reproduced in ICLQ, 1958, pp.519-521.

(190) Lagoni, op.cit., Ref.(141), at 435, p.222.

> Arabia in accordance with the wish of H.H. the Ruler of Bahrain and the agreement of H.M. the King of Saudi Arabia. The exploitation of the oil resources in this area will be carried out in the way chosen by His Majesty on the condition that he grants to the Government of Bahrain one half of the net revenue accruing to the Government of Saudi Arabia and arising from this exploitation."(191)

The above excerpt clearly reveals that the Saudi Arabian Government may decide the way by which the exploitation of oil resources in the area may be carried out. Each party to the present agreement would be entitled to equal shares of income and benefits from this common structure.

A completely different approach has been selected in the agreement of 1960 between Czechoslovakia and Austria.(192) Here the parties agreed to exploit the common deposit each on the part which underlies its land territory. Each party would be entitled to produce an amount in proportion to the amount of reserves in its territory at the time when the agreement was concluded. Furthermore, a number of means were provided for to guarantee non-wastage of the deposit and to ensure that each party would confine itself to the limits of production to which he was entitled.(193)

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(191) See op.cit., Ref. (189), at 453, pp.520-521.

(192) Agreement Between the Government of the Czechoslovak Republic and the Austrian Federal Government Concerning the Working of Common Deposits of Natural Gas and Petroleum 1960, UNTS, Vol. 495, No. 7242, p.125.

(193) Ibid. at Article 3 and Article 5; see also Onorato, op.cit., Ref.(137) at 434, p.97et seq.; Lagoni, op. cit., Ref.(141), at 435, p.223.

Another type of solution can be found in the Supplementary Agreement of 1962 to the (Ems-Dollart Treaty of 1960) between the Netherlands and the Federal Republic of Germany.(194) Following a different approach, the parties here agreed on settling their national exploitation rights in common oil field or other substances, by sharing equally the petroleum and natural gas extracted. In accordance with the provisions of this agreement the concessionaires on both sides are bound to cooperate with each other.

In a fourth kind of agreement the matter is approached in a wholly different way. A number of agreements provide for unitized exploitation of a common deposit.(195) That is to say a single operator who will manage the common deposit on behalf of the other parties. Examples of this can be found in the 1974 Treaty between Japan and South Korea.(196)

An almost similar approach, with a slight difference in details, was followed in the agreement of 10 May, 1976 between the U.K. and Norway.(197) Here again, for the purpose of exploiting the "Frigg Gas Field" it is

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(194) The Ems-Dollard Treaty, Supplementary Agreement Concerning Arrangements for the Cooperation in the Ems Estuary, U.N.T.S., No. 7404, p.104.

(195) Horigan, J.E. "Unitization of Petroleum Reservoirs Extending Across Sub-Sea Boundary Lines of Bordering States in the North Sea", NRL, Vol. 7, No. 1, 1974, pp.67, 73.

(196) "Agreement Between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the two Countries, 5 February 1974, "Cited in New Directions in the Law of the Sea", Vol. 4, 1975, p.117.

(197) Cmnd. 6491, op.cit., Ref. (151), at 438.

considered as a single unit. It is worth quoting in part Article 1(1)[1] of the above agreement which provides that:

> "(1) The gas in the Frigg Field Reservoir and the hydrocarbons produced with or from the gas 'excluding oil underlying the gas and gas and oil in other horizons', referred to in this agreement as "Frigg Gas', shall be exploited as a single unit by means of installations specified in Annex A to this Agreement...."(198)

Moreover, the above agreement provides that a Unit operator shall exploit the Frigg Gas. Article (5) runs as follows:

> "For the purpose of exploitation of Frigg Gas in accordance with this Agreement a Unit Operator shall be appointed by agreement between the licensees, subject to the approval of the two Governments."(199)

A fifth scheme of arrangements calls for exercising joint power over the common deposit. Along these lines is the agreement of July 7, 1965 between the State of Kuwait and the Kingdom of Saudi Arabia over the partition of the Neutral Zone.(200) Although both these States annexed their part of the zone as an "integral part" of their territory, under the provisions of this treaty the resources exploited from the Neutral Zone are divided equally among the parties. Article 8 provides in part that:

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(198) Ibid., Article 1(1).

(199) Ibid., Article 5.

(200) Reproduced in ILM, Vol. 4, 1965, pp.1134-1137.

> "... the two Contracting Parties shall exercise their equal rights in the submerged zone beyond the aforesaid six miles limit mentioned in the Previous Article by means of shared exploitation unless the two parties agree otherwise."(201)

b. Future Discoveries of Common Deposits

As regards possible discoveries of common deposits, it can be safely said that in almost all delimitation agreements of continental shelf areas, particular clauses have often been incorporated. One may unreservedly accept that these clauses are almost uniform. To say this is not to argue the establishment of a customary rule for cooperative development of common oil fields. However, in order to appreciate the value of this uniformity for the purpose of establishing a general rule of international law, it is useful to quote passages from these agreements.

A good illustration of this may be found in the agreement between Britain and Norway in 1965.(202) Article 4 of this agreement runs as follows:(203)

> "If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line

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(201) Article 8, ibid., p.1135. Along this line is also the Agreement on Settlement of Maritime Boundary Lines and Sovereign rights over islands Between Qatar and Abu Dhabi, 30 March 1969, see ST/LEG/SER. B/16, 1974, p.403, or New Directions in the Law of the Sea, Vol. 5, 1977, p.223. Here referred to as signed on 20 March 1969.

(202) Agreement Between the Government of the U.K. of Great Britain and Northern Ireland and the Government of the Kingdom of Norway Relating to the Delimitation of the Continental Shelf Between the Two Countries" 10 March 1965, UNTS Vol.551, p.214.

(203) See below p. 462.

> and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the proceeds deriving therefrom shall be apportioned."(204)

Exactly the same picture emerges in the Rome Agreement of January 8, 1968 on the Delimitation of the Continental Shelf between Italy and Yugoslavia. Article (2) provides that:

> "In the event that natural resources of the seabed or beneath the seabed extend from the line of delimitation to both sides of the continental shelf, so that the resources on the continental shelf of one of the contracting parties can, in all or in part, be exploited from the continental shelf belonging to the other contracting party, the competent authorities of the contracting parties will meet with the intent of reaching an agreement to determine the manner in which said resources will be exploited, after having first consulted with the holders of any concessions in that area."(205)

Again, a similar provision is that of Article 7 of the agreement of 1974 between India and Sri Lanka on the boundary in historic waters between the two countries and related matters.(206)

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(204) See Ref. (202), at 456, Article 4.

(205) Italy-Yugoslavia: Agreement on Delimitation of the Continental Shelf, Rome, January 8, 1968. Reproduced in ILM, Vol. 7, 1968, pp.547-553, at 550.

(206) Reproduced in the ILM, Vol. 13, 1974, pp.1442-1443 at 1443.

c. Is there any obligation on States to require the use of any specific rule of apportioning a common deposit?

In order to answer this question, it is necessary in the first place to ascertain whether there exists any principle of international law. In endeavouring to trace the general lines along which state practice is followed it may be relevant to examine pertinent treaties of the classification cited, namely whether they deal with previously discovered or possible oil fields.

As regards the first category, the foregoing survey reveals that the agreements on previously discovered common deposits do not adopt one scheme. The first group, agreements which adopt a revenue sharing rule,(207) as Mr. Lagoni rightly observed, are not "cooperative agreements".(208)

The second group of agreements, as in the Czechoslovak-Austrian agreement of 1960, can hardly be relied upon or considered as "cooperative". If this agreement was so, how can one explain that each State is entitled to exploit its share in the production separately?

It may be argued that the other agreements cited,(209) from which a customary rule calling for cooperative exploitation is derived, could be regarded to recommend a kind of cooperation.

In order to answer this contention, it is submitted that even if they could be considered so, the real question

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(207) The Agreement of 1958 Between Bahrain and Saudi Arabia, see above, Ref.(189), at 452.

(208) Lagoni, op.cit., Ref.(141) at 435, p.222.

(209) See above pp. 456, 457.

which one may pose is on the other side. Do these agreements satisfy the prerequisite elements for the formation of customary international law rule? In exploring these agreements to extract the answer, it is worth recalling that these agreements adopted little uniformity if any. It may be added that to ascertain a rule of international law implies an investigation of the way in which custom acquires consistency and thus comes to be considered as constituting rules governing a particular situation. Undoubtedly, the foundation of a custom must be the united will of several States, and even of many, constituting a union of wills, or a general consensus of opinion among the countries concerned. Moreover, it must be proved that this custom is established in such a manner that it has become binding on all those concerned. This follows from Article 38 of the Statute of the ICJ which defined custom "as evidence of a general practice accepted as law".(210)

It follows from this that the number of agreements referred to in which common deposit fields were apportioned, has not reflected that the alleged rule of cooperative development was, apart from conventional stipulations, exercised by States as binding and not merely for reasons of practical expediency. Even more evident is the fact the different approaches followed in the agreements give a general idea that by reason of absence of consistency, without which a rule of international law cannot be based on custom, no rule of customary law can come into existence.

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(210) Article 38 of the Statute of the ICJ.

In the Asylum Case[211] after having cited treaties concerning asylum, the ICJ observed that those treaties contained provisions which were at variance. The variant provisions, as the Court correctly decided, yielded no clear line of practice. In the words of the Court, there was too much "inconsistency in the rapid succession of conventions on asylum."[212]

Similarly, in the Anglo-Norwegian Fisheries Case[213] the World Court had to examine whether there had been a rule of customary law laying down a ten-mile closing line for the indention of bodies of water in order that they could be called "bays". The Court was quite specific in deciding that

> "although the ten-mile rule has been adopted by certain States... in their treaties and conventions"

other States "have adopted a different limit".[214] Consequently, the Court held that the ten-mile rule "has not acquired the authority of a general rule of international law."[215]

In short, as it is observed by the Court in the foregoing cases, the substantive inconsistency of state practice prevented them from giving rise to a general principle of law.

For the reasons which have been given, the conclusion

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(211) ICJ Reports, 1950, pp.266-389.
(212) Ibid., p.277.
(213) ICJ Reports, 1951, pp.116-206.
(214) Ibid., p.131.
(215) Ibid.

which must be reached is that state practice, pertinent to the subject, is too inconsistent to yield any clear rule of customary law prescribing the cooperative development and exploitation of common oil fields. It would be reasonable to suppose that the techniques adopted in such bilateral arrangements are sui generis, their success depending on the readiness and willingness of the parties in question. That is to say, there is apparently no rule of international law which requires the use of any specific rule in the exploitation of common offshore fields.

To say the foregoing is not to argue for a complete denial of the existence of any other relevant rule. Whilst it is convenient to suggest the non-existence of a cooperative rule, this is no reason for ignoring the fact that there undoubtedly exists a practice whereby a State, sharing a common oil field, is required not to exploit it without some kind of understanding with the others concerned. In the course of state practice there has been a conclusive testimony which leads one to believe that a rule of customary law in this connection has been established. This may be supported by the fact that special provisions have often been incorporated in conventions to determine offshore boundaries. An appropriate illustration may be found in the agreement of 1965 between the United Kingdom and Norway.(216)

Other agreements in which similar provisions have been incorporated are:

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(216) See Article 4 of this Agreement, op.cit., Ref. (202), at 456.

The agreement of 1974 between India and Srilanka.(217)

The agreement of 1971 between the U.K. and Denmark.(218)

The agreement of 1971 between the U.K. and the Federal Republic of Germany.(219)

The agreement of 1965 between the Netherlands and the U.K.(220)

The agreement of 1973 between Canada and Denmark.(221)

Other agreements in the Middle East,(222) the Indian Ocean and the Far East.(223)

This uniformity in stipulating an agreement in the case of common deposit may serve as a basis for the establishment of a rule prescribing that the exploitation of a common deposit by some understanding between the parties concerned. It may be noted, as Mr. Onorato concluded in his earlier article, that it is now recognized in international law that:-(224)

1. No State is allowed to develop or exploit a common oil field if it is reasonably objected to by another State unless an understanding with the objecting State is arrived at.

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(217) Reproduced in ILM, Vol. 13, 1974, p.1442.

(218) Reproduced in ILM, Vol. 11, 1972, pp.723-725.

(219) Reproduced in ILM, Vol. 11, 1972, pp.731-733.

(220) Reproduced in Oda, op.cit., Ref. (408) at 180, Vol. 1, pp.385-386.

(221) Reproduced in ILM, Vol. 13, 1974, pp.506-511.

(222) Agreement of 1974 Between Iran and Oman, reproduced in ILM, Vol. 14, 1975, pp.1478-1479; Agreement of 1969 Between Iran and Qatar, U.N.T.S., Vol. 787, p.165; Agreement of 1968 Between Iran and Saudi Arabia, U.N.T.S., Vol. 696, p.189.

(223) See Lagoni, op.cit., Ref. (141), at 435, p.231.

(224) Onorato, op.cit., Ref.(152), at 438, pp.327-329.

2. The manner in which the question of dividing up an international common oil deposit must be settled by agreement between the States concerned.
3. The States concerned are under an obligation to enter into negotiation with a view towards arriving at such an agreement.(225)
4. The apportionment of a common oil field among the interested States is to be an equitable one.(226)

Conclusion and Recommendation

It now appears that no precise rule of international law has been recognized to have been applied in the absence

(225) Onorato, op.cit., Ref.(152), at 438, pp.327-329; Woodliffe, op.cit., Ref.(137), at 434, p.339.

(226) However, in order to present a complete picture on the subject, it may be noted that the legal basis of non-competitive exploitation of a common deposit is a matter upon which inconsistent views have been expressed. It is dealt with in various ways by writers. One of the arguments made is to the effect that the principle of territorial sovereignty over the subsoil together with the obligation not to cause material damage to another State and in addition to exchange information and consult on matters concerning the common deposit, would sufficiently furnish solid grounds for this rule. Lagoni, op.cit., Ref.(141) at 435, p.220. According to another writer, the protection of property rights under international law and considerations of sovereignty are the legal grounds on which the rule rests. Onorato, op.cit., Ref.(152) at 438, pp.328, 329. Each of the aforementioned contentions has its own fundamental errors. For further details see Lagoni, op.cit., Ref. (141) at 435, pp.220, 221, 228. In any event, in a work such as this which is not mainly concerned with such a problem, it may however be useful to note briefly that the principle of limited sovereignty alone could serve as a basis for the contention of the rule by which no State may unilaterally exploit a common deposit. It is recognized that the purpose of international law is to harmonize and reconcile the different interests of States and thus each State is allowed to use that which is its own as not to injure another's property.

of an agreement. The fundamental error in the view claiming the existence of a rule prescribing the application of the cooperative rule, is its endeavour to find sources of international law in places where they do not exist. It is submitted that international law is not created by an accumulation of opinions, neither is its source a sum total of systems, even if they agree with each other. Those are only methods of discovering some of its aspects, of finding some of its principles. In reality, the only source of international law is the consensus omnium. Whenever it appears that the majority of nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule then becomes part of international law. From what has been said, along with the fact that various types of attitudes have been adopted it would be impossible to infer an undertaking of any kind. The most that can be said is that cooperative development as a rule governing the apportionment of a common oil deposit is now a mere trend. It is to be stressed that the only principle, in this regard, not to be overlooked is the inconvenient exploitation of a common deposit, without the recognition of the States concerned.

As earlier references pointed out that large amounts of petroleum underlie the waters of the Arabian Gulf,(227) therefore, it is more likely that a number of oil fields are situated in such a way as to be shared by Iraq and each of her neighbours Kuwait and Iran. This fact alone

(227) See above pp. 310 et seq.

suggests that there is good reason to seek a satisfactory solution to the problem. In the absence of any international convention and since current State practice now favours the need for some sort of understanding between the nations concerned, where several countries are found to be tapping the same oil deposit, it may be suggested that an agreement be reached between Iraq, Kuwait and Iran as the case may be. This agreement should seek for an undertaking as any common single structure or field of petroleum shall not be developed or exploited unless an agreement as to the manner whereby such a structure shall be developed.(228) The following provision is suggested to be included in any future agreement between Iraq, Kuwait and Iran.

If any single geological structure or field of petroleum, or any other mineral deposit beneath the seabed, extends across any of the dividing lines set out in this agreement, and if any part of such a structure or field, situated on one side of that dividing line, is wholly or partially exploitable from the other side of the line, then both parties hereto shall endeavour to reach agreement as to the manner in which such a structure or field shall be most effectively exploited and also as to the manner in which the benefits arising from such exploitation shall be shared.(229)

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(228) See Mouton, op.cit., Ref.(258) at 135, p.421. This procedure is the only means to solve such a difficulty. Otherwise, in Professor Mouton's view, it would be difficult to lay down any general rule. Ibid.

(229) If such an agreement could not be reached, see below pp. 466 et seq.

Subsection Two

The Settlement of Overlapping Disputes Between Iraq and Her Neighbours

The problem

It should first of all be observed that, had submarine boundaries in general been carefully determined according to the recognized principles of international law, then, overlapping of marine zones, would not exist.

However, this does not imply that the delimitation of offshore boundaries may always be established without disagreement. Indeed, it is sound to suggest that in every social system there are inherent areas of dissent and dispute.

In looking at the Arabian Gulf in particular, concessions granted by the respective States have revealed positively that overlapping inevitably occurs. The emergence of the problem is more likely in the dividing up of marine boundaries, especially, between Iraq and her neighbours. Undoubtedly, the configuration of the Iraqi coastline; which stretches for only about ten nautical miles, further complicates the question and contributes tellingly to the existence of overlapping. That is to say, the Iraqi continental shelf becomes narrower towards the high sea until it overlaps with the Iranian and Kuwaiti continental shelves.

It would be inappropriate to argue to the contrary, on the grounds that Iraq, Kuwait and/or Iran might possibly not challenge the application of the concept of equity.

In short, apart from the well known differences concerning the interpretation, content and application of the concept of equity,(230) overlapping is still viable due to controversial claims about the location of the baselines, or at least the basepoints on these lines, from which seaward limits are measured.(231) It also might be ascribed to the differences regarding the interpretation of the principles of international law pertinent to the subject.

Indeed, whatever the factors that produce this result, which naturally vary according to the circumstances of the case, it will cause a source of international conflicts.

Presumably, a viable social system must in general, have the means by which such disputes can be settled without threatening the entity of the system.

In reality, in most domestic societies the law performs an essential function by supplying the procedures by which disputes can be settled, or at least contained, without destroying the fabric of the society. Domestic disagreements are not forbidden by national legislation, but are limited in scope and intensity as they are frequently subject to a definite settlement by centralization of authority.

In contrast to this, is the conclusion which would follow in the international community. Undoubtedly, the settlement of international disputes is a subject of great complexity as there was no central body recognized by the international society, or at least the majority

(230) Colson, op.cit., Ref. (20), at 198, p.105.
(231) Blecher, op.cit., Ref. (23), at 200, p.61.

of States, as being competent enough to settle disputes.(232)

Here, the use of force, instead played an essential role in the relations between States.(233) However, around the turn of the present century, the idea that war as a means of settling international disputes, was seriously questioned, and the thought that war could function as the final arbiter in the international bargaining process was rejected.(234) It may be said that the principle of renunciation of threats or use of force as instruments of national policy, has been adopted in a large number of treaties,(235) and has now become a fundamental principle of international law.(236) Thus, it has been formulated with the utmost clarity in the Charter of the U.N. Article 2(4) imposes definite obligations on members of the World Organization, in their conduct of international relations, not to use or threaten force.(237)

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(232) Pechota, Vratislav, "Complementary Structures of Third Party Settlement of International Disputes" Edited in "Dispute Settlement Through the U.N.", ed. by K. Venkata Raman, 1977, pp.149-155.

(233) Luard, Evan, "Frontier Disputes in Modern International Relations" In the International Regulation of Frontier Disputes, 1970, p.22.

(234) Blishchenko, I.P., "The Use of Force in International Relations and the Role of Prohibition of Certain Weapons" Current Problems of International Law, by Antonio Cassese (ed.) 1975, p.157.

(235) Some of these treaties have been referred to in Ref. (126) in, Menon, P.K., "International Boundaries, A Case Study of the Guyana-Surinam Boundary", ICLQ, Vol. 27, 1978, p.762; Blishchenko, ibid., pp.159-160. However the Hague Conventions of 1899 and 1907 made a significant contribution to the development of the principle of prohibiting recourse to force by States. See ibid., p.157.

(236) Jennings, R.Y., "The Acquisition of Territory in International Law", 1963, pp.52-68. Blishchenko, ibid. p.162.

(237) Charter of the U.N.

Not only has the Charter of the U.N. imposed obligations not to use force but also enumerated procedures whereby States may adjust their differences peacefully. By virtue of Article 33 of the Charter of the World Organization, the parties to any dispute which is likely to disturb the maintenance of international peace and good understanding between nations, shall first of all seek a solution, inter alia, by negotiation.(238) Failing to reach a mutual solution by negotiation, disputants would resort to a third party.(239)

The Possible Solutions

Accordingly, if a controversy arose between Iraq and any of her neighbours relating to the overlapping of the continental shelf, it would be solved on the basis of either of the above existing amicable means. These means and their applicability to disputes relating to the problem under consideration will be briefly explored. For convenience, they will be discussed here under two headings: diplomatic negotiation and means other than negotiation.(240)

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(238) Charter of the U.N. Article 33.

(239) Ibid. The various kinds of third party intervention may be, mediation, conciliation, good offices, and arbitration or judicial settlement. See Menon, op. cit., Ref.(235), at 468, p.726.

(240) That is because - the use of good offices to bring the parties together into direct negotiations, or mediation in which the mediating parties take part in the discussion, or conciliation, where in the conciliator makes finding which the parties remain free to accept or reject - are all methods to get the parties to the dispute to negotiate and agree upon a solution. Thus it, appears reasonable not to separate them from negotiation. See Bishop, op.cit., Ref. (2), at 8 , p.173.

I. Diplomatic Negotiation

For the reasons previously suggested it is possible to stress that areas of the continental shelf between Iraq, Iran and Kuwait will in some manner converge and overlap.(241)

On the threshold of an exploration of the rules to be applied so as to solve the problem it may be of use to ascertain the record of the ILC pertinent to the subject. It may be noted that the Commission was faced with the problem under consideration. It was recorded, along with others relating to the continental shelf under the heading (question 7).(242) It would be fair to say that a number of alternatives through which this point ought to be settled, were open to the Commission. One of the Commission's members, Mr. Hudson, pointed out that the International Law Association's Committee on Rights to the Seabed and its Subsoil, had considered the rights vested in coastal States on the said area. The Committee, Mr. Hudson mentioned, had recommended in its report that there must have been criteria to find a solution when continental shelves overlapped. It had been the view of the International Law Association's Committee that neither international custom nor international practice had provided any enlightenment on the subject. Not only had international custom and practice been so, but also writers had not been able to offer a suitable solution. Therefore, as a matter of reasonable inference according

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(241) See above p. 466.

(242) YBILC, 1950, Vol. 1, p.232.

to Mr. Hudson, it was suggested to set the question aside.(243)

A second possibility was examined to achieve this aim. The disputed area was to be equally divided between the States concerned under Mr. el-Khourg's view. He affirmed that there was good reason for this to be used as a basis. From his standpoint, since the general rule when two States were separated by waters was that the frontier was fixed in the middle of these waters the same rule should be applied in the case of overlapping.(244)

A third type of solution was suggested by Mr. Amado who, to enhance his argument, cited that the Barcelona Conference had failed to reach an agreement in the case of the utilization of the water power of frontier river. He went on further to state that the attempts which some South American States had made in this regard to reach a desirable mutual agreement at the Pan-American meetings at Havana in 1928 and at Montevideo in 1933 were also not successful. Consequently Mr. Amado pointed out that it was impossible to adopt a general principle on that point. Thus, he recommended that a ruling by an impartial body in each particular instance, on the basis of law, would be an appropriate means of settling overlapping disputes.(245)

Another proposal was suggested by Mr. Yepes. Potential areas of overlapping of the continental shelf as he put his case, had to be settled by agreement between

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(243) YBILC, 1950, Vol. 1, pp.232-233.

(244) Ibid., p.233. This view was opposed by Mr. Hudson on the grounds that there had been no such principle. Ibid., p.233.

(245) Ibid.

the nations concerned. He remarked that it would be inappropriate to set forth any general rule, since each situation was unique. He then proposed that a problem of the sort under consideration could be satisfactorily settled only in the light of its own conditions, as considered by the parties concerned. In the absence of any agreement, the dispute would be settled by the means provided under international law for the settlement of disputes between States.(246)

Comment

It is submitted that the history of the consideration of the question of overlapping confirms the conclusion that there was a strong need for a general substantive rule to be applied in the case of overlapping. Nevertheless, the ILC was unable to lay down any universal criteria. Consequently, as had been advocated by the Truman Proclamation of 28 September 1945,(247) the question was left to be settled between the parties.(248) Therefore, as Mr. Yepes correctly stated, no single method to settle such a problem would be satisfactory since each situation is unique by virtue of its own facts. Accordingly, it would appear that negotiation, with a view to reaching agreement, is the only apposite means by which the goal

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(246) Ibid.

(247) See above Ref. (283), at 144.

(248) The agreement may be brought about through direct negotiation by the disputant States or through the friendly intervention of a third State or States. See above p. 469.

is to be achieved.(249)

Here, it is necessary to return to the legislation of Iraq. It may be observed that the principles set forth in that legislation are so devised as to be in clear conformity with the principles just outlined. Apparently, by virtue of Article 3 of the Law No. 71 of 1958,(250) the apportionment of the continental shelf area between Iraq and her neighbours when disputed shall be determined by agreement between Iraq and the States concerned.

It may be noted that diplomatic negotiation is obviously the chief method for settling the vast majority of differences and for forestalling the rise of potential controversies.(251) To demonstrate this, one may quote the following sentences from the dissenting opinion of Judge Moore in the Mavrommatis Case,(252) in which he pointed out that:

> "... Yet, in the international sphere and in the sense of international law, negotiation is the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences. Many celebrated judical decisions might be cited to show the respect paid to this principle...".(253)

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(249) Negotiation is the simplest method of settling disputes and very often what happens. See Summers, op.cit., Ref. (166), at 373, p.118.

(250) Appendix No.IV.

(251) Bishop, op.cit., Ref. (2), at 8, pp.172-173.

(252) PCIJ, Series A, No. 2, pp.6-93 (1924).

(253) Ibid., pp. 62-63.

Thus, one is accordingly entitled to assume that, acting in good faith, disagreements on the question in hand are susceptible to settlement through negotiation. To clarify this, it is important to note that disagreements on overlapping areas, as has been shown,(254) vary according to the reasons which give rise to overlapping. Two main possibilities are feasible in this respect. In the first place, it could be ascribed to the controversial attitudes to the location of baselines. If such is the case, it is proposed to resort to the provisions of the Geneva Convention on the TSCZ pertinent to the subject. Articles 4, 7, 8 and 9 which define the baseline and lay down the principles closely related to the foregoing, may offer useful assistance.

It is certain that the provisions referred to cannot eliminate all disagreements involving delimitation of continental shelf boundaries. Nevertheless, they do accommodate the majority of differences which if not settled, lead to dangerous and acute conflicts.

On the other hand, if overlapping was due to disagreement on the interpretation or application of the rules of international law under which lateral boundaries of the continental shelf can be delimited, it is recommended to chose, by mutual negotiation, the most appropriate method or methods for carrying out this delimitation. This, it may be added, must be achieved in the light of the established principles of international law pertinent to the subject which requires equitable delimitation as

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(254) See above, p. 467.

shown in the previous chapter.(255)

One final point should perhaps be considered. It is conceivable to argue that, although an agreement is certainly the chief method of settling disputes between States, and negotiation is a necessary preliminary before having recourse to other procedures, nonetheless it has obvious disadvantages by reason of its primordial nature. Firstly, it may be contended that the States concerned are, as shown earlier, frequently grossly unequal in bargaining power, and less powerful States negotiating with strong States find themselves subjected to the will of the others.(256) Secondly, negotiation is not suitable for fixing disputed facts objectively and impartially, as this is a task of particular difficulty in international disputes. Thirdly, in the absence of a moderating third party influence, the negotiators usually stake claims as high as possible in the bargaining process, regardless of legal or other merits, and this may aggravate rather than ease the dispute.

Confronted with the foregoing objections, it must however be said that these weaknesses in the principle should not be exaggerated. Neighbouring States obviously have a strong interest in arriving at an agreement to the dispute,(257) otherwise they would not be able to fully

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(255) An equitable delimitation of continental shelf areas is required, as was conspicuously decided by the Court of Arbitration in the Anglo-French Case, under the Geneva Convention no less than under customary international law. See above pp. 263.

(256) See above, pp. 205 et seq.

(257) Grisel, op.cit., Ref. (48), at 209, p.593.

exploit the seabed and its subsoil.(258) In addition, the principle that the States concerned must resort to negotiation whenever areas were claimed by more than one State to be part of their continental shelves might find clear support in the Judgment of the ICJ in the North Sea Cases. The Court laid down that areas of continental shelf claimed by several States "... are to be divided between them in agreed proportions".(259)

It is thus appropriate to mention that when an area is claimed by Iraq, Kuwait or Iran, as the case may be, recourse in the first instance must be made to negotiation.

However, to say the foregoing is not to deny the event of difficult dispute, or it may sometimes be impossible to arrive at a settlement by negotiation. If a dispute is of a serious and complex nature, requiring thorough investigation and involving some measure of controversy as to legal or other merits, some technique other than that of negotiation seems indispensable. Therefore, it would be appropriate to resort to arbitral procedure or adjudication. This procedure is our concern in the following discussion.

II. Means Other Than Negotiation

Once the issue regarding overlapping reaches the stage that it cannot be solved by negotiation, a variety of methods for dealing further with it are open to the

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(258) See Judge Tanaka's dissenting opinion in the North Sea Cases, ICJ Reports, 1969, p.172.

(259) ICJ Reports, 1969, p.53.

parties to the dispute.(260)

It may be noted that the ILC was apparently aware of the fact that the application of the Geneva Convention on the continental shelf would not be satisfactory in all cases. Therefore, having anticipated the potential for disputes between States with overlapping claims, the ILC in the early stages was inclined to adopt a solution which demanded that when an agreement could not be reached, the States concerned should be obliged to submit the dispute to arbitration ex aequo et bono.(261) Article 3 of the Draft Articles on the continental shelf adopted at the 1951 Session of the ILC ran as follows:

> "Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration."(262)

However, the question was reconsidered on other occasions in the ILC and the Geneva Conference on the Law of the Sea.

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(260) Since forms of third parties other than arbitration or adjudication are not more than negotiation in which the task of third party is only to bring the disputants together (see above p.469), they will not be discussed as independent means. For further details see Sohn, Louis B., "International Arbitration Today", Hague Recueil, Vol. 108, 1963, I, pp.11-21.

(261) YBILC, 1951, Vol. II, p.143.

(262) Ibid. The commentary of the Commission on this Article was "it is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise... it is proposed therefore that if agreement cannot be reached and a prompt is needed the interested States should be under an obligation to submit to arbitration ex aequo et bono." Ibid.

In brief, the compulsory judicial settlement was strongly opposed and no provision in this connection was eventually adopted. Instead, an Optional Protocol of Signature dated April 29, 1958, which was based on a Swiss proposal, was adopted.(263)

It is now convenient to deal briefly with the factors employed to meet the proposals of the compulsory judicial settlement as set forth, with caution and even suspicion in the Draft Articles. Throughout the debate, the opposing attitudes of the delegates questioned the adequacy of the compulsory jurisdiction of the ICJ on matters of the continental shelf. The objections put forward were:

a. It was pointed out that the extension of the Court's compulsory jurisdiction to include differences on the continental shelf, served as a permanent restraint on the will of States concerned to resort to other pacific means. Indeed, any reference to arbitration or adjudication must be linked to the situation envisaged in Article 33 of the Charter of the U.N. In other words, the act of resorting to the ICJ is not fully independent of other procedures provided for in the said Article. Otherwise, it may be observed, the extension of the Court's compulsory jurisdiction may endanger rather than secure international peace.(264)

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(263) For further details, see Al-Havnawi, M., "The Law of Sea in Time of Peace", 1963, pp.503, 504.

(264) See the argument of Mr. Ruiz Mereno (Argentian) UNCLOS I, Summary Records, pp. 100-104; the argument of Mr. Kanakaratne (Venezuela), ibid., p.105.

b. It was argued that it was against the Charter of the U.N. to refer disputes on questions of continental shelves compulsorily to the ICJ. Continental shelf questions, like any other type of international dispute, were to be settled in the light of the Charter of the U.N. which contained no such obligation. It was also important to bear in mind that accession to the ICJ had been left optional.(265) Moreover,

> "the number of States which had accepted compulsory jurisdiction of the Court in respect of certain categories of disputes never a very large one, was constantly diminishing."

Even those States which did accept such jurisdiction limited its scope, as they first of all accepted it only with respect to certain disputes and, secondly, with various reservations.(266)

c. There were no significant grounds to justify the compulsory jurisdiction of the ICJ on disputes arising over the continental shelf.(267) This observation, became even more evident once it was remembered that States were not compelled to have resource to the World Court in the case of any disputes arising out of the articles relating to the interpretation or application of other subjects, such as the fisheries or the conservation of living resources, which had been much more controversial.(268)

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(265) See the argument of Mr. Lee (Republic of Korea), ibid., p.99; the argument of Mr. Nae (Romania), ibid., p.101.

(266) The Argument of Mr. Nae (Romania), ibid., p.101.

(267) The Argument of Mr. Lee (Republic of Korea), ibid., p.99.

(268) Ibid.

d. It was obvious, according to another point of view, that the compulsory jurisdiction of the ICJ was not in favour of less powerful States, for it would give some opportunity to take unnecessary legal action as a means to bring pressure to bear on others. Additionally, if either disputant simply did not agree to refer a question to the Court, or refused to accept a Court's judgment, it may have endangered rather than secured international peace.(269)

e. It was noted that the jurisdiction of the ICJ had already extended to "all cases which the parties refer to it". In the terms of the Statute of the ICJ, the parties could evidently authorize the Court to decide their case not only "in accordance with international law", but also "ex aequo et bono".(270) So, as a matter of reasonable inference, it was perfectly clear that there was no need to assert this procedure in Article 73 of the draft Articles on the law of the sea, since the action proposed was already in hand. Accordingly, Article 73, was rendered obsolete.(271) In other words, it appears that no convincing reasons were given as to why compulsory jurisdiction of the ICJ was provided for in Article 73, since such a procedure was already included in the Statute of the ICJ.(272)

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(269) The argument of Mr. Lee (Republic of Korea), ibid., p.99.

(270) The argument of Mr. Gomez Robledo (Mexico), ibid., p.103; Statute of the ICJ, Article 36(1) and Article 38 (1,2).

(271) The argument of Mr. Gomez Robledo (Mexico) ibid., p.103.

(272) See the argument of Mr. Nikolic (Yugoslavia), ibid., at 104; the argument of Mr. Jhirad (India), ibid., at 105.

f. Importance was also attached to the fact that the concept of the continental shelf was new in international law and the rules relating to it had not been put to the test of experience. Therefore, this surely amounted to stating that it was not only unnecessary but also dangerous to compel States to accept the compulsory jurisdiction of the ICJ.(273)

g. Another important reason for objecting to the compulsory jurisdiction, was that placing restrictions on States to accept one particular method of settling disputes before trying to seek a solution by another, was unacceptable since disputes were of different natures. Moreover, the ICJ was a legal tribunal, whilst the subject on which it was proposed that the Court had compulsory jurisdiction,was in fact technical.(274)

h. With regard to this, it was contended that the compulsory dispute settlement was, by its nature, contrary to one of the most basic and honoured traditions of international law.(275) The equality of sovereigns, it was stressed, served as a permanent restraint on the concept of compulsory settlement of disputes.(276)

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(273) See the argument of Mr. Molodtsov (Union of Socialist Republics), ibid., p.99.

(274) See the argument of Mr. Ruiz Moreno (Argentina), ibid., pp. 100, 102; the argument of Mr. Schwarch Anglade (Venezuela), ibid., pp.100, 101; the argument of Mr. Gomez Robledo (Mexico), ibid., p.103.

(275) The argument of Mr. Ruiz Moreno (Argentina), ibid., p.104.

(276) This is well characterized in the writings of Lauterpacht:

> "... the function of law is to regulate the conduct of men by reference to rules whose formal- as distinguished from their historical - source of validity lies in the last resort, in a precept imposed from outside. Within the community of

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However, for the reasons mentioned above, Article 73 of the Draft Articles of the ILC was not approved. Instead, an alternative proposal, as shown earlier, was submitted as a reasonable compromise to annex an optional protocol to the Convention. It only remains to examine the main principles of the protocol in order to ascertain their applicability over matters relating to overlapping of continental shelf areas. The following principles might be identified:

1. Instead of the compulsory jurisdiction of the ICJ provided for in Article 73 of the ILC's draft, which was vigorously opposed in the deliberation of the ILC,(277) the accession to the clause was made optional.(278)
2. It is also to be noted that any party to a conflict can take its dispute to the ICJ. It is clear that once the jurisdiction of the Court is accepted by the disputants, its decision shall be final and binding on both parties.(279)

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(276) contd...
nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community. This is the reason why any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty". See Lauterpacht, H., "The function of law in the International Community", 1933, p.3.

(277) See above pp. 478 et seq.

(278) See the preamble of the Protocol and Article 5. The full text of the Protocol reproduced in Knight, op. cit., Ref. (1), at 8, Vol. 2, Annex E. pp. E1,E2.

(279) Article 1 of the Protocol.

3. The disputing parties shall refer the conflict to a second type of third-party settlement of international disputes, namely, to an arbitral tribunal in lieu of the ICJ. However, such reference is on the condition that the parties must agree within a period of two months after one party has forwarded its opinion to the other that a dispute exists.(280)
4. Again, there is an alternative way to settle the dispute. It is also possible to bring the dispute, within the same period of two months, to a conciliation procedure before recourse to the ICJ.(281) The conciliation commission shall make its recommendations for the settlement of the dispute within five months after its appointment.
5. There is no obligation on the part of the disputants to adhere to any of the suggestions made by the conciliation commission. Either party is entitled within two months of making the recommendations not to accept them and then to bring the dispute before t e ICJ.(282)
6. Finally, the protocol is only open to States who become parties to any of the Conventions on the Law of the Sea approved by the Geneva Conference of 1958.(283)

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(280) Article 3 of the Protocol.

(281) Article 4(1).

(282) Article 4(2)

(283) Article 5.

The settlement of the problem of overlapping between Iraq and her neighbours

Previously, we have been dealing with the procedures through which, States in general, may settle their differences on the delimitation of the continental shelf, in accordance with the general principles of international law including the Geneva Convention. It now remains to examine the applicability of those procedures in the case of Iraq. Before passing on to this investigation, it may be convenient first of all to state that all differences pertinent to the subject which may arise between Iraq and her neighbours, may be settled by either of the following procedures:

1. The optional protocol of signature.
2. The ICJ.
3. Bilateral Agreements.

The aim of what follows is to examine the above procedures.

I. The Optional Protocol of Signature

It would be possible to argue that the solution may be found in the Optional Protocol annexed to the Geneva Conventions of 1958.

In reply to this, it may be pointed out that, whether the optional protocol operates as a means to settle overlapping disputes, depends largely on the conditions provided for therein in order to be applied.

In terms of this protocol, the protocol is to be applied on claims brought by any party to it.(284) Certainly,

(284) Article (1).

the protocol is open to be signed only by States who become party to any of the conventions on the law of the sea.(285) As for Iraq, this protocol would appear to be inapplicable inasmuch as she has not been a party to any of the Geneva Conventions on the law of the sea. This would not therefore, qualify her to accede to the optional protocol. Consequently, the question under consideration is not covered by the optional protocol.(286)

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(285) Article (5).

(286) No doubt, the Geneva Conventions of 1958 on the Law of the Sea lack a watertight and efficient system for settling disputes in the area of the law of the sea. See Fahrney, op.cit., Ref. (108), at 46 , p.540. On the other hand, the basic aim of the UNCLOS III is to adopt a comprehensive Law of the Sea Convention. The establishment of an effective and comprehensive system for settling Law of the Sea disputes which may arise from the interpretation and application of the Convention is highly desirable.Adede, A.O. "Settlement of Disputes Arising Under the International Law of the Sea Convention", AJIL, Vol. 69, 1975, p.798.

In short, as a result of discussion during the Sessions of the Conference held to date, the approach adopted by the ICNT (U.N. Doc. A/CONF. 62/WP 10/Add. 1/22 July, 1977, Part XV, p.142) would offer States a wide choice of modes of settlement, ranging from the most informal non compulsory procedures with non binding decisions, to formal compulsory procedures entailing binding decisions. Adede, A.O., "Notes and Comments: Law of the Sea - The Integration of the System of Settlement Disputes Under the Draft Convention as a Whole". AJIL, Vol. 72, 1978, p.84; and ibid., "Settlement of Disputes" pp. 798-818; and "Law of the Sea: The Scope of the Third Party Compulsory procedures for Settlement of Disputes", AJIL, Vol. 71, 1977, pp.305-311. However, although the draft articles contain elaborate provisions in the area of the law under consideration, in terms of these provisions only a limited group of cases will be subject to the compulsory procedure provided for in the convention to be concluded. It is to be noted that certain exceptions may be made to the compulsory settlement procedures (Part XV Article 287 of the ICNT). Boundary delimitation falls in this category. See Article 297 of the ICNT, ibid. Thus, if one believes Mr. Adede's reasoning that the Convention will require careful interpretation and application as it will be in the form of delicately

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II. The ICJ

It may also be proposed that the ICJ may be resorted to in order to settle any dispute which might arise with respect to the delimitation of the continental shelf between Iraq and her neighbours. In order to test whether such a procedure could be turned to in this connection, it must be observed that the chief channel through which jurisdiction is conferred on the Court, lies in Article 36(1,2) of the Statute. This provision runs in part as follows:

Article 36

> "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the U.N. or in treaties or conventions in force.
>
> 2. The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court..."(287)

It follows that, to bring the question before the Court, disputants were simply required either to be parties to the Statute, or to agree to do so. It is of significance to recall that the Statute of the Court as yet has never had all States as parties to it, and Iraq belongs to the States in this category.

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(286) contd.
balanced provisions representing painfully worked out compromises, then the need for a more efficient system for settling disputes is stronger. See Brown, op.cit., Ref. (99), at 44, Part II, p.203.

(287) Statute of the ICJ.

Of course, this leads one to conclude that the ICJ is without jurisdiction in disputes over the law of the sea in general which might exist between Iraq and her neighbours.

III Bilateral Agreements

It remains to ascertain whether any bilateral agreement in force which can be considered as providing for a procedure leading to the peaceful settlement of disputes in relation to the delimitation between Iraq, Kuwait or Iran.

As regards Iraq and Iran, they appear to have entered into an agreement for Pacific Settlement of Disputes of July 24, 1937.(288) It may be noted at the outset that the treaty defines certain methods for the settlement of disputes between the two parties. These are judicial means, arbitration or conciliation.(289)

Turning firstly to judicial settlement, it would be fair to say that Article 2(1) confers compulsory jurisdiction upon the PCIJ (now may be read the ICJ).(290)

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(288) L.N.T.S., Vol. 190, p.271. The Treaty came into force with the exchange of ratifications, June 20, 1938. This treaty was to be in force for a period of five years and to remain so for successive periods of five years unless denounced by either party within a period of not less than six months earlier than the expiry of the five-year period. As far as this writer is aware, no denunciation has been traced. One is accordingly entitled to assume that it still to be in force.

(289) Article (1).

(290) Article 37 of the Statute of the ICJ provides that:
"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International

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Meanwhile, Article 2(2) enumerates a variety of conditions in which certain defined classes of differences are excluded from the World Court's jurisdiction. Amongst matters excluded are those provided for in paragraph 3, concerning the territorial status of one or other of the parties.(291) As the delimitation of offshore boundaries, by their very nature, are always to be deemed territorial, accordingly, disputes of this type would appear to be excluded from the compulsory jurisdiction of the Court.

As an alternative to judicial settlement, recourse may be made, by agreement between Iraq and Iran, to arbitration.(292) Under the treaty it may be noted, the party unwilling to resort to arbitration, due to his reluctance to accept the expected award, has the opportunity to avoid this procedure. Thus, to dispose of the consequences which might be produced by arbitration, the party concerned can simply refuse to agree to resort to arbitration.

It remains to examine the third form of procedure provided for in Article 6 of the treaty which runs as follows:

> "Any dispute a settlement of which cannot be reached by means of a judicial or arbitral decision under the provisions of the present Treaty shall be submitted to conciliation."(293)

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(290) contd.
Court of Justice."
Brownlie, op.cit., Ref. (31), at 20, p.276.

(291) L.N.T.S., Vol. 190, p.271.

(292) Articles 3 and 4. L.N.T.S., Vol. 190, p.271.

(293) Article 6. Ibid.

This provision is put into force when disputes cannot be settled by means of judicial or arbitral decisions. Consequently, disputes over territorial status, including differences on the delimitation of offshore boundaries, would fall within this category.

But, although conciliation has a role to play in international relations, it is submitted that this provision would not fully serve to settle disputes of the nature under consideration. It is true that conciliation performs a useful service, as the intervention of an independent body can give new life to negotiation and open up a new perspectives.(294) Irrespective of the above advantages of conciliation, the difficulty is that the treaty adopts the pattern of the Hague Conventions and provision is made for a commission(295) consisting of five members.(296) Each party appoints one national commissioner, while the other three are chosen by agreement. It may be predicted with certainty that a party reluctant to the formation of the Commission would prevent the establishment of the Commission by merely refusing to appoint the members of the Commission. At any rate, the appointment of the non-national members, in the event of disagreement to mutually appoint them, can be made by the President of the Council of the League of Nations. Correct as this may be, a similar solution cannot be made with

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(294) See Cot Jean-Pierre, "International Conciliation", translated by R. Myers, European Publications, London, 1972, pp.1-5.

(295) Articles 8 and 9.

(296) The odd number five makes it easier to take decisions.

respect to the national commissioners. Also, further difficulties may arise even in the event of appointing non-national members, for as the League of Nations Council no longer exists, it would be debatable whether the Security Council of the United Nations could be regarded as its successor.(297)

To this it may be added that, according to Article 17 of the treaty, conciliation would not lead to a binding settlement unless the conciliation decision was accepted by the parties concerned.(298)

As to similar disputes which may arise between Iraq and Kuwait, both countries appear to be bound by the impact of the League of Arab States. In disputes, in which the rights of the parties are at issue, they undertake by virtue of Article 5 of the Pact to solve their differences in accordance with the language of this provision.

This Article provides in part that:

> "Any resort to force in order to resolve disputes arising between two or more member States of the League is prohibited. If there should arise among them a difference which does not concern a State's independence, sovereignty, or territorial integrity, and if the parties to the dispute have

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(297) Johnson, D.H., "The Constitution of an Arbitral Tribunal" BYBIL, Vol. 30, 1953, pp.156-157.

(298) Article 17 provides that: "The Purpose of the Conciliation Commission shall be to clear up points in dispute, to obtain all requisite information to that end by enquiry or otherwise, and to endeavour to reconcile the parties to the dispute. It shall be free to submit to the parties, after consideration of the dispute, the terms of whatever agreement it may consider appropriate, and fix a time limit for the expression of their respective opinions".

recourse to the Council for the settlement of this difference, the decision of the Council shall then be enforceable and obligatory..."(299)

A careful reading of the above text would reveal that territorial disputes and questions of territorial integrity of member States are out of its scope. Moreover, prior to the application of this Article, the consent of the disputants is required. Exceptions to the provision are hence so many that it does not operate in cases involving offshore boundaries.

Comment and Recommendation

The facts advanced above make it clear that the methods of settling disputes, which have been discussed, have problems in common, or unique difficulties. In the light of the preceding arguments, it may now be stated that when disputes concerning overlapping arise between Iraq and her neighbours, no procedure is available by which they may be definitely settled. It is therefore proposed to work out arrangements to settle quarrels prior to the actual disputes.

It is suggested to enter into either bilateral agreements with Iran and Kuwait separately, or a multilateral agreement with them both on a wide and firm basis. In either case, disputes on the delimitation of marine boundaries which diplomacy will fail to settle must be subject to a binding settlement. Two types of arrangement may be imagined to achieve the above proposal:

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(299) Cited in Peaslee, Amos J., (ed.) "International Governmental Organizations: Constitutional Documents," Vol. II, 1974, p.1118.

a. A treaty by which Iraq and her neighbours may agree on the delimitation of their offshore boundaries in general, and also agree to submit disputes which arise under the treaty and cannot be settled by negotiations, to some form of third party determination.

b. A general arbitration treaty between Iraq and her neighbours including reciprocal acceptance of the ICJ jurisdiction.

With any of the above alternatives, it is submitted that in the structure of these agreements, the kinds of problems which party nations agree to submit to binding settlement should be characterized.(300)

Therefore, it appears reasonable to suggest that special provision is necessary to be incorporated in any possible treaty between Iraq and her neighbours. The following text may be suitable in this respect.

> The signatory Powers agree that disputes which may arise between them as to the interpretation or application of the present treaty(301) and which have not been possible to settle by diplomacy, shall at the request of either party, be submitted to settlement by arbitration, unless the parties agree to seek a solution by some other pacific means.

(300) In dealing with this particular question, namely the delimitation of submarine boundaries, it is submitted that a variety of reasons may cause unwillingness to to accept the compulsory jurisdiction of the ICJ rather than the arbitration. Firstly, arbiters are usually chosen by the disputant States. They, therefore enjoy their confidence. Secondly, for the same reason, arbiters may be chosen to be particularly competent in settling a certain dispute such as the one under consideration.

(301) Or by characterizing particular kinds of problems.

CONCLUSION

What has been said demonstrates quite conclusively that consideration of the subject of marine boundaries is both timely and complex. It is timely in that the law of the sea is in a state of exceptional activity and reform. The complexity of the subject is due not only to the unclear status of the rules of international law on the subject, but also to the fact that the use and exploitation of the sea and the seabed increases with the rise in the world's population on the one hand and the progress of technology on the other. Certainly, the different policies and interests of States have made it difficult to establish precise rules for delimiting marine boundaries.

One component of the limits of coastal jurisdiction is the baseline along the coast from which marine zones are measured. The Geneva Convention on the Territorial Sea and Contiguous Zone contains particular provisions to deal with the determination of baselines. However, the Convention, as noted earlier, makes no provision for island groups and archipelagos. It may be added that the rules adduced in the Convention relating to the circumstances justifying the drawing of straight baselines along coasts are loose and invite wide flexibility of interpretation. Another shortcoming in the Convention in this regard is the absence of specific provision for so-called "historic bays" other than recognising their existence.[1] Needless to say the closing off of certain

(1) Article 7(6) of the TSCZ Convention in referring to the rules for closing off bays the coasts of which belong to a single State, points out, "the foregoing provisions shall not apply to so-called historic bays".

coastal waters on the grounds that they are "historic", thereby enjoying the status of internal waters, would push the outer limits of offshore boundaries further seaward and this would no doubt affect the total extent of offshore waters over which a coastal State may claim jurisdiction.

The first type of jurisdictional claims relates to the waters considered as part of the territorial sea over which coastal States exercise jurisdiction, as well as over the airspace above these waters. The legal status and the extent of the areas within the territorial sea affords little difficulty. As far as the seaward extent of the territorial sea is concerned, it seems clear that until recent times writers differed in their opinions as to the breadth of territorial sea. Whilst a number of them considered the three-mile limit as a rule of international law, others opposed this view, arguing that it never was accepted as a general rule; and still others believed that it was a rule of international law, but that it should be changed according to the times. However, as was demonstrated, the three-mile rule was never universally adhered to as a general rule of international law. No better evidence may be found to enhance this suggestion than what was concluded by the International Law Commission in its 1956 report with reference to the width of the territorial sea: "International practice is not uniform". It went on further to say that "many States have fixed a breadth greater than twelve miles". Indeed,

the twelve mile limit was recognized by the International Law Commission in 1956 when it stated that any claim for territorial sea up to 12 miles would not be regarded as illegal. However even on the assumption that the limit of three miles was universally accepted, after analyzing the various present claims and examining international evidence (treaties, unilateral acts, etc.), one can only conclude that the three-mile limit is no longer accepted as the maximum width of the territorial sea. Instead a rule of international law entitling coastal States to determine their territorial seas up to a twelve mile limit has been well established. The claims of States, including those who used to adhere to the three-mile limit, and the impression given by writers would warrant the above proposition. If further evidence was needed to prove the establishment of the 12-mile limit, one may look to the debate of the UNCLOS III. It seems quite clear, as noted earlier, that the overwhelming majority of States are prepared to agree on a 12-miles territorial sea. It is true that the outcome of the Conference is at this time unclear. If a conventional rule were to emerge from the Conference, it will have to receive the acceptance of the necessary majority of States. Moreover, even if a Convention were signed in 1981, and presently predicted, it would not immediately be law. It would then have to be ratified, and it could be some years before the requisite number of instruments of ratification were deposited.(2) Correct as that may be, it is equally true

(2) See Articles 298-300 of the ICNT, U.N. Doc. A/CONF. 62/WP. 10/Add 1, p.151.

that the debates at the international conference reflecting the attitudes of various governments are of great value. There is no better quotation in this regard than a passage from Elihu Root[3] in which he indicated that:

> "Not only the conventions signed and ratified, but the steps taken towards conclusions which may not reach practical and effective form for many years to come, are of value."[4]

Concerning the definition of the continental shelf, it is important to emphasize that critics of the Continental Shelf Convention have pointed out one of its shortcomings as failing to prescribe a definite outer limit of the continental shelf. How far out may coastal States make claims over areas of the seabed pursuant to the Convention? Article 1 defines the continental shelf as an area adjacent to the coast out to a depth up to 200 metres or beyond that limit to the extent that the depth of the water permits exploitation of the natural resources. This is a double-barrelled definition; depth of 200 metres or depth of exploitability, make ambulatory the limit to seaward of the sovereign rights recognized by the Convention. Several qualified observers have maintained that no determined proponent of this interpretation of the Convention will be embarrassed either by its language or by such legislative history as is available. Neither is it apparently confined by the term "adjacent to the coast".

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(3) A "well known jurist and statesman, one of the framers of the Statute of the PCIJ" See ICJ Reports, 1969, the dissenting opinion of Judge Koretsky, p.157.

(4) "Note to the Texts of the Peace Conferences at the Hague, 1899 and 1907, Boston 1908" cited in ibid.

Undoubtedly, this is an undesirable conclusion but it is a possible interpretation of the Convention as it is, and not as it should be. At least the 200 metre depth and the exploitability tests, despite their drafting history, may well be viewed as being independent of one another. This interpretation, one may suggest, is not only theoretical, but there is even the possibility that States are going to extend control beyond 200 metre depth since the resources of the zone claimed could be exploited by the application of new technological skills. This has already occurred in a number of instances. The U.S. Department of the Interior has already leased land for resources extending on the outer portion of the continental shelf to a depth beyond 200 metres which, in a conceptual sense, is beginning down the slope towards the deep ocean floor. So has the U.K. and many other States.

Despite the strong argument which has been presented by a number of leading authorities in the field for holding that the Convention imposes a limit on the shelf, nevertheless one may be entitled to suggest that there may be a number of possible interpretations of the exploitability criterion. It is submitted that due to the under sea technology and States' maritime ambitions and greed, the exploitability test will be resorted to more and more to justify an extensible movement far out into the oceans. This is a possibility which, at the time of reviewing and revising the continental shelf convention every effort should be made to avoid. Greater precision in defining the outer limit is desirable. Surely, the outer limit of

the continental shelf under the ICNT is precise. Nevertheless, it is proposed that the present criteria in being exchanged for a 200 miles limit at least, would permit the extension of national jurisdiction to areas which should be part of the high sea.

We may now turn to the problems relating to the establishment of boundaries in areas of sea shared by two or more States. While these matters do not raise problems of principle, they do cause problems of practical importance which are both difficult and of immediate concern to the States involved.

As noted earlier, Article 6 of the Continental Shelf Convention provides that in the case of States lying opposite or adjacent to each other, the boundary on the shelf between them - in the absence of agreement or unless another line is justified by special circumstances - should be a median or an equidistance line. As regards the importance that is to be attached to the equidistance rule, strictly speaking, it is worth asserting that there is no objection to this rule as a method of dividing up continental shelf areas. It is not intended here to repeat all that has been said. Particular attention will be paid only to the following points. The chief flaw appears in the application of the equidistance rule to particular situations. For present purposes, it is enough to suppose that two States, (A) and (B) are opposite or adjacent to each other, and they both are parties to the Continental Shelf Convention, but only (A) is a party to the TSCZ Convention. If (B) measured its territorial

sea from a baseline further seaward than it should have been according to the TSCZ Convention, then the results would be inequitable; that is to say (B) would acquire substantially more shelf area than (A). It may be contended, that this problem relates to baselines, rather than to the rules of delimiting marine zones. True as this may be, it is equally valid that this argument would not lessen the shortcoming attributed to the equidistance rule in this respect. It may be observed that, instead of removing, or at least reducing, the hardship caused by the different ways of establishing baselines, the application of the equidistance method in this situation, would increase the allotment of continental shelf areas to be given to one State at the expense of another.

Another type of difficulty appears to be in cases where islands exist on the continental shelf. Surely, this difficulty is a result of geographical factors, rather than legal principles, but such a situation brings us to the question of what position is to be held by islands in establishing the equidistance line, a question to which Article 6 fails to furnish an adequate answer. Bearing in mind that the Convention affirms only that islands also possess shelf areas, the presence of islands can make a great difference particularly in narrow seas.

At this point, it should be added that Article 6 of the Continental Shelf Convention, under which the equi-distance rule is to be excluded where circumstances necessitate special treatment, fails to define the scope of these circumstances. Of course, the omission of such a list is not only understandable, but also reasonable.

Nevertheless, such a broad term leaves the way open for invoking all kinds of allegations as "special circumstances".

However, all these considerations could perhaps be observed and overcome since the Convention prescribed agreement among the parties concerned. The ICJ, in the North Sea Cases, laid stress on the importance of agreement in solving marine boundary problems. Admittedly, this is not an automatic solution. However, one may be entitled to assume that even Article 6 of the Continental Shelf Convention does not provide such a solution, nor does the Court of Arbitration in the Anglo-French Continental Shelf Case. The equidistance-special circumstances rule, which has acquired the status of a general rule, at least in the Court of Arbitration's view, could not possibly enable a State to fix unilaterally its continental shelf boundary if the other State objected to such a boundary because there were no circumstances preventing the application of the equidistance rule. Therefore, there must be an agreement amongst the States concerned, otherwise the question falls to be settled by some other means.

As far as the boundaries of the Iraqi territorial sea are concerned, from the outset, there could be no doubt as to the position of the Iraqi Government, at least in principle, conforming with the rules of international law. Law No. 71 clearly points out that the Iraqi base-line is "the low-water mark following the sinuosities of the Iraqi coast". Iraq has explicitly maintained that the width of her territorial sea is twelve miles. It is perfectly clear from the context in which Iraq claims her

rights regarding her territorial sea that she wants to show thereby that her claims correspond to the rules of international law. More important is the fact that both Iran and Kuwait have maintained their adherence to a twelve mile limit for the territorial sea. It remains to be stressed that no agreement is in force establishing the territorial boundaries between Iraq, Kuwait and Iran. The reason appears to be attributed to the differences between Iraq and her neighbours concerning the boundaries on land. That is to say the final point on the boundary line on land is decisive and affects the location of the territorial sea boundaries. No doubt, the rules according to which territorial sea boundaries are to be drawn are well accepted, as laid down in the Geneva Convention on the TSCZ. Moreover, the course of constructing such boundaries should not present great difficulties, nor involve any issues of principle. Nevertheless, the necessity for definite territorial sea boundaries between Iraq and her neighbours can naturally be understood from the fact that differences concerning marine boundaries may involve disputes between the nations concerned as serious as in the case of conflicts over land boundaries. This suggests that a workable solution for all boundary disputes is desirable.

Two difficulties have arisen concerning the delimitation of territorial sea zones between Iraq and Iran. The first that exists in deciding the legal status of the new land which is constantly being built up by the annual volume of sediment deposited by the Shatt al-Arab. The

Shatt al-Arab as noted earlier is building new land at the head of the Arabian Gulf. It is observed that no specific rule is laid down in the Geneva Convention on the TSCZ dealing with this difficulty. It is concluded that the general rules of international law according to which newly emerged land belongs to the coastal State cover the question well.

A more important problem is the effect to be given to the alteration of the location of the Iraqi baseline which is extending further seaward due to the above reason. The comment on this question confirms that there is no trace in the TSCZ Convention of a solution to this matter. For reasons given, it is submitted that an agreement on periodical revision of baselines may operate as a workable solution.

On the question of continental shelf boundaries, it should be mentioned in introduction, that this matter is of exceptional importance to Iraq. This is due partly to the huge petroleum deposits which are found throughout the seabed of the Arabian Gulf and partly to the fact that Iraq is in a geographical position of particular configuration.(5) Certainly, the difference between areas of the continental shelf of a State with a concave coastline and a convex coastline is multiplied as the limits of national jurisdiction are moved further seaward. Here again, the attitude of Iraq conforms with the rules of international law pertinent to the subject. The very strong assertion in the declaration of 1957 that areas of continental shelf

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(5) Geographically disadvantages State.

shared by Iraq and her neighbours are to be determined by agreement between Iraq and the nation concerned is a clear indication in this respect. Under general rules of international law, the determination of the continental shelf boundary is left to the agreement of the parties. Although it may be true that there are cases in which the parties have to accept the strict equidistance line, namely if it is equitable, it is equally true that in other cases there is no obligation on the nations concerned to accept a boundary based on the equidistance rule. The arguments in support of this are mainly contained in chapters three and five. Therefore, it is not intended to repeat what has been said there, but it is worthwhile to stress the following. Even the Court of Arbitration in the Anglo-French Continental Shelf Case confirmed that equity must be taken into consideration in any delimitation of continental shelf areas between States opposite or adjacent to each other. The Court is surely of the opinion that the equidistance-special circumstances, as one rule, has gained the status of a general rule of international law. Indeed, it repeatedly stressed that this rule or any other method ought to be used whenever such an application would result in equitable solution. It may be added that not only the ICJ in the North Sea Cases and the Court of Arbitration in the Anglo-French Case, laid stress on equitable principles. In fact, the emphasis placed upon this concept seems consistent with past practice. In the case of Diversion of Water from the Meuse, for instance, Judge Hudson, stated that "under Article 38 of the Statute, if not independently of that Article, the Court has some

freedom to consider principles of equity as part of the international law which it must apply".(6) Among the writings of leading authorities, the following passage may seem worth citing: "... international judicial institutions act within their range in giving full rein ... to considerations of reasonableness and good faith". Such institutions, goes on the same author, "may find that, if not expressly, then at least by implication, parties to a dispute have authorised them to supplement in this way established rules on international law". To support this suggestion, the author invokes the rules on the minimum standard in favour of foreigners and on international responsibility as "pertinent illustrations both of the incorporation of jus aequum into actual rules of international customary law and of the application of such rules in the spirit of jus aequum by international courts and tribunals".(7) Perhaps the rules concerning the delimitation of the continental shelf may now be added.

Another related point deserves comment before going on further. There remains the allegation that the concept of "equitable principles" is vague and subjective and that the concept of "special circumstances" is more restricted. Of course, the concept of "equitable principle" is not very clear, seen in terms of boundary delimitation. However, the recognition of the ICJ that it could not render an automatic solution should be appreciated. Indeed, the main responsibility, as the ICJ decided, was always upon

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(6) PCIJ. Series A/B No. 70, p.77 (1937).

(7) Schwarzenberger, G., "International Law", 3rd ed., 1957, pp.52-53.

the nations concerned to negotiate to reach agreement. In referring this dispute to the parties, the ICJ focused on the principles which ought to be taken into consideration and which may be welcomed as a clear advance.

One final point is worth special mention. It is suggested, for reasons already given, that the word "equidistance" alluded to in the 1957 Proclamation should not be exploited to construct the acceptance of Iraq to apply the strict equidistance rule. It was pointed out in this connection that this word should not be over-weighted, since it had been phrased in such a manner as to show that the equidistance rule would find application in accordance with the rules of international law. This suggestion might find strong support in the decision of the Court of Arbitration which repeatedly asserts that there is not and never has been a rule of equidistance, but always an equidistance-special circumstances rule. It may be added that the present attitude of Iraq in the UNCLOS III might well reveal the policy of the Iraqi Government in vigorously supporting equitable principles and strongly opposing the adoption of any proposal to give the equidistance rule any primacy. It may be added that Kuwait and Iran both declare by some means their adherence to the rules of international law and equity in particular. Whilst this step is of great importance on the way towards successfully resolving the whole problem, there is still much more to be done as it is well known that unilateral acts by coastal States can lead only to international conflicts. If that is correct, then the need for an

agreement between Iraq and her neighbours becomes imperative. The pertinent problems relating to the delimitation of the continental shelf between Iraq and her neighbours are examined. The difficulty likely to arise is that of international common oil fields which lie across the marine boundaries or in a position near these boundaries where they may be exploited from the other side. Examples of state practice are given showing that no rule of customary law prescribing the use of a specific rule for the exploitation of such deposits has been established. The most that can be said is that international law forbids unilateral exploitation of such deposits. Therefore, a sort of understanding between the parties concerned is indispensible.in solving the problem.

As there are ample reasons for expecting practical conflicts and disputes to exist, there appears a need to establish an authoritative body entitled to solve any controversy which might arise.

It is pertinent to end this conclusion with the suggestion that instead of the separate negotiation resulting sometimes in agreement binding only between the nations concerned and sometimes even in failure to agree, there should be a multilateral Conference of all the Arabian Gulf States, or alternatively, only of Iraq, Kuwait and Iran, at which the marine boundaries of all would be simultaneously agreed upon. The proposal agreement should:-

1. Define the position of the points which indicate exactly the dividing lines in the light of equitable principles

Otherwise, in the absence of such a precise definition, there could afterwards arise disputes which might have been avoided by more careful drafting of the agreement.

2. There should be some mechanism for compulsory settlement of any dispute in the future.
3. As the general legal rules and the existence of the continental shelf are designed to meet various economic interests, the suggested agreement should contain a provision or provisions to regulate the exploitation of common deposits which have already been discovered or may be discovered in the future.
4. Finally, some provision ought to be made with respect to the alterations which might be caused by the Shatt al-Arab.

APPENDIX No. 1*

OFFICIAL PROCLAMATION OF NOVEMBER 23, 1957 CONCERNING THE CONTINENTAL SHELF OF IRAQ

The Government of Iraq being anxious to exploit the natural resources of Iraq to the fullest possible extent, and being convinced that a considerable amount of such resources lies at the bottom of the maritime zone extending outwards to the sea and contiguous to the Iraqi territorial sea, and being further confident that the exploitation of such resources in such a way as will bring benefit to the Iraqi people has become possible in view of modern scientific progress;

It therefore declares that all natural resources existing on the sea-bed and the sub-soil beneath it are the property of Iraq and that Iraq has exclusive general jurisdiction over such resources and over their preservation and exploitation. It has likewise the exclusive right to take all measures necessary for the exploration of such resources and their exploitation in such a way as it deems suitable. It has also the right to take such administrative and legislative measures as are necessary for the protection of all constructions required by the process of exploration and exploitation.

The Government of Iraq wishes to assert that the sole purpose of its issue of this proclamation is the exercise of rights established by international practice. It also wishes to assert that nothing in this proclamation shall infringe the established rules pertaining to the freedom of navigation.

APPENDIX No. II**

SUPPLEMENTARY PROCLAMATION OF APRIL 10, 1958 CONCERNING THE CONTINENTAL SHELF OF IRAQ

In affirmation of the proclamation of the Government of Iraq made on 23rd November 1957 establishing the rights

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* Source: ST/LEG/SER.B/15(1970) pp.368-369.

** Source: ST/LEG/SER.B/15(1970) p.369.

of the Iraqi State to the waters contiguous to Iraqi territorial waters; the Government of Iraq declares that its full sovereignty extends to Iraqi territorial waters and to the air-space over these waters and to the surface and subsoil of the sea-bed beneath them. The Government of Iraq wishes to assert that such works and constructions as have been or will be undertaken in this zone or the zone encompassing the waters contiguous to it are subject to the sovereignty of the Iraqi State, and that the undertaking of such works and constructions is permissible to none other than the Iraqi authorities or to such quarters as may be duly authorized by Iraqi authorities. While declaring this in establishment of its rights, the Government of Iraq declares also its adherence to international practice in this respect and to the principle of equidistance which guarantees to Iraq freedom of passage into and out of the high seas.

While declaring the above, the Government of Iraq declares also its non-recognition of any proclamation, declaration, legislation or planning pertaining to territorial waters or to contiguous waters issued by any neighbouring country in contradiction with the contents of this proclamation.

APPENDIX No. III*

REPUBLICAN ORDINANCE NO. 435 OF 15 NOVEMBER 1958

1. The Iraqi territorial sea, its bed and subsoil and the air space above it shall be under the sovereignty of the Iraqi Republic, subject to the rules recognized by International Law pertaining to the innocent passage of the ships of other countries through the said sea.

2. The Iraqi territorial sea extends twelve nautical miles (a nautical mile is equivalent to 1852 metres) in the direction of the high sea, measured from the low-watet line of the Iraqi coast.

3. In case the territorial sea of another State inter-

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* Source: ST/LEG/SER. B/15 (1970) pp.89-90.

laps with the Iraqi territorial sea, the limits between the two territorial seas shall be determined by agreement with the State concerned in accordance with the recognized rules of international law or with such understanding as may be reached between the two States.

4. No provisions in this Ordinance shall infringe Iraq's other internationally recognized rights in the two maritime belts known as the contiguous zone and the continental shelf following the Iraqi territorial sea in the direction of the high sea. Nor shall any provisions in this Ordinance infringe the official announcements previously issued by the Iraqi Government in this respect

APPENDIX No. IV[*]

LAW NO. 71 OF 1958 DELIMITING THE IRAQI TERRITORIAL WATERS

Article 1

The Iraqi territorial sea, its bed and subsoil and the air space about it shall be under the sovereignty of the Iraqi Republic, subject to the rules recognized by International Law pertaining to the innocent passage of the ships of other countries through the said sea.

Article 2

The Iraqi territorial sea extends twelve nautical miles (a nautical mile is equivalent to 1852 metres) in the direction of the high sea, measured from the low-water mark following the sinuosities of the Iraqi coast.

Article 3

In case the territorial sea of another State interlaps with the Iraqi territorial sea, the limits between the two territorial seas shall be determined by agreement with the State concerned in accordance with the recognized rules of International Law or with such understanding as may be reached between the two States.

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[*] Source: ST/LEG/SER B/15 (1970) p.90.

Article 4

No provisions in this Law shall infringe Iraq's other internationally recognized rights in the two maritime belts known as the contiguous zone and the continental shelf following the Iraqi territorial sea in the direction of the high sea. Nor shall any provisions in this Law infringe the official proclamations previously issued by the Iraqi Government in this respect.

APPENDIX No. V*

ACT OF 18 JUNE 1955 ON THE EXPLORATION AND EXPLOITATION OF THE NATURAL RESOURCES OF THE CONTINENTAL SHELF OF IRAN

Article 1. The term "Falate Gharreh" used in this Act, shall have the same meaning as the term "Continental Shelf" in English or "Plateau continental" in French.

Article 2. The (submarine) areas as well as the natural resources of the sea-bed and the subsoil thereof, up to the limit of the continental Shelf adjacent to the Iranian coast and to the coasts of Iranian islands in the Persian Gulf and the Sea of Oman have belonged and shall continue to belong to Iran and shall remain under its sovereignty.

Note: In respect of the Caspian Sea, the principles of International Law relating to closed seas shall remain applicable.

Article 3. In case where the Continental Shelf referred to above extends to the shores of another State or neighbours upon the territory of a state bordering upon Iran, any eventual differences concerning delimitation of the Continental Shelf of Iran are ruled by the principles of equity and the government shall take the necessary measures for the settlement of such eventual differences.

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* ST/LEG/SER. B/16 (1974) p.151. Articles 3 and 5 are reproduced from text of the Act published in Petroleum Legislation Basic Oil Laws and Concession Contracts: Middle East, Supplement No. XXXIII, p. Iran A-1.

Article 5. This law shall not contravene status governing superjacent waters insofar as same apply to the rights of free navigation and the installation of submarine cables.

The government may construct necessary installations on the continental shelf to explore and exploit its natural resources and shall take the necessary measures for security of such installations.

APPENDIX No. VI*

ACT OF 12 APRIL 1959 AMENDING THE ACT OF 15 JULY 1934 ON THE TERRITORIAL WATERS AND THE CONTIGUOUS ZONE OF IRAN

Article 1. The sovereignty of Iran extends, beyond its land territory and internal waters, to a belt of the sea adjacent to its coast, referred hereto as the "territorial sea".

Article 2. The said sovereignty extends to the air space over the territorial sea as well as to the sea-bed and subsoil thereof.

Article 3. The breadth of the territorial sea of Iran is 12 nautical miles from the baseline of the said sea. The baseline will be determined by the Government with due regard to the established rules of public international law.

Note: One nautical mile is equal to 1,852 metres.

Article 4. Wherever the coast of Iran is adjacent to or opposite the coast of another State, the dividing line between Iran's coastal waters and those of the other State shall be, unless otherwise agreed between the parties, the median line every point of which is equi-distant from the nearest point on the baselines of both States.

Article 5. Every island belonging to Iran, situated within or outside the territorial sea of Iran, shall have its own territorial sea determined in accordance with the

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* Source: ST/LEG/SER. B/16 (1974) p.10.

provisions of the present Act. The islands situated at a distance not exceeding 12 nautical miles from one another, shall be considered as a single island and the limit of their territorial sea shall be determined from the islands remotest from the centre of the archipelago.

Article 6. The waters between Iran's coast and baseline, as well as the waters between the islands belonging to Iran situated at a distance not exceeding 12 nautical miles from one another, shall constitute the internal waters of Iran.

Article 7. Fishing and other rights of Iran beyond the limits of its territorial sea, shall remain unaffected.

APPENDIX No. VII*

Proclamation of the Sheikh of Kuwait with respect to the seabed and the subsoil of the high seas of 12 June 1949.

Whereas it is desirable to encourage any effort which will lead towards the greater utilisation of the world's natural resources;

And whereas it is possible that there may be there valuable resources lying under parts of the waters of the Persian Gulf at a distance from the coast of Kuwait and the wish is expressed to realise the utilization of such submerged resources;

And whereas it is desirable in the interests of protection, conservation and orderly development that such exploitation shall be placed under control in the proper manner;

And whereas it is right and just that the seabed and the subsoil extending to a reasonable distance from the coast should appertain to and be controlled by the littoral state to which it is adjacent;

And whereas the right of the state in the exercise of its authority over the natural resources of the seabed and the subsoil adjacent to its coasts has been decided and established in international practice by the action of other states;

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* Source: ST/LEG/SER. B/1 (1951) p.26.

Now, therefore, we Ahmed al Jabir al Subah, Ruler of Kuwait, in pursuance of all powers enabling us in that behalf, are pleased to publish the following proclamation:

The Ruler of Kuwait hereby proclaims that the seabed and the subsoil lying beneath the waters of the sea in the middle of the sea of the Persian Gulf delimited as follows become part of the principality of Kuwait and are subject to its administration and authority. The seabed and the subsoil referred to above are those which adjoin the coastal territorial waters of the principality of Kuwait and extend in the direction of the sea to limits which will be decided upon more precisely as the resulting situation may demand, and on equitable principles, by the Ruler of Kuwait after consulting the neighbouring countries.

Nothing in this Proclamation shall be deemed to affect the sovereignty of the islands or the status of the seabed and the subsoil underlying any part of the territorial waters.

Nothing in this Proclamation shall be deemed to affect the ways of sea navigation of the waters of the Persian Gulf above the seabed and outside the limit of the boundaries of the territorial waters or the status of air navigation above the waters of the Persian Gulf outside the limit of the boundaries of the territorial waters or the traditional fishing rights and pearling rights in such waters.

APPENDIX No. VIII*

DECREE OF 17 DECEMBER 1967 REGARDING THE DELIMITATION OF THE BREADTH OF THE TERRITORIAL SEA OF THE STATE OF KUWAIT

We, Sabah Al-Salem Al-Sabah, Amir of Kuwait,

Having noted Articles 1 and 65 of the Constitution, and

Annex III to Law No. 12 of 1964 regarding the Prevention of the Pollution of Navigable Waters by Oil, and

Law No. 48 of 1966 approving the Agreement of 7th July, 1965, concluded between the State of Kuwait and the Kingdom

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* Source: ST/LEG/SER. B/15 (1970) pp.96-98.

of Saudi Arabia concerning the Partition of the Neutral Zone between them, and

The International Convention on "The Territorial Sea and the Contiguous Zone" approved by the Geneva Conference and dated 29th April, 1958 and

The Concession Agreements concluded between the Government of Kuwait and the Oil Companies operating in the territory of Kuwait, the (Partitioned) Neutral Zone, or in the sea-bed areas appertaining to each, and

Pursuant to the recommendation of the President of the Council of Ministers, and

After approval by the Council of Ministers,

Have decreed as follows:

Article 1

The territorial sea of the State of Kuwait extends seaward for a distance of twelve miles from the baselines of the mainland and of Kuwaiti islands as hereinafter defined in Article 2 of this Decree.

Article 2

The base-lines from which the territorial sea of the State of Kuwait is measured are established as follows:

(a) Whereas the shore of the mainland or of a Kuwaiti island is fully exposed to the open sea, the low-water line along the coast is the baseline;

(b) Where there is a port or harbour, the outer-most permanent harbour works which form an integral part of the harbour system are considered as forming part of the coast;

(c) Where there is a low-tide elevation situated not more than twelve miles from the mainland or from a Kuwaiti island, the outer edge of the said low-tide elevation constitutes the baseline for measuring the territorial sea of the mainland or, as the case may be, of the island off which the elevation is situated;

(d) In the case of Kuwait Bay, the waters of which are internal waters, the base-line is the closing line across the entrance to the Bay established in Annex III to Law No. 12 of 1964 regarding Prevention of the Pollution of Navigable Waters by Oil.

Article 3

In this Decree, the expression "island" means a naturally formed area of land surrounded by water, which is above water at mean high-water tides.

The expression "low-tide elevation" means a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high-tide.

Article 4

If the territorial sea of Kuwait measured in accordance with the provisions of this Decree overlaps the territorial sea of another State or of the Zone partitioned by the Agreement relating to the Partition of the Neutral Zone dated 7th July 1965, the boundary shall be determined in conformity with the provisions of Article 12 of the Geneva Convention on the Territorial Sea and Contiguous Zone, referred to in the Preamble of this Decree.

Article 5

The enforcement of the provisions of this Decree shall not be understood as affecting in any way any rights of the interested parties in the submerged area to seawards of the Zone partitioned under the Partition Agreement of the Neutral Zone hereinabove mentioned.

Nor shall it be understood to detract in any way from any rights provided for in existing Concession Agreements between the Government of Kuwait and the Oil Companies operating in the territory of Kuwait, in the Partitioned Zone or in the sea-bed areas appertaining to each, particularly as regards the acreage of concession area as defined in the said agreements.

Article 6

Nothing in the provisions of this Decree shall prejudice the rights of the State of Kuwait to an area contiguous to its territorial sea to be delimited later on, or to the exploitation of fish resources.

Article 7

The President of the Council of Ministers and the Ministers shall, each within his competence, execute the provisions of this Decree which shall come into force as from the date of its publication in the Official Gazette.

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