

THE NATURE OF THE CONTINENTAL SHELF RIGHTS IN INTERNATIONAL LAW

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With reference to a certain case pending in the District Court of Tokyo¹, I was requested to give an expert opinion concerning the incidentally posed questions of international law. The questions are: (1) At the time of 1971 to 1973 inclusive did there exist any rule of customary international law providing that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources?; (2) If this question is answered in the affirmative, do such sovereign rights include the power of the coastal State to impose taxes on the incomes accruing from the exploring and exploiting activities in the continental shelf?; (3) What is the meaning of "sovereign rights" referred to in Article 2, paragraph 2 of the Convention on the Continental Shelf to be exercised "for the purpose of exploring the continental shelf and exploiting its natural resources"?; and (4) What is the purport of Article 12, paragraph 1 (that is, concerning reservations to articles of the Convention) of the same Convention? These questions are examined and answered *seriatim* in my opinion dated 8 December, 1980.

Opinion:

The first question concerns the existence or not of a given rule of customary international law. Customary international law is unwritten law which comes into existence on the basis of a general practice accepted as law among the subjects of international law (Art. 38, para. 1 of the Statute of the Court). Difficulties are not infrequently encountered in ascertaining precisely when the rule in question has been established as customary law. But it is here inquired with the explicit temporal limitation: "at the time of 1971 to 1973 inclusive." The material contents of the rule are also indicated. Thus the question concerns a general rule of the continental shelf—if any—which seems to have appeared recently and its existence at stated periods. It is my opinion that the question should be answered in the affirmative for the following reasons.

As commonly known, it is the Proclamation by President Truman of 28 September 1945 which has paved the way to the formation through custom of international law on the continental shelf. The Proclamation said: "having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States

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¹ The plaintiff of the case is the company incorporated on the law of Panama. From 1971 to 1973, the company undertook the exploring activities of the seabed outside the territorial sea of Japan under the contract concluded with the Japanese and the American companies. The taxes were levied by the Revenue Office on the incomes derived from the boring activities of the seabed for the years 1971, 1972 and 1973. The company did not file the final income tax returns by reason that the seabed outside the territorial sea does not fall within the "enforcement area" defined in our Corporation Tax Act. The State authorities rejected this view. The action was introduced by the plaintiff for annulment of the imposition of corporation tax.

regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." A considerable number of States followed the similar course as the United States, but the declarations having emanated from them were by no means uniform in the contents and international legal doctrine as well as not concordant with regard to the legal position or scope of the continental shelf. Particularly, the Latin American States made exorbitant claims in this respect of exercising sovereign power over the epicontinental sea and continental shelf which evoked the stern protest by the United States.

Since 1950 the International Law Commission entered upon its work of preparing the draft articles of the continental shelf as forming a part of the treaties on the law of the sea. In the *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* case (1951)², the arbitrator (Lord Asquith) held that "the submarine area contiguous with the Abu Dhabi outside the territorial zone" was not included in the Concession of 1939. Referring to the works of the International Law Commission with its own comments on the draft articles, the arbitrator said: "I . . . cannot accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939."

The Convention on the Continental Shelf based on the draft articles elaborated by the International Law Commission was finally adopted on 29 April 1958 at the United Nations Conference on the Law of the Sea and came into force on 10 June 1964. Whatever the original intention of the Commission might be, it would be necessary for the evaluation of the legal situation at the time of 1958 to take into account such factors as the codifying task continuously undertaken in a span of six years to its completion, reactions revealed in at least no gainsaying by the generality of States, the consciousness of law deepened in the proceedings of the Conference and so on.

In the *North Sea Continental Shelf* cases (1969), where the International Court of Justice was requested to decide what principles and rules of international law are applicable to the delimitation between the Parties of the areas of the continental shelf, the Court held that the rule of equidistance provided in Article 6 of the Convention has not been established as customary rule. However, as to the rules provided in Articles 1 to 3 inclusive, the Court found that they were regarded "as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf."³ The rule of which existence is asked in the present opinion corresponds to that provided in Article 2, paragraph 1 of the Convention, and as such, falls within the ambit of the above ruling by the Court. The declaration of the Court, as a court of law, should be regarded as having the high authority, if it were *obiter* stated⁴. This is especially so, when the issue concerns the existence or not of a specific rule of customary international law. Moreover, the Court deemed in the operative part of the judgment as the binding requirement of international

² Green, *International Law through the Cases*, 1959, pp. 390-397.

³ *I.C.J. Reports 1969*, p. 39.

⁴ ". . . in default of a decision on the point, even a dictum may be of some weight." Beckett, *Decisions of the Permanent Court of International Justice on Points of Law and Procedure*, in *British Year Book of International Law*, 1930, p. 1.

law the delimitation to be effected "in such a way to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the prolongation of the land territory of the other."⁵ If so, it goes without saying that the principle of sovereign rights by the coastal State over the continental shelf is equally established as a binding rule—otherwise, the very concept of spatial delimitation of sovereign rights would be meaningless.

The practice of States from 1958 to 1969 seems to have been consistently developed premising or attesting the existence of a customary rule formulated in Article 2, paragraph 1 of the Convention.⁶ Therefore, if the statement of law by the Court is correct, it cannot be disputed *a fortiori* that at the time of 1971 to 1973 there existed a rule of customary international law corresponding to the provision of Article 2, paragraph 1 of the Convention. At any rate, the elapse of more than a decade—carrying with it the increasing accessions and expanding practice—bears ample witness to the completed custom-making in the contemporary international life.

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The second question concerns whether the sovereign rights of the coastal State comprehend the taxing power upon the accrual of profits from the exploration and exploitation of continental shelf. At the Conference on the Law of the Sea the opinions of States were divided as to how the right of the coastal State over the continental shelf should be legally described.⁷ Some States proposed the term of "sovereignty," and others the expression of "exclusive rights." The International Law Commission for its part initially spoke of "control and jurisdiction" by the coastal State, but subsequently replaced it with the term of "sovereign rights." Finally, agreement was reached at the Conference to describe the relevant rights as sovereign and exclusive.

Hence the right of the coastal State is both sovereign and exclusive (the meaning of "exclusive" is expressly defined in Article 2, paragraph 2 of the Convention). Referring to the term of "sovereign rights," we must point to the quasi-consensus in the sense that it is not equivalent to that of sovereignty of a State in international law. It follows that the coastal State has not the full sovereignty over the continental shelf. On the other hand, the sovereign rights of the coastal State are understood to cover all the governmental powers required for the exploration and exploitation of continental shelf. To put it otherwise, the coastal State is entitled in international law to perform legislative, adjudicative and administrative functions in so far as it is needed for the realization of the said purpose.

The taxing power (*Steuerhoheit*) is the essential ingredient of a State's governmental functions and as such, obviously included in the sovereign rights referred to in the Convention. The preparatory work of the Conference does not give any contrary indication in this respect. It is needless to say, however, that the taxing power, if extended to the area of continental shelf, is limited from the viewpoint of aim and purpose. The taxable object is an accrual

⁵ *I.C.J. Reports 1969*, p. 53.

⁶ *En passant*, Judge Lachs referred to a noteworthy fact that "about 70 States are at present engaged in the exploration and exploitation of continental shelf areas." *I.C.J. Reports 1969*, p. 227.

⁷ See, Oda, *International Law of the Sea*, II, (in Japanese), 1969, pp. 216 et seq.

of some gain from the relevant activities in the continental shelf. The payment of tax, tax rate, taxing area, and so on are also prescribed by domestic laws to which international law refers. This aspect of the matter will be discussed in detail later.

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The third question asks what is the meaning of sovereign rights in the context of the Continental Shelf Convention. As already mentioned, sovereign rights of the coastal State over the continental shelf do not amount to the right of territorial sovereignty in international law. The right of territorial sovereignty is based upon the juridical bond of a given territory's belonging to a State. It is by definition a right of a State to which a territory appertains to perform the governmental functions in a general and exclusive way in order to attain the object and purpose freely determined and determinable by the State itself.⁸ *Per contra*, the continental shelf rights in international law are limited in scope from the teleological angle, and solely exercised for the economic exploitation of shelf natural resources. The rights are subject to further limitation in the sense that they do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters (Art. 3 of the Convention).⁹

The continental shelf rights of the coastal State are related to a certain area, and the qualification of "exclusive" is defined as meaning 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" (Art. 2, para. 2). Now the rights in question constitute not only *jus excludendi*, but also *jus agendi*. In the latter aspect, however, the rights are functionally limited. For instance, the coastal State is precluded to utilize the continental shelf for the military purpose. This appears to show that the principal concern of international law is to protect the State activities in the continental shelf rather than the spatial ambit as such. In any event the continental shelf is not assimilated to the State territory in its strict sense. Thus the *Conseil d'Etat* of France declared in the *Saar* case (1970) that a floating target moored to the continental shelf of the Bay of Gascogne is situated outside the territory subject to the sovereignty of the French State, and within the terms of the 1958 Convention "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."¹⁰

By the same token, the Declaration of 20 January 1964 by the Federal Republic of Germany seems to reflect the proper interpretation of the rule of international law in question: "In the light of the development of general international law, as expressed in the recent practice of States and especially in the signing of the Geneva Convention on the Continental Shelf, the Federal Government regards the exploration and exploitation of the natural re-

⁸ See, Sperduti, *Sovranità territoriale, atti di disposizione di territori ed effettività in diritto internazionale*, in *Rivista di diritto internazionale*, 1969, pp. 412-415.

⁹ Nguyen-Quoc-Dihn, *Droit international public*, 1975, p. 562. It is pointed out that "la souveraineté reconnue par la convention n'est pas une véritable souveraineté territoriale car, au lieu d'être plénière, elle est réduite aux seuls fins d'exploration et d'exploitation."

¹⁰ Cited from Rousseau, *Droit international public*, IV, 1980, p. 434.

sources of the sea-bed and subsoil of the submarine area adjacent to the German coast but outside the area of the German territorial sea to a depth of 200 metres and beyond that limit, to where the depth of the subjacent waters admits of the exploitation of the natural resources as an exclusive sovereign right of the Federal Republic of Germany.”¹¹

Certainly, for the exposition of law, the International Court of Justice attached importance to the physical fact that “the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of the territory, an extension of it under the sea.”¹² Again the Court in another case stated that “it is solely by virtue of the coastal State’s sovereignty over the land that the rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.”¹³ However, it would be the true intent of the Court that in saying so it wishes to elucidate the *ratio legis* of the régime of the continental shelf by bringing into relief the principle that “the land dominates the sea” to rationalize the recent erosion of the freedom of the seas.¹⁴ Presumably, the Court would not be ready to admit that the continental shelf is part of the national territory and as such, placed under the same legal régime with it.¹⁵

As a matter of law, the coastal State can exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. Accordingly, the coastal State, in order to attain the purpose, can enact the necessary laws, regulations and proclamations. This is actually the case with the greater part of the States. For example, the French *Loi* N° 68-1181 of 30 December 1968 relative to the exploration of the continental shelf and the exploitation of its natural resources provides: “En matière douanière, les produits extraits du plateau continental sont considérés comme extraits d’une nouvelle partie du territoire douanière prévue par l’article premier du code des douanes. Les mêmes produits doivent, pour l’application de la législation fiscale, être considérés comme extraits du territoire français métropolitain” (Art. 15). The Italian Act No. 613 of 21 July 1967 stipulates: “Operations undertaken with a view to prospecting for, surveying and producing oil and gas in the submarine areas adjacent to the territory of the Italian peninsula and islands, from the coast at low tide to the outer boundary of the Italian continental shelf, shall be subject to the provisions of this Act and to those provisions of the laws in force which are not in conflict therewith. . . . Minerals extracted from the continental shelf shall, for all purposes, including taxation not provided for in this Act, be deemed to be equivalent to those extracted in Italian territory. . . .” (Art. 2). On the other hand, the Act sets up the favourable treatment for tax purposes of the profits of companies derived from activities relating to the production of oil and gas in the continental shelf area (Art. 34). It is obvious that these and other similar steps on the domestic plane constitute the exercise of sovereign rights by the coastal State referred to Article 2, paragraph 1 of the Convention.

Now it should be asked what is the juridical premise of the various steps to be taken

¹¹ *United Nations Legislative Series*, ST/LEG/SER.B/15, p. 351.

¹² *I.C.J. Reports 1969*, p. 31.

¹³ *I.C.J. Reports 1978*, p. 36.

¹⁴ *United Nations Legislative Series*, cit., p. 358.

¹⁵ *Ibid.*, p. 370.

on the domestic plane. The premise consists in what the status of the continental shelf is in international law.

First, it may be contended that the continental shelf is a part of the territory of the coastal State with the consequence that it can automatically apply and enforce the national laws there. Strictly speaking, however, the continental shelf is not a part of the national territory. Therefore, the premise is not correct, let alone the unilateral and exorbitant claims of certain States in this respect.

Secondly, it may be suggested that the continental shelf is assimilated to the national territory for the purpose of exploring and exploiting its natural resources. This seems to be merely a problematical version of the proposition that the coastal State exercises sovereign rights over the continental shelf for the stated purpose.

Thirdly, there remains the premise that the continental shelf is a special area where the coastal State exercises sovereign rights for the specific purpose, but not the full sovereignty. To be sure, the coastal State can extend to apply and enforce its laws there on which international law relies. For the matter of that, international law refers to national laws, and not vice versa. It is for the coastal State to measure up to the reference of international law in preparing the legal tools to materialize the international policy of development. International law allows States much latitude in this regard, but it does not operate directly and immediately to remove the limitations inherent to internal legal order. It may be argued that the contrary is inferred by recourse to a sweeping formula of "exercise sovereign rights." The purport of this formula is not presumably to lend itself to exculpate the legislative inertia. So, if the formula is used to enforce the national laws *de plano* dispensing with any further steps on the domestic plane, it would be tantamount to placing the cart before the horse. At least such an approach does not seem to represent the common *modus operandi* adopted by the greater majority of States in receiving and putting into practice the international legal doctrine of the continental shelf.

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The fourth question asks to clarify the main point of Article 12, paragraph 1 of the Convention. This Article runs: "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." In the law of treaties the term of reservation means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (Art. 2, 1 (d) of the Vienna Convention of the Law of Treaties).

It would be inquired whether a State can make any reservation except to Articles 1 to 3 inclusive so as to oblige the other States to accept it. With regard to this point, it was affirmed by the Court of Arbitration in the *Delimitation of the Continental Shelf* case (Great Britain/France, 1977) that the above provision of the Convention cannot be read as "committing to accept in advance any and every reservation to articles other than Articles 1, 2 and 3."¹⁶

¹⁶ *Decision of 30 June 1977*, p. 56.

Apart from this point, the possibility of making reservations to Articles 1 to 3 inclusive is excluded by the Convention itself. The International Court of Justice stated in the *North Sea Continental Shelf* cases that the exclusion of reservations provided in Article 12 significantly proves that the articles concerned are declaratory or reflective of the customary rules of international law. In the view of the Court, "it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must 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 one of them in its own favour."¹⁷

Now the raised question implicitly concerns the customary rule codified as Article 2, paragraph 4 of the Convention. This provision reads: "The natural resources referred to in these articles not only consist of the mineral resources and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." Given the customary nature of such a rule, read together with the provision of Article 2, paragraph 1, the question arises whether a State can take the position to recognize solely the exclusive exploitation of the mineral and other non-living resources, separating them from living resources belonging to sedentary species of which any sovereign jurisdiction by the coastal State is positively rejected.

In the first place, it is not open for a State to ratify or accede to a treaty with the reservation formulating such a position of principle concerning the application of Article 2, paragraph 4. At any rate, the reservation to Article 2, of course inclusive of its paragraph 4, is deemed inadmissible by the Convention itself, all the more because the reservation in question purports to detract from the right of exclusive exploitation of natural resources in the continental shelf area. On the other hand, for instance, the instrument of accession of France to the Convention on the Continental Shelf comprehends the statement that "the expression 'living organisms belonging to sedentary species' must be interpreted as exclud-

¹⁷ *I.C.J. Reports 1969*, pp. 38-39. In this regard a different opinion is propounded by some dissenting Judges in the sense that the possibility of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be regarded as a customary rule of international law. It is stated that "the power to make reservations affects only the contractual obligation following from the convention; that obligation, that is to say, the obligation vis-à-vis the other contracting parties to consider the rule in question as a customary law, is excluded in the case of the State making the reservation" (Morelli, *I.C.J. Reports 1969*, p. 198). Again, it is pointed out that the acceptance of a reservation by a contracting party "has only the effect of establishing a special contractual relationship between the parties concerned with the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such" (Sørensen, *ibid.*, p. 248). I agree to the opinion of the Court in this respect. In principle a customary rule of international law is not subject to unilateral reservation by States aside from eventual derogation *ex contractu*. Consequently, when a certain rule is placed outside the purview of admissible reservation in a codifying treaty, it is at least to be presumed that the rule belongs to a customary law, unless the contrary is proved. The possibility of establishing a special contractual relationship as to law-cognition or concluding an agreement materially derogating from a customary rule does not afford the relevant considerations to question the validity of the general proposition of the Court. Referring to the former, the question will come down to whether it is correct as law-cognition. If there exists really a customary law rule, it is no longer possible to speak of the freedom to disregard it whether *en de hors* the convention or not. The latter concerns the ascertainment of *jus cogens*, a point unrelated to a general hall-mark of a customary law rule.

ing crustaceans, with the exception of the species of crab termed 'barnacle' ". Such an interpretative declaration cannot be regarded as being incompatible *tout court* with Article 12 of the Convention.

Secondly, as indicated above, reservations to the customary rule of international law is out of the question. A State cannot detract unilaterally from the right of exclusive exploitation of the sedentary species, in so far as the right is recognized by customary international law. Even if the State does not claim the right of its own free will, it does not offer any valid ground to oblige the other States to forgo the exercise of the same right *vis-à-vis* that State.

Thirdly, for all that, if a State takes the position that the continental shelf resources are solely restricted to the mineral and other non-living resources and declares itself not to claim any exclusive right of exploitation of the sedentary species, it involves a renunciation of subjective right *qua* unilateral act in international law which is deemed as admissible and valid. It would be of no purpose, however, to insert such a declaration in the instrument of accession to the Convention.

Finally, a State may well take a negative attitude to the continental shelf régime for the reason that it extends the principle of exclusion to the sedentary fisheries. But it is not warrantable to deduce from such a negative attitude the complete renunciation of the continental shelf rights. Abandonment cannot be presumed or inferred. The will must be unambiguously represented. On the other hand, it is obvious that the same attitude cannot be reconcilable with the territory-expansionist conception of the continental shelf which asserts the exercise of full sovereignty over that area to exploit the natural resources of all kinds. In this sense the relevant circumstances, if ascertained, may afford an explicative element as to its legal position taken by our Government concerning the shelf régime at the time of 1971 to 1973. Indeed, it does not hold water for a State to assert that the continental shelf should be a national domain, not to disclaim, but to support the freedom of fishing.

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With reference to the expert opinion previously submitted, I was requested to give supplementary statements before the Court on the following points: (1) Did there exist the customary rule different in the contents with Article 2, paragraph 1 of the Geneva Convention at the time of 1971 to 1973?; (2) If the question is answered in the negative, is it permissible for a State to exercise sovereign rights solely for the purpose of exploiting the mineral resources, whereas not to admit the similar sovereign jurisdiction over the sedentary species by other States?; and (3) For the establishment of a customary law rule or its enjoyment by States, is it not required for States to take some positive actions such as making a declaration? What should be the modalities of a declaration? I prepared the opinion to these questions, though not orally stated *in toto* before the Court.

Supplementary Opinion:

As already indicated, customary international law is moulded through the development of a general practice accepted as law among States. The practice is composed of State

behaviour, which has been repeated in a uniform manner for a considerable period of time, and has attained generality so as to comprehend a great majority of States. At that stage it may occur that the consciousness of States converges in recognizing the practice as law. Then there emerges a binding rule of customary international law (*consuetudo sicut ius accepta, servanda est*).¹⁸

As to Article 2, paragraph 1 of the Convention on the Continental Shelf, it should be recalled that the Convention itself was adopted at the Geneva Conference by an overwhelming majority of States on the basis of draft articles elaborated by the International Law Commission. The Convention is the product of a complex process of accommodation within the international society to meet the demand caused by the technical progress in the exploitation of submarine mineral resources and the necessity of law-building initiated by the Truman Proclamation. The process was essentially that of law creation which was developed over a quarter of a century within some organic, semi-institutional frames of the contemporary world. The process is appositely depicted by Judge Koretsky in the following terms: "As a result of the inclusion in the work of the United Nations of the task of determining the principles and rules of international law relating to the continental shelf, the general principles of the law of the continental shelf has already taken the shape before the Conference, though not in a finally 'polished' form, on the basis of governmental acts, agreements and scientific works. The Geneva Conference of 1958, in the Convention on the Continental Shelf which was adopted, gave definite formulation to the principles and rules relating thereto. These were consolidated in subsequent practice in a growing number of governmental acts, international declarations and agreements. . . , which in most cases referred to the Convention or, when they did not do so, made use of its wording. All this has led to the development, in great measure organized and not spontaneous, of the general principles of international law relating to the continental shelf, in not only their generality but also their correctness. Thus, by a kind of coalescence of the principle, a genuine *communis opinio juris* on the matter has come into being. States, even some not having acceded to the Convention, have followed its principles because to do so was for them a recognition of necessity, and have thereby given practical expression to the other part of the well-known formula *opinio juris sive necessitatis*."¹⁹

The International Court of Justice, in its turn, held in the above-mentioned case that Articles 1 to 3 inclusive, "were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf."²⁰ This finding of the Court should be upheld. Certainly, it may be pointed out that the pronouncement of the Court is made by way of *dictum*. However, even the *dictum* of the Court is given with a leading authority, especially when it bears reference to the existence of a customary law rule.²¹

¹⁸ See, Verdross, *Die Quellen des Universellen Völkerrechts*, 1973, pp. 104 et seq.; *Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1969, pp. 649 et seq.; Sperduti, *La consuetudine internazionale*, in *Scritti in onore di Gaspare Ambrosini*, III, pp. 1979-1983.

¹⁹ *I.C.J. Reports 1969*, pp. 157-158.

²⁰ See *supra*, p. 2.

²¹ As to the contention that the Court cannot apply *obiter dicta*, Rosenne states: ". . . with its differentiation between the *ratio decidendi* and *obiter dicta*, may be found to suffer precisely from the very weakness to which the Court drew attention in relation to the value of municipal analogies. It can be surmised that the 'reasons in point of law' of Article 74 of the Rules of Court do not contemplate such a finely-drawn distinction." *The International Court of Justice*, 1957, p. 427.

Moreover, the Court declared in the operative part of the judgment what is the principle and rule of international law in the matter of the delimitation of the boundary between the continental shelf. In this regard, it must be noted that the Court's declaration necessarily presupposes that the coastal State exercises sovereign rights over the continental shelf which forms a natural prolongation of that State's land territory. Indeed, it would be nonsensical to speak of the delimitation of boundary, if the exercise of sovereign rights does not follow upon the delimitation.

On the other hand, it may be argued that the criterion of exploitability as to the scope of the continental shelf, and particularly, the inclusion of the sedentary species in the natural resources of the continental shelf, make it difficult to consider that there existed the uniform practice and *communis opinio juris* of States. At that time (i.e., the time of the Geneva Conference), it seemed to have been no longer possible to contend that the claim of exercising sovereign exclusive rights to the seabed and subsoil to a depth of 200 metres was contrary to international law. Indeed, according to the Geneva definition, the continental shelf extends beyond the limit of 200 metres to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas. This part of the provision appears to reflect the attitude of international society to reserve for future exploitation, taking into account of the technical progress, for the sake of each coastal State. It is not conceivable that the framers of the Convention introduced the criterion of exploitability purportedly to recast into the concept of shelf which is foreign to the geological *données*.

The Convention of 1958 provides that the natural resources include living organisms belonging to sedentary species. In fact, there was a difference of opinion at the Conference whether certain living organisms belong to sedentary species within the meaning of the Convention.²² There is still a possibility that this difference will come to the fore. In this connection, it may be also asked whether it was possible for a State to challenge effectually as a principle the inclusion of sedentary species in the continental shelf resources. Was it even then a matter of the general freedom of the seas or of any historic title? At all events, States seemed to have faced a realistic need not to demolish a quasi-consensus, which was the matrix of uniform practice. It is a matter of nicety to draw a line between an emergent rule and a provision *de lege ferenda*.

Now it should be pointed out that the finding of the Court concerning certain rules of the Convention was given with reference to the period of 1958. The period concerning which my expert opinion was requested is more than a decade later. The formation of a custom as law is the dynamic and continuous process including a welter of State actions and reactions. The passive attitude of a State merely denying the existence of a custom is not sufficient to check the dynamic progress of custom-building. The State practice since 1958 seemed to have reached the maturity in consuetude of the rules embodied in Articles 1 to 3 inclusive of the Convention. For the period of more than a decade later, we can not find any evidence to see the relevant practice operated to modify the contents of the above rule, that is, to make the criterion of exploitability no longer in force or to exclude

²² Oda, *International Law of the Sea*, cit., pp. 223-227.

the sedentary species from the continental shelf resources.²³ In view of the foregoing, it may be safely concluded that there existed the customary rule not different in the contents with Article 2 of the Geneva Convention on the Continental Shelf at the period of 1971 to 1973.

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As the first question is answered in the negative, I now proceed to the next question, that is, whether it is permissible for a State to exercise sovereign rights solely for the purpose of exploiting the mineral resources, whereas not to admit the similar sovereign jurisdiction over the sedentary species by other States.

The coastal State is entitled to exercise sovereign rights over the continental shelf for the exploitation of its natural resources on the basis of customary or general rule. Apart from the question whether the rule was strictly on *lex lata* lines, the inclusion of sedentary fisheries seems to have evolved into more than a conventional rule today. If so, *ex parte* statement of a policy by a State to restrict the continental shelf right exclusively to the mineral resources is not opposable to other States, in so far as it purports to detract from the right to exclusive jurisdiction of sedentary living resources now recognized by a customary law rule. To be sure, it may arise a difference of legal views between the States as to whether certain living resources pertain to the category of sedentary species within the terms of the 1958 Convention and also in the sense of contemporary international law. On the other hand, agreements may be validly concluded and applied between the States concerned recognizing the limited exercise of the continental shelf rights on a reciprocal reserving the sedentary fisheries to the régime of freedom, for it seems not to involve any question of *jus cogens*. Notwithstanding, the rule is considered to have been framed to apply on a customary basis in the sense that sedentary fisheries are subject to the régime of the continental shelf. Consequently, any attempt of unilateral derogation therefrom—if it entails denial of right possessed by other States—could not be warranted in law, however much a State may dislike the rule.

But, if a State restricts its right of exploitation only to the mineral resources such as oil and gas, and does not claim any exclusive right with respect to sedentary species, it may be interpreted as abandonment of subjective right on its own account. International law contemplates such a unilateral act as being productive of its intended effect.

Abandonment of a right is one thing; demanding others a similar abandonment is quite another. A State cannot require abandonment being made also by other States on the simple score of its *ex parte* commitment. As already observed, on the other hand, even

²³ In another context, can we argue that the Convention has fallen into desuetude? The French Republic, in *Delimitation of the Continental Shelf* case, went so far as to contend that "all the Geneva Conventions on the Law of the Sea, including the Continental Shelf, have been rendered obsolete by the recent evolution of customary law stimulated by the work of the Third United Nations Conference on the Law of the Sea." This argument was rightly rejected by the Court of Arbitration for the reason that "in the opinion of the Court. . . 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." *Decision of 30 June 1977*, pp. 62, 64.

if such a self-regulative attitude is taken by a State, it would not be proper to deduce from it the overall renunciation of the continental shelf right which is not only ascertained, but under present conditions would be of no realistic avail. Still such a basic position may be taken as a significant expression of objection against the territory-expansionist conception of the continental shelf, inasmuch as it disclaims the exercise of sovereign jurisdiction over the submarine living resources—though such a negative attitude seems to have been increasingly eclipsed by the further development of the law of the sea in the recent years.

* * *

Finally, it is asked whether it is required for States to take some positive action such as making a declaration for the establishment of a customary law rule or subjective entitlement to it by States.

In the first place, a question will be raised whether it is required for States to take some action on the international plane. If customary international law is reduced to tacit agreement among States, it stands to reason that States should participate in the process of custom-building, i.e. agreement-making through the medium of some action or other—of course making a declaration being included. However, dogmatic conception of State volitionalism being discarded, the substance of customary international law should be considered to consist in the general practice accepted as law among States. Accordingly, for the creation and establishment of a customary law rule, it is not necessary that all the members of international society should participate in the relevant process. Even a State which is deprived in fact of any opportunity to have a part in the custom-making will not be precluded on that score to become a subject of customary rights and obligations.²⁴

Another question will be posed whether it is required for States to take some action on the domestic plane in order to exercise the right or fulfil the obligation derived from an international rule of customary law. This question cannot be treated on a wholesale basis. It must be examined rule by rule. But, as a matter of principle, it should be noticed that "international law generally relies upon internal orders of States for the attainment of its intended objects." Because of cooperation to be offered by national laws, international law may be characterized as "legal order guaranteed by other orders."²⁵ Indeed, it frequently occurs that a customary rule confines itself to laying down a general principle and refers to national laws in order to satisfy the necessary conditions of its application *in concreto*.²⁶ In contrast to this, States may adopt the so-called self-executing rules—conventional or customary—which are automatically enforceable on the domestic plane.

These general statements will not suffice as a reply to the formulated question. The point must be examined further in the particular context of customary rule embodied in Article 2, paragraph 1 of the Convention on the Continental Shelf. In other words, the

²⁴ Cf. Kelsen, *Principles of International Law*, 2nd ed., 1966, pp. 453–454; Guggenheim, *Traité de Droit international public*, I, 1953, p. 49; Morelli, *Nozioni di diritto internazionale*, 7^a ed., 1967, p. 30.

²⁵ Sperduti, *Diritto internazionale e diritto interno*, in *Rivista di diritto internazionale*, 1958, p. 188.

²⁶ By way of example, we can mention the principle of maritime warfare that "*toute prise doit être jugée*." While international law lays down this general principle, it does not contain any detailed rule governing the process of condemnation. Cf. Perassi, *Lezioni di diritto internazionale*, II, 1957, p. 31.

question is whether it is required for States to take some positive action on the domestic plane in order to apply and enforce the customary rule of the continental shelf.

According to this customary rule, the coastal State exercises "sovereign" and "exclusive" rights over the continental shelf for the purpose of exploiting its natural resources. The continental shelf rights are ensured to the coastal State as *jus excludendi alios*. If a State encroaches upon the continental shelf to undertake the exploration and/or exploitation of its natural resources, the former will commit a wrong to the latter in violation of international law. These rights "do not depend on occupation, effective or national, or any express proclamation" (Art. 2, para. 3). Hence the protection of the continental shelf rights as *jus excludendi* is sufficient by itself in international law. It is not necessary for States to take any internal steps in order to enforce this aspect of the rights.

The continental shelf right also manifests itself in *jus agendi*. The right to exploit the continental shelf resources shall be vested in the State. And the coastal State exercises all the governmental powers and functions—legislative, administrative and adjudicative—for the specific purpose of economic development. At first sight, it seems that the right intends to give the functional protection of State power. Emphasis is laid on the protection of economic activities of States in the continental shelf area. In this connection it is suggestive that the limit of State power is made dependent upon the additional criterion of exploitability of natural resources. However, the protection given in the form of sovereign rights is not only functional, but also spatial.

As a matter of terminology, right of partial or functional sovereignty (*souveraineté finalisée*) may be used. But the right is not in contradistinction to the right of territorial sovereignty. As Judge Koretsky pointed out, sovereign rights have "an inherent spatial reference." The Judge said: "the continental shelf itself is within the sphere of the special territorial (though limited) rights of the coastal State to which it is appurtenant, on the ground of the close physical relationship of the continental shelf with the mainland (*via* the submarine area of its territorial area), as being its natural prolongation."²⁷ On the other hand, the International Court of Justice in the *Aegean Sea Continental Shelf* case held: ". . . a dispute regarding entitlement and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf."²⁸

Thus the rights of the coastal State over the continental shelf have a spatial reference and are predicated on the right of territorial sovereignty. They are commonly characterized by the criterion of exclusivity in international law. Nevertheless, the rights are not full nor general in amplitude, but limited in correlation with the purpose to be materialized. States act *jure imperii* in the exploitation of the continental shelf resources. But sovereign rights exercised by States are not general *imperium*.²⁹

The rights are based on, and included in the right of territorial sovereignty, but are not the same with the latter, nor to be exercised as such. This holds true of other sovereign rights such as the right of the coastal State in the fishery zone. Consequently, the fishery

²⁷ *I.C.J. Reports 1969*, p. 159.

²⁸ *I.C.J. Reports 1978*, p. 36.

²⁹ See, Sperduti, *Sul régime giuridico dei mari*, in *Rivista di diritto internazionale*, 1960, p. 62.

zone is legally kept distinct from the territorial sea of a State. In a same vein, the continental shelf is not the territory of a State.³⁰

The right of territorial sovereignty is not the object of grant (*octroi*) to States by international law. It is the power immanent in the existence of independent State *qua* governing entity. In this sense the continental shelf rights as sovereign rights do not in itself depend on occupation or on any express proclamation. International law recognized the coastal State to extend its sovereign rights over the continental shelf area, requiring that they should be exercised in a limited way. What is the *ratio* of recognizing such an extension of sovereign rights? It is afforded by the so-called principle that "the land dominates the sea."³¹

Accordingly, a State is not required as a subject of international law to take any special steps to claim the rights *via-à-vis* other States except any eventual agreement of boundary delimitation. However, a State is not only a subject of international law, but also a *gestor* of its own municipal legal order. It goes without saying that the exercise of governing power by States is subject to the provisions of their municipal orders.

If the continental shelf is a spatial ambit distinct from the territory of a State, it would be necessary for a State to take appropriate steps in order to enforce its municipal law in the area. These steps range from the special legal régime practically indispensable for the work of economic development being operated on a huge scale to the step by which enables the national legislation to extend its effect outside the limits of the territory in so far as it is needed for the exploitation of the continental shelf resources. Notwithstanding, it may be contended that such steps are not necessary to be taken on a State's own responsibility, for continental shelf rights are "an automatic adjunct of the territorial sovereignty" of the coastal State and international law gives much discretion to it in the exercise of these rights. It is doubtful whether the formula that "the coastal State exercises sovereign rights" is self-contained in the sense that any further steps can be dispensed with on the domestic level. The characterization of "automatic adjunct" does not involve automatic enforceability of national laws and discretion is not absolute in the sense that a State is allowed even to disregard the limits of municipal order. It may well be queried whether a State can have recourse to the formula of "sovereign rights" affirming an automatic effect healing the deficiencies due to the domestic legislative inertia.³² International law does not transcend the existence of municipal legal orders of States, but for its actual operability, depends upon and is guaranteed by these orders.

³⁰ According to Judge De Castro, "it must not be thought that the Court considers the continental shelf to be a real part of the coastal State's territory, enjoying the same legal status. It seems rather that the Court wished to express, in metaphorical but striking terms, what was the basis of the rights over the shelf. . ." *I.C.J. Reports 1978*, p. 66.

³¹ The International Court declared: "the doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea." *I.C.J. Reports 1969*, p. 51.

³² Whether the "enforcement area" provided in the Corporation Tax Act includes the continental shelf or not, is an issue of our national law in the sense that it is to be decided on its proper construction. If not included, invocation of the "sovereign rights" formula may justify a step in national law extending to include it. But such a step needs to be specifically taken. For the municipal purpose, in my view, reference to the formula *tout court* is not capable of substitution for that step.