

THE LEGALITY OF THE EXTENSION BY ICELAND OF HER FISHERIES JURISDICTION

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The biological resources of the sea have long fascinated man, whose fishing was one of the earliest occupations. The secret of what lies beneath the surface has stimulated man's imagination and encouraged his hope that in this vast area are resources capable of feeding a growing and still hungry population for centuries to come. Growing population pressure in many parts of the world, increased exploitation of the earth's natural resources, and the facilities of movement and communication afforded by modern technical progress are factors which focus attention upon exploitation of the biological resources of the vast areas of the globe covered by the sea. The sea is an area belonging to no one or to everyone, and its biological resources cannot be made the property of either one State or several of them. Although the sea gives the States the opportunity to co-operate in the exploitation of its resources, but when such a co-operation fails, the sea's resources become a source of frictions and conflicts among States. Thus, on the high seas there exists a confrontation between the interests of particular States or particular groups of States.

Since in some conflicts in the sea areas the vital interest of particular States are involved, such conflicts may endanger the

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maintenance of international peace and security. Therefore, the dispute between States concerning the utilization of the high sea or its resources should be solved according to the methods of pacific settlement of international disputes provided for in the Charter of the United Nations. One of the major objectives of the United Nations is to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (Article 1, paragraph 1). The object of this article is the analysis of the legality of the extension by Iceland of her fisheries jurisdiction to 50 nautical miles from the baselines in the light of the Judgments of the International Court of Justice in the Fisheries Jurisdiction Cases (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland).

On August 31, 1971, Iceland addressed an aide-mémoire to the United Kingdom and an aide-mémoire to the Federal Republic of Germany, in which she stated that she found it essential to extend further the zone of exclusive fisheries jurisdiction around her coast to include the areas of the sea covering the continental shelf (to 50 nautical miles from baselines) and that this extension would become effective not later than September 1st, 1972.¹ The United Kingdom, in her reply of September 27, 1971, and in her aide-mémoire of March 14, 1972, stated that «such an extension of the fishery zone around Iceland would have no basis in international law».² Similarly, the Federal Republic of Germany, in her reply of the same date, asserted that «the unilateral assumption of sovereign power by a coastal State over zones of the high seas is inadmissible under international law».³ On the other hand, the Icelandic Minister for Foreign Affairs, in his speech denying the

1. I.C.J., **Fisheries Jurisdiction Case** (United Kingdom v. Iceland, Federal Republic of Germany v. Iceland), Reports 1974, at 14, and 186.

2. *Ibid.*, at 14-15.

3. *Ibid.*, at 186. Moreover, on March 14, 1972, the Federal Republic of Germany, in an aide-mémoire reaffirmed her position that «a unilateral extension of the fishery zone of Iceland to 50 miles is incompatible with the general rules of international law» *ibid.*, at 187.

existence of rules of international law in this regard, said: «I cannot see that our proposed extension of fisheries jurisdiction is contrary to any accepted international law. It is a fact that there are no generally accepted rules in international law on the territorial limit».⁴

Since, in its Judgment of December 18, 1951 in the Fisheries Case, the International Court of Justice stated that «[t]he delimitation of sea areas has always an international aspect» and its validity «with regard to other States depends upon international Law» — in other words the delimitation of sea areas depends upon international law — it therefore seems indispensable to ascertain what the international law to be applied is, regarding the extension by the coastal State of fisheries jurisdiction outside 12 miles from baselines, and subsequently to determine the legality of the Icelandic extension. Judge F. de Castro, who asserts that the delimitation of sea areas is considered from a legal point of view when it concerns the question of *mare adjacens*, is right when saying that there is a crisis in the law of the sea, because the changes and increasingly rapid development of technical conditions for the exploitation of the sea have resulted in a visible lagging behind of the old rules.⁶ It seems useful to examine briefly the development of these principles of maritime international law which apply to the delimitation of sea areas.

PRINCIPLES OF THE DELIMITATION OF THE SEA AREAS

1. Prior to the Geneva Conferences on the Law of the Sea

— In the early Middle Ages, although men believed in the freedom of the seas or acted as though they believed in it, some States or City-States advanced, and occasionally enforced, doctrines dealing with the rights of men to the seas. However, those doctrines were largely of regional application: for instance, Venice and Genoa

4. *Iceland and the Law of the Sea*, 31, (1972) quoted in the Memorail on the merits of the Federal Republic of Germany, Part IV, at 96; I.C.J., *Fisheries Jurisdiction*, Reports 1974, at 80.

5. I.C.J., *Fisheries Case, 1951*, at 132.

6. *Ibid.*, at 80.

asserted rights over the Adriatic and the Ligurian Seas respectively.⁷ In the fifteenth and sixteenth centuries, there were many claims of exclusive jurisdiction over seas, the most prominent of them being the division of the newly-discovered parts of the Atlantic, the Pacific, and the Indian Oceans between Spain and Portugal by Pope Alexander VI in his Bull **Inter Caetera** of May 4, 1493.⁸ In that epoch, the Scandinavian kingdoms asserted similar rights over the Baltic and the adjacent Atlantic.⁹ Similarly, the British claimed the British Seas. As C. J. Colombos indicates, the first recorded claim of the English kings to sea power goes back to the tenth century, when Edgar the Peaceful styled himself «sovereign of the Britannic Ocean».¹⁰ Later, after the Battle of Sluys, Edward III exacted a salute from all foreign vessels as being due him as «King of the Sea».¹¹

The claims to exercise exclusive control of the seas met with the opposite point of view from the very beginning, according to which the high seas are not subject to the ownership nor the sovereignty of any State. This point of view goes back to the Roman Law. For instance, Ulpian maintained that the sea should be open to everybody by nature,¹² and Celsius referred to the sea as being common to all men, like the air.¹³ Some of the later Roman jurists considered the sea as one of the things common to all and not subject to property at all.¹⁴ In the seventeenth century, H. Grotius, in his **Mare Liberum**, asserted that the high seas, **res communis omnium** (a thing belonging to all. — F. P.), is not something that lends itself to ownership, but its use is common to

7. C. J. COLOMBOS, **The International Law of the Sea**, 49 (London 1967).

8. H. S. COMMAGER (ed.), **1 Documents of American History**, 2-3, (New York 1963).

9. C. J. COLOMBOS, *supra* note 7, at 48-49.

10. *Ibid.*, at 48; T. W. FULTON, **The Sovereignty of the Sea**, 25 and ff., (Edinburgh 1911).

11. C. J. COLOMBOS, *supra* note 7, at 48.

12. ROMAN LAW, Lib. 13, pr. D. viii, 4.

13. *Ibid.*, Lib. 3, D. xLiii, 8.

14. C. J. COLOMBOS, *supra* note 7, at 62.

everybody, and this applies also to fishing.¹⁵ According to H. Grotius, the **mare adjacens** is subject to the jurisdiction and protection of the ruler of the territory. Over that area the **potestas** of the master of the coast is recognized without difficulty.¹⁶

The opinion of the eighteenth century on the delimitation of sea areas is reflected correctly by E. de Vattel, in his book entitled **The Law of Nations**. He writes that «[i]t is not easy to determine just what extent of its marginal waters a nation may bring within its jurisdiction».¹⁷ In his view, in general the sovereignty of a State over its marginal waters extends as far as is necessary for its safety and as far as it can be effectively maintained, since «a nation may appropriate only so much of common property, like the sea, as it has need for lawful end».¹⁸ F. de Castro calls this principle «the classical concept», which predominated until the middle of this century, and says it «is no more than the development of ancient principles».¹⁹ According to this classical concept, sovereignty over land is regarded to extend to the sea dominated by that land. That marine belt constitutes a territorial sea. The imperium over that sea gives rights to and imposes obligations on a coastal State. The former include, among other things, exclusive fishing rights.²⁰

From the eighteenth century up to the Second World War, the law of the sea, as F. de Castro rightly indicates, «was a model of stability in the international community»,²¹ and the question of the limits of fishing zones did not give rise to serious problems. Article I of the draft regulations concerning the territorial sea in

15. H. GROTIUS, **Mare Liberum Sive de Jure, Quod Batavis Competit ad Indicana Commercia**, Dissertatio H. Cocceius (ed.), 469, (Lausanne 1752 IV).

16. H. GROTIUS, **De Jure Belli ac Pacis**, II, 3, 13, 2 Amstelaedami (ed.), (1735 I), at 238.

17. E. DE VATTEL, **The Law of Nations**. Ch. G. Fenwick (trans.), 108, (Washington 1916).

18. *Ibid.*, at 108.

19. F. DE CASTRO, in I.C.J., **Fisheries Jurisdiction**, Reports 1974, at 82.

20. G. G. FITZMAURICE, *ibid.*, (Reports 1973), at 24.

21. F. DE CASTRO, *ibid.*, (Reports 1974), at 82.

time of peace, prepared by the Institute of International Law at its Stockholm session in 1928, well reflected the general opinion of the international community. According to this Article, «[t]he territorial sea extends for three miles. An international custom may justify recognition of the greater or lesser breadth than three miles».²² The same idea is also reflected in Article 5 of the draft convention on law of maritime jurisdiction in time of peace, prepared by the International Law Association at its Vienna session in 1926, as well as in Article I of the Rules concerning the extent of littoral waters and of powers exercised therein by the littoral State, prepared by the Japanese branch of the International Law Association in 1926.

According to the former of these Articles, the territorial jurisdiction of each State extends over the waters along its coast for three marine miles from lower-water mark at ordinary spring tide.²³ Under the latter Article, the littoral waters of a State extend seawards for three marine miles measured from low-water along the coasts of its territory.²⁴ The first symptom of a withdrawal from the classic concept of the law of the sea was the Declaration of Panama of October 3, 1939, wherein twenty-nine States, under the aegis of the United States, established a neutral zone beyond the territorial sea, extending in some places as far as 300 miles.²⁵ The origin of the crisis in the law of the sea with respect to fisheries, as F. de Castro indicates, is to be found in President Truman's Proclamation of September 28, 1945,²⁶ entitled «Policy of the United States with respect to Coast Fisheries in Certain Areas of the High Seas»,²⁷ known as the «Fisheries Proclamation».

22. Appendix No 2 in Harvard Law School Research in International Law, *The Draft Convention on the Law of Territorial Waters*, 368, (Cambridge, Mass. 1929).

23. *Ibid.*, at 374.

24. *Ibid.*, at 376.

25. G. H. HACKWORTH, *7 Digest of International Law*, 702-703, (Washington 1943).

26. F. DE CASTRO, I.C.J., *Fisheries Jurisdiction*, Reports 1974, at 82.

27. M. M. WHITEMAN, *4 Digest of International Law*, 954-955, (Washington 1965).

According to its text, the Truman Fisheries Proclamation was based on «the pressing need for conservation and protection of fishery resources» and provided for the following: 1) establishment of conservation zones in the areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale; 2) where such fishing activities are conducted only by U. S. nationals, establishing bounded conservation zones is subject to the regulation and control of the United States; 3) where such activities are conducted jointly by U.S. nationals and nationals of other States, establishment of bounded conservation zones, as well as fisheries regulations and their control, is subject to agreement between the U.S.A. and such other States; 4) establishment by other States of conservation zones in the areas of the high seas contiguous to their coast is subject to the corresponding recognition given to any fishing interests of the nationals of the United States which may exist in such areas; and 5) the character of high seas of the areas in which such conservation zones are established, and the right to their free and unimpeded navigation, are in no way thus affected.²⁸

The Truman Fisheries Proclamation, which was subject to carefully defined limits and reservations, taking into account the interests of the States engaged in fishing on the high seas, afforded States a plausible basis for enlarging their zones of fisheries jurisdiction.²⁹ Thus, the old principle of the division of the sea into two zones (the territorial sea and the seas which had up till then been regarded as dogma) was abandoned. A new zone, beyond the territorial sea was now recognized, that of the protection and conservation of fisheries.³⁰ The success of principles enunciated in the Truman Proclamation

28. *Ibid.*, at 955.

29. F. GARCIA AMADOR, *The Exploitation and Conservation of the Resources of the Sea*, 99 (Leyden 1959); S. Oda, *International Control of Sea Resources*, 28-31, 72-76, (Leyden 1962).

30. F. DE CASTRO, I.C.J., *Fisheries Jurisdiction*, Reports 1974, at 83; M. M. WHITEMAN, *supra* note 27, at 963-968, and 977-1042.

was justified by the new methods of fishing which made the conservation of the living resources of the high seas necessary, because the Grotian theory of the inexhaustibility of fisheries, constituting the basis of freedom of fishing in the high seas outside territorial waters, had become unsound.³¹ Thus, as O. de Ferron indicates, new concepts entered international practice, marking «a reversal of the traditional ideas on the liberty of the high seas,» and principles were stated of «a new theory which was soon to throw international law into confusion, by provoking ever bolder initiatives».³²

Following the Truman Fisheries Proclamation, there was a series of declarations in favor of extension of the fisheries jurisdiction of States.³³ Mention should also be made of the Santiago Declaration of August 18, 1952³⁴ and of the principles adopted at the Third Meeting of the Inter-American Conference of Legal Advisers held in Mexico in 1956.³⁵ The claiming of exclusive jurisdiction over fisheries over wider and wider zones — 6 nautical miles, 12 and even 200 miles — and the claim by coastal States to settle their fishery jurisdiction unilaterally, have alarmed other countries, especially those interested in high-seas fishing. With a view to put an end to such dangerous uncertainties, the International Law Commission, in its Draft Article on the Law of the Sea of 1956, prepared for the United Nations Conference on the Law of the Sea, laid down the 12-mile rule as a compromise formula. The Commission indicated that international practice was not uniform with respect to the delimitation, and pointed out that it «considers that international law does not permit an extension of the territorial sea beyond 12 miles».³⁶

31. *Ibid.*, at 83.

32. O. DE FERRON, 2 *Le Droit international de la mer*, 141, (Paris 1960).

33. A. ALVAREZ, *Los nuevos principios del derecho del mar*, 21, (Montevideo 1961).

34. M. M. WHITEMAN, *supra* note 27, at 1101.

35. *Ibid.*, at 1110; and also Inter-American Specialized Conference, Ciudad Trujillo, *ibid.*, at 1111.

36. *Ibid.*, at 74.

2. **The 1958 Geneva Conventions** — Despite the efforts made at the Geneva Conferences of 1958 and 1960, two of the most important questions relating to the delimitation of the sea areas, i.e. the maximum breadth of the territorial sea and the maximum distance seaward beyond which States are allowed to extend unilaterally their fisheries jurisdiction, were left unsolved. It is true that the 1960 Conference failed by one vote to adopt the Canadian-United States proposal governing the two questions of the breadth of the territorial sea and the extent of fishery rights.³⁷ However, after that Conference, as the International Court of Justice indicates in its Judgments in the Fisheries Jurisdiction Cases on merits, «the law evolved through the practice of States on the basis of the debates and nearagreements at the Conference».³⁸ Thus, the concept of maritime international law, which has been evolved over several centuries and has been consecrated in the Geneva Conventions on the Law of the Sea,³⁸ was founded on the clear-cut distinction of the status and principles between the territorial sea as part of or extension of the land domain, and the high seas as *res communis* open to all, the limit of the former, marking and constituting the start of the latter.

As regards the term «territorial sea,» it is to be noted that the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone does not contain the definition of that term. According to Article I of the Convention, «[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea».³⁹ The authors of the Harvard Draft of Territorial Waters, in

37. *Ibid.*, at 95, 127, 135-136; A. H. DEAN, «The Geneva Conference on the Law of the Sea: What Was Accomplished», 52, *Am. J. Int'l L.* 607 (1958); A. H. DEAN, «The Conference — Its Problems and Results», 5 *Federal Bar News*, 331, (1958); G. G. FITZMAURICE, «Some Results of the Geneva Conference on the Law of the Sea», 73, 8 *Int'l L. Quart.* (1959).

38. *I.C.J., Fisheries Jurisdiction*, Reports 1974, at 23, and 191-192.

39. *U.N. The Work of the International Law Commission*, 97, (67. V. 4).

their comment to Article 2 of the draft, define the marginal sea of a State as not exceeding three miles as «a belt over which the litoral state has full power, and it may be recognized that on the adjacent high sea outside this belt, the litoral state may perform some acts of authority».⁴⁰ The definition is not very precise, and it may meet the objection that it may impair the freedom of the sea to admit that acts of authority may be performed by the coastal State outside the territorial sea. The nature of the right of a State over its territorial sea was viewed in different ways by the writers on international law. For instance, in the opinion of A. Raestad, it is actual ownership (dominium), since it implies, in certain cases, an exclusive enjoyment very characteristic of ownership, especially in the matter of fishing.⁴¹

The opposite view was represented by A. de la Pradelle, who considered that the coastal State is neither the owner nor the sovereign of the territorial sea, but merely possesses «a bundle of servitudes» over it.⁴² On the other hand, E. W. Hall, L. Oppenheim, and J. Westlake⁴³ were of the opinion that a territorial sea is subject to the sovereignty of the coastal State. Their point of view was consecrated in Article I of the 1958 Geneva Territorial Sea Convention. In our opinion, the territorial sea may be defined as the part of the sea immediately adjacent to the coast of a State, over which the State exercises sovereignty. The territorial sea extends from a line running parallel to the shore to a specified distance therefrom, generally not exceeding twelve miles measured from low-water mark. The United Kingdom, the United States, the Federal Republic of Germany, and many other States have always maintained that by international law and practice, the general limit of territorial jurisdiction is three miles, but in the last two decades there has been a general tendency to extend the breadth of the territorial sea beyond the three-mile limit.

40. H. L. S. R., *supra* note 22, at 251.

41. A. RAEDSTAD, *La mer Territoriale*, 13, (Paris 1913).

42. 5 *Revue Générale de Droit International*, 264-284, (1898).

43. E. W. HALL, *International Law*, 190, (Oxford 1924); L. OPPE-
NHEIM, 1 *International Law*, 487, (London 1967); J. WESTLAKE, 1 *Inter-
national Law*, 195, (Cambridge 1910); U. N. Work, *supra* note 39, at 97.

For instance, reference may be made to the protest entered by the United States when Honduras enacted, in 1950 and 1951, two Decrees claiming control and jurisdiction over an area in the Atlantic Ocean «extending 200 marine miles seaward of its coasts». ⁴⁴ The United States Note of Protest, dated June 19, 1951, stressed the interference with freedom of the seas which the recognition of such decrees would entail. ⁴⁵ It should be observed that each extension of the breadth of the territorial sea beyond the 12-mile limit always met with protest from other States. The breadth of the territorial sea was not defined by the 1958 Geneva Territorial Sea Convention. Although there was a controversy as to the permissible extent and the limit of the territorial sea, there was no doubt that within it the coastal State possessed **imperium (jurisdictio)**, if not **dominium (proprietas)** or its equivalent sovereignty (according to the terminology of Article I of the 1958 Geneva Territorial Sea Convention). Consequently, the coastal State possesses in that area exclusive rights of different kinds, such as, for instance, exclusive fishery rights.

On the other hand, there is also no doubt that in the area outside the belt of the territorial sea, which area is called the high seas, the coastal State has neither **imperium** nor, as Judge G. G. Fitzmaurice rightly indicates, **dominium** nor proprietary or exclusive rights of any kind, including fisheries. ⁴⁶ On the other hand, in a zone known as the «contiguous zone», defined by Article 24 of the 1958 Geneva Territorial Sea Convention as a «zone of the high sea», the coastal State was authorized only to exercise the control necessary for certain specified purposes, i. e. the prevention and punishment of infringements of the coastal State's customs or fiscal, immigration or sanitary regulations within its territory or territorial sea. ⁴⁷ In that zone, the coastal State has no right of exclusive fishery. It must be pointed out that Article 24

44. C. J. COLOMBOS, *supra* note 7, at 98.

45. *Ibid.*, at 98.

46. G. G. FITZMAURICE, I.C.J., **Fisheries Jurisdiction**, Reports 1973, at 24-25.

47. U. N. WORK., *supra* note 39, at 102; S. ODA, «The Concept of the Contiguous Zone», 131, 11 Int'l L. L. Com. Quart. (1962).

of the Convention limits the contiguous zone to 12 miles «from the baseline from which the breadth of the territorial sea is measured».⁴⁸ It has been contended that a 12-mile maximum fishery limit results by implication from Article 24 of the 1958 Geneva Territorial Sea Convention establishing a maximum 12-mile limit for the contiguous zone. Since the contiguous zone is entirely unrelated to fisheries, it does not seem possible, therefore, to infer from this provision a restriction with regard to fishery limits.

In other parts of the high seas beyond the contiguous zone, the coastal State has no rights or jurisdiction or control at all, except in respect of its own vessels generally (Articles 10 and 11 of the 1958 Geneva High Sea Convention). In respect of foreign vessels, the State has, under this Convention, the rights of jurisdiction or control only for the suppression of piracy (Articles 14 to 21), the slave trade (Article 13), flag verification in certain cases (Article 22), and as part of the process known as «hot pursuit», started from within the territorial sea or contiguous zone in respect of violation of laws which would have justified arrest or stoppage if it could have been effected there (Article 23). The 1958 Geneva Convention on the High Sea, which, according to its Preamble, was adopted as being «generally declaratory of established principles of international law», defines in Article 1 the term «high seas» as «all parts of the sea that are not included in the territorial sea or in the internal waters of a State».⁴⁹ Article 2 then declares that «[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty».⁵⁰ Freedom of the high seas comprises, among other things, freedom of navigation and freedom of fishing, both for coastal and non-coastal States.

Under this Article, the freedom of the high seas is made subject to the consideration that it shall be exercised by all States with reasonable regard to the interests of other States in their

48. U. N. WORK., at 102.

49. Ibid., at 104; C. J. COLOMBOS, *supra* note 7, at 65.

50. U. N. WORK., *supra* note 39, at 104.

exercise of the freedom of the high seas. It follows from the 1958 Geneva High Seas Convention that fishing in the high seas could only be shared and not exclusive, since exclusive fishing would be incompatible with the status of the high seas as **res communis**. The problem of fishery conservation is separately dealt with, not only on a universal scale by the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, but also on a regional scale by the North-East Atlantic Fisheries Convention, concluded in London on January 24, 1959,⁵¹ of which, among others, the Federal Republic of Germany, Iceland, and the United Kingdom were the signatories. The object of the latter Convention, pursuant to its Preamble, was «to ensure the conservation of the fish stocks and the rational exploitation of the fisheries of the North-East Atlantic Ocean and adjacent waters, which are of common concern to them».⁵²

The basic principles of the 1958 Fishing and Conservation Convention are set forth in Article I, in which the freedom for nationals of all States to fish on the high seas is reaffirmed, subject to special treaty obligations, to the other provisions of the Convention, and «to the interests and rights of coastal States as provided for in this Convention».⁵³ This Article goes on to make it incumbent upon all States to adopt or to cooperate with other States in adopting such conservation measures for their respective nationals as may be necessary. If the nationals of only one State are engaged in fishing a certain stock in a certain area, no further problem arises. In principle, the State is obliged to take any necessary conservation measures, but no other State can intervene if this duty is disregarded. If, on the other hand, the nationals of two or more States are engaged in fishing the same stock in the same area, these States should enter into negotiations with a view to prescribing by agreement any necessary conservation

51. M. M. WHITEMAN, *supra* note 27, at 978-980.

52. **The Northeast Atlantic Fisheries Convention**, Cmnd. 659, 2, Misc. N° 3, (London 1959).

53. G. G. FITZMAURICE, I.C.J., **Fisheries Jurisdiction**, Reports 1973, at 26.

measures. However, agreed measures of conservation on the high seas for the preservation of common fisheries in which all have a right to participate is, as Judge G. G. Fitzmaurice rightly indicates, an entirely different matter from a unilateral claim by a coastal State to prevent fishing by foreign vessels completely, or to allow it at the will and under the conditions fixed by that State».⁵⁴

As regards the continental shelf doctrine, which is of recent origin, the submarine land mass that declines moderately from the coast of most continents to a depth of a few hundred meters before descending steeply into the deep ocean was not subject to human exploitation until a few decades ago, and therefore not the object of legal claims by States. By reason of the development of sea-bed drilling techniques and of floating derricks, claims arose by the coastal States for extensive rights over the sea-bed not only below the territorial sea, but also beyond its limits.⁵⁵ Under Article I of the 1958 Geneva Convention on the Continental Shelf, the term «continental shelf» is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of said areas; and (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coast of islands. According to Article 5, paragraph 1, the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or conservation of the living resources of the sea.⁵⁶

It is clear that the continental shelf does not afford any ground for the assertion of exclusive fishery claims by the coastal State merely on the basis that its continental shelf underlies the waters concerned. This idea is expressed not only in the 1958

54. *Ibid.*, at 26.

55. M. SORENSEN, «The Law of the Sea», 520 *International Conciliation*, 226, (1958).

56. U. N. WORK., *supra* note 39, at 117.

Geneva Continental Shelf Convention, but also in the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases. Thus, by virtue of Article 2 of the former, whose provisions were generally considered as reflecting already accepted law, it was provided that the coastal State exercised sovereign rights over the shelf for the purpose of exploring it and exploiting its natural resources. According to the definition of the Convention, the term «natural resources» is defined in Article 2, paragraph 4, as consisting of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, i. e. organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil.

This definition includes «demersal species», i. e. fish which, though they are swimming fish, spend a part of their time on or near the ocean bed, called «sedentary fishery» in general terms. On the other hand, the definition in question excludes purposely «swimming fish». M. Sorensen affirms that there was little support for the view that fish and other living resources, whether sea-mammals or invertebrates like shrimp, swimming in the waters above the continental shelf, should be included in the definition of natural resources. Since the Convention expressly maintains the freedom of fishing, it relates also to the bottom-fish and other fish occasionally having their habitat at the bottom or breeding there, but which otherwise live in the sea.⁵⁷ It follows from the above provisions that the 1958 Geneva Continental Shelf Convention, with exception to sedentary fisheries, did not grant to the coastal State the right to exclusive fishery. The same idea is reflected in the Judgment of the International Court of Justice in the North Sea Continental Cases.

In that Judgment, the Court, distinguishing between territorial sea and continental shelf rights, held that «the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial

57. M. SORENSEN, *supra* note 55, at 230-231.

waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation».⁵⁸ It follows from the foregoing considerations that under the 1958 Geneva Conventions on the Law of the Sea, the States are not authorized to extend the exclusive fisheries jurisdiction outside the territorial sea, because such an extension would be inconsistent with Article 2 of the High Sea Convention and Article 3 of the Continental Shelf Convention providing that «[t]he rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas».⁵⁹ However, the problem does not end here, because the 1958 Geneva Territorial Sea Convention does not define the breadth of the territorial sea. Therefore this problem must be established under customary law.

3. Customary Law — The International Court of Justice, in its Judgments in the Fisheries Jurisdiction Cases on merits, stated that «the question of the extent of the fisheries jurisdiction of the coastal State, which had constituted a serious obstacle to the reaching of an agreement at the 1958 Conference, became gradually separated from the notion of the territorial sea».⁶⁰ In the Court's opinion, that development reflected the increasing importance of fishery for all States.⁶¹ In the latter parts of those Judgments, the Court, leaving aside the problem of the breadth of the territorial sea, indicates that after the 1960 Geneva Conference on the Law of the Sea, the fishery zone evolved through the practice of States as customary law independently of its territorial sea. The Court said that «two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference»,⁶² namely: 1) the fishery zone, and 2) preferential rights of fishing in adjacent waters.

58. I.C.J., **North Sea Continental Shelf Cases**, Reports 1969, at 37.

59. U. N. WORK., supra note 39, at 117.

60. I.C.J., **Fisheries Jurisdiction**, at 23, and 191.

61. Ibid., at 23, and 191.

62. Ibid., at 23, and 192.

In this context, it is to be noted that custom must not be confused with usage. Custom means a clear and continuous habit of certain behavior in the conviction that under international law, such a behavior is obligatory.

As regards the concept of the fishery zone being the area in which a State may claim «exclusive fishery jurisdiction independently of its territorial sea», the International Court of Justice asserts that «the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted».⁶³ The key argument of the Applicants in the Fisheries Jurisdiction Cases was that the 12-mile rule is the international law in force on the subject, since it has become a rule of customary law, and also because it has not been abrogated by a contrary custom.⁶⁴ On the other hand, the respondent State and some judges in their separate opinion maintained that the 12-mile rule has not been established as a customary law. In the view of Judges I. Forster, C. Bengzon, E. J. de Arechaga, N. Singh, and J. M. Ruda, «to reach the conclusion» by the Court in its Judgments on Fisheries Jurisdiction Cases that «there is at present a general rule of customary law establishing for coastal States an obligatory maximum fishery limit of 12 miles would not have been well founded».⁶⁵ Similarly, Judge F. de Castro asserts that there «are no well-founded arguments in favour of the binding character of the 12-mile rule».⁶⁶

As the Permanent Court of International Justice stated in its Judgment in the Lotus Case, «[t]he existence of a rule of international law must be conclusively proved»;⁶⁷ therefore, it seems necessary to ascertain whether the 12-mile rule amounts to a rule of customary international law. There exists a general opinion that a customary law, as Judge F. de Castro indicates, comes into existence when a practice crystallizes which has the following

63. *Ibid.*, at 23, and 192.

64. *Ibid.*, at 89.

65. *Ibid.*, at 45.

66. *Ibid.*, at 93.

67. P.C.I.J., Series A, No. 10, at 26.

distinguishing marks: 1) a general or universal acceptance; 2) a uniform practice; 3) a considerable period of time, and 4) an **opinio juris**.⁶⁸ The requirement of a general or universal acceptance of the rule in question has been consecrated, among others, in the Judgment in the Lotus Case by the Permanent Court of International Justice, which held that «[t]he rules of law binding upon States . . . emanate from their own free will as expressed . . . by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims».⁶⁹ It is required that there should be no doubt as to the attitude of States towards such a rule.

The International Court of Justice, in its Judgments in the Fisheries Jurisdiction Cases on merits, recognizing that the extension of the fishery zone up to 12 miles appears now to be generally accepted, indicated that the Court was «aware that a number of States has asserted an extension of fishery limits».⁷⁰ The Court went on to remark that the concept of a 12-mile fishery zone, as a **tertium genus** (a third type. — F. P.) between the territorial sea and the high seas, has been accepted with regard to Iceland in the substantive provisions of the 1961 Exchange of Notes between Iceland on the one hand and, on the other, the United Kingdom and the Federal Republic of Germany respectively, who also applied the same fishery limit to their own coastal waters since 1964; therefore, this matter is no longer in dispute between the Parties.⁷¹ On the other hand, in the view of Judges I. Forster, C. Bengzon, E. J. de Arechaga, N. Singh, and M. Ruda, regarding the 12-mile limit of exclusive fisheries jurisdiction, there is today no international usage to that effect sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1 (b) of the Court's Statute, «evidence of a general practice accepted as law».⁷²

68. I.C.J., **Fisheries Jurisdiction**., Reports 1974, at 89-90.

69. P.C.I.J., Series A, No. 10, at 18.

70. I.C.J., **Fisheries Jurisdiction**., Reports 1974., at 23, and 192.

71. *Ibid.*, at 24, and 192.

72. *Ibid.*, at 45.

The above quoted statement of the International Court of Justice concerning the recognition of the 12-mile limit of the exclusive fisheries jurisdiction as customary international law is inconsistent with the position of the same Court with regard to customary law. The Court, in its Judgment in the Fisheries Case of 1951, held that a customary rule (the ten-mile for the demarcation of bays) cannot be regarded as having «acquired the authority of a general rule of international law» by reason of its having been «adopted by certain States both in their national law and in their treaties and conventions» and applied «as between these States» by «certain arbitral decisions» if «other States have adopted a different limit». ⁷³ Therefore, the existence of a majority trend does not mean that the rule has crystallized as a rule of customary law. ⁷⁴ The above quoted five judges, who denied that the 12-mile limit of the exclusive fisheries jurisdiction does not constitute an international usage within the meaning of Article 38 of the Statute of the Court, nevertheless admit that a general practice has developed around the proposal (which failed to be adopted by one vote at the 1960 Conference on the Law of the Sea) and «has in fact amended the 1958 Convention **praeter legem**: an exclusive fishery zone beyond the territorial sea has become an established feature of contemporary international law». ⁷⁵

At the same time, these Judges emphasized that a distinction must be made between the two meanings of an exclusive 12-mile fishery zone, which may be ascribed to that reference to 12 miles, namely: 1) on the one hand, that the 12-mile extension has now obtained recognition to the point that even distant-water fishing States no longer object to a coastal State extending its exclusive fisheries jurisdiction zone to 12 miles; or 2) on the other hand, that the 12-mile rule has come to mean that States cannot validly extend their exclusive fishery zones beyond that limit. ⁷⁶ In the

73. I.C.J., **Fisheries Case**, 1951, at 131.

74. I.C.J., **North Sea Continental Shelf Cases**, Reports 1969, at 41-42.

75. I.C.J., **Fisheries Jurisdiction**, Reports 1974, at 46.

76. *Ibid.*, at 47.

view of Judges I. Forster, C. Bengzon, E. J. de Arechaga, N. Singh, and M. Ruda, the concept of the fishery zone and the 12-mile limit became established with the former meaning when, in the mid-sixties, distant-water fishing States ceased to challenge the exclusive fishery zone of 12 miles established by a number of coastal States. In this sense, in their opinion, the Judgments in the Fisheries Jurisdictions Cases on merits, it is admitted that the 12-mile limit «appears now to be generally accepted».⁷⁷

As regards a uniform practice as a prerequisite for a formation of a new rule of international law, it is to be noted that for such a rule to be formed, the practice of States, including those whose interests are particularly affected, must have been substantially or practically uniform.⁷⁸ In this context, it should be observed that the International Court of Justice, in its Judgment in the Fisheries Case, held that «notoriety of the facts» and «general toleration of the international community» may warrant the enforcement of a unilateral claim which diverges from the practice of other States.⁷⁹ The element of uniformity in a State's practice with regard to the 12-mile fishery zone consisted of the following: in the mid-sixties, distant-water fishing States ceased to challenge such a zone established by other States; thus it may be said that the 12-mile fishery zone has been recognized and applied in the practice of States in a quasi-uniform way, because any other claims to fisheries jurisdiction exceeding the 12-mile limit were challenged and not recognized by the other States.

As far as a considerable period of time is concerned, it should be observed that it is time which ripens a practice and transforms it into a custom. However, the International Court of Justice recognized the possibility of some waiver of the requirement of a considerable length of time under certain conditions. In its Judgment in the North Sea Continental Shelf Cases, the Court stated that «the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a

77. *Ibid.*, at 47.

78. *Ibid.*, at 90.

79. I.C.J., **Fisheries Case**, Reports 1951, at 139.

new rule of customary international law», but «an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should 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».⁸⁰ It seems that the practice of States in relation to the 12-mile fishery zone limit satisfies those requirements to become the rule of customary international law.

As regards **opinio juris sive necessitatis**, or conviction on the part of creators of precedents, that in creating them they are implementing legal rule, it is to be noted that this element has a long history which dates back to Roman law. Since not every practice, though it be wholly constant and entirely general, gives rise to a rule of law, some test is therefore necessary to differentiate between usages of this sort and proper custom; and it is supplied by the concept of the **opinio juris**. Some contemporary writers, including P. Guggenheim, deny the necessity for this element in the creation of custom.⁸¹ Others assert that international tribunals seem to take note of it only in a negative manner, with a view to demonstrate the nonexistence of a pretended customary rule in cases where the precedents adduced in its support appear to be essentially the product of political expedience or convenience.⁸² The International Court of Justice, in its Judgment in the North Sea Continental Shelf Cases, formulated this element as follows: «Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i. e., the existence of a subjective element, is implicit in the very notion of the **opinio**

80. I.C.J., **North Sea Continental Shelf Cases**, Reports 1969, at 43.

81. P. GUGGENHEIM, **1 Traité de droit international public**, 47, (Geneve 1953).

82. I.C.J., **Asylum Case**, Reports 1950, at 286.

juris sive necessitatis. The States . . . must therefore feel that they are conforming to what amounts to a legal obligation».⁸³

From the above considerations, it follows that the International Court of Justice is right when stating that the concept of the fishery zone up to a 12-mile limit from baselines, which crystallized as customary law in recent years arising out of the general consensus revealed at the 1960 Geneva Conference on the Law of the Sea, appears now to be generally accepted. It derives from this statement that the unilateral extension to a 50-mile limit by Iceland of her fisheries jurisdiction is contrary to international law. Thus, it may be said that the Court recognized, directly and in an implicit manner, that there is no foundation in international law for the claim by Iceland to be entitled to extend her fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines, since the high seas are not **res nullius** to be appropriated on a first-come first-served basis; as **res omnium communis**, they belong to mankind, and the appropriation of an exclusive fisheries zone in an area being part of the free seas is equivalent to the deprivation of other peoples of their rights.

THE CONCEPT OF PREFERENTIAL RIGHTS

As has been indicated earlier, in the opinion of the International Court of Justice the concept of preferential rights of fishing in adjacent waters in favor of the coastal State in a situation of special dependence on its coastal fisheries has also crystallized as customary law in recent years, arising out of the general consensus revealed at the 1958 and 1960 Geneva Conferences on the Law of the Sea.⁸⁴ The concept of preferential rights for the coastal State in a situation of special dependence on coastal fisheries originated in proposals submitted by Iceland at the 1958 Geneva Conference on the Law of the Sea. Judge F. de Castro deduces the origin of the concept of preferential

83. I.C.J., **North Sea Continental Shelf Cases**, Reports 1969, at 44.

84. I.C.J., **Fisheries Jurisdiction**, Reports 1974 at 23, and 192.

rights from President Truman's Proclamations, which, in his view, are the «starting point of the positive law on the subject».⁸⁵ It is true that the idea of preferential rights may be inferred from the Truman Fisheries Proclamation, but the concept of those rights in the meaning used by the International Court of Justice in its Judgments in the Fisheries Jurisdiction Cases on merits, was originated by the Icelandic delegation, which drew attention to the problem that would arise when, despite adequate fisheries conservation measures, the efficiency would cease to suffice to satisfy the requirements of all those who were interested in fishing in a given area.

The Icelandic delegation contended that in such a case, when a catchlimitation becomes necessary, special consideration should be given to the coastal State whose population is overwhelmingly dependent on the fishing resources in its adjacent waters.⁸⁶ The proposal of this delegation containing the above concept failed to obtain the required majority and has not been enshrined in a convention, but a resolution was adopted at the 1958 Geneva Conference on the Law of the Sea concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development. That resolution, recognizing that such situations call for exceptional measures befitting particular needs, recommended that where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measure which should recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States.⁸⁷

At the 1960 Geneva Conference on the Law of the Sea, the concept of preferential rights was contained in a joint amendment

85. *Ibid.*, at 98.

86. *Ibid.*, at 24, and 193.

87. *Ibid.*, at 25, and 193.

presented by the Brazilian, Cuban and Uruguayan delegations providing that «the coastal State has the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone».⁸⁸ This proposal was subsequently incorporated by a substantial vote into a joint Canadian-United States proposal concerning a 6-mile territorial sea and an additional 6-mile fishing zone, thus totalling a 12-mile exclusive fishing zone, subject to a phasing-out period. This amendment provided, independently of exclusive fishing zones, that the coastal State had the faculty of claiming preferential rights in any area of the high seas adjacent to its exclusive fishing zone when it is scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal State or the feeding of its population.

Moreover, that Amendment stipulated that a special situation or condition may be deemed to exist when: 1) the fisheries and the economic development of the coastal State or the feeding of its population are so manifestly interrelated that, in consequence, that State is greatly dependent on the living resources of the high seas in the area in respect of which preferential fishing is being claimed; and 2) it becomes necessary to limit the total catch of a stock or stocks of fish in such areas.⁸⁹ As has been indicated earlier, the Canadian-United States proposal failed by one vote to be adopted by the 1960 Geneva Conference on the Law of the Sea. Although the concept of preferential rights has not been included in a convention, as Judge F. de Castro indicates, it has been «accepted as something natural».⁹⁰ The practice of States on the subject of fisheries, as indicated by the International Court of Justice, reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, in particular in favor of States in a situation of special dependence on coastal

88. Doc. A/CONF. 19/L. 12, M. M. WHITEMAN, *supra* note 27 at 135.

89. Doc. A/CONF. 19/L. 10, *id.*, at 126-127.

90. I.C.J., **Fisheries Jurisdiction.**, Reports 1974, at 98.

fisheries. After the 1958 and 1960 Conferences, the preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements.

For instance, the Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands, signed at Copenhagen on December 18, 1973,⁹¹ and the Agreement on the Regulation of the Fishing of North-East Arctic Cod, signed on March 15, 1974:⁹² on the one hand, both these agreements allocate the annual shares on the basis of past performance of the parties in the area; on the other, they assign an additional share to the coastal State on the ground of its preferential right in the fisheries in its adjacent waters. The International Court of Justice, in its Judgments in the Fisheries Jurisdiction Cases on merits, says that «[t]he contemporary practice of States leads to the conclusion that the preferential rights of the coastal State in a special situation are to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations.»⁹³ It must be observed that the preferential rights of the coastal State comes into play only at the moment when an intensification of exploitation of fishery resources makes it absolutely necessary to introduce some system of catch-limitation and sharing of those resources, with a view to preserve the fish stocks in the interests of their rational and economic exploitation.

However, the final decision as to whether a given situation makes it imperative to introduce a system of catch-limitation does not belong only to the coastal State. A claim by a coastal State to this respect should be tested and determined by a special commission on the basis of scientific criteria and of evidence presented by the coastal State and other States concerned. Such a commission would be able to determine the conditions of a system of catch-limitation, taking into account the preferential

91. *Ibid.*, at 26, and 195.

92. *Ibid.*, at 26, and 195.

rights of the coastal State as well as the interests of any other States in the exploitation of such stock or stocks of fish, since, as the International Court of Justice held in its Judgments in the Fisheries Jurisdiction Cases on merits, «[t]he concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights.»⁹⁴ It is doubtless true that the essence of the preferential rights implies a certain priority, but, as the Court rightly stresses, they «cannot imply the extinction of the concurrent rights of other States.»⁹⁵

The coastal State has the duty to take into account the interests of such other States which are economically dependent on the same fishing grounds, because otherwise, as the Court indicates, it «would not be compatible with the notion of preferential rights as it was recognized at the Geneva Conferences of 1958 and 1960, nor would it be equitable.»⁹⁶ The Court goes on to remark that at the latter Conference, the concept of the preferential rights of the coastal State in a situation of special dependence on coastal fisheries was recognized under such limitations and such extent as is found «necessary by reason of the dependence of the coastal State on the stock or stocks of fish, while having regard to the interests of any other State or States in the exploitation of such stocks of fish.»⁹⁷ Finally, the Court emphasizes that the reference to the interests of other States in the exploitation of the same stocks evidently indicates that «the preferential rights of the coastal State and the established rights of other States were considered as, in principle, continuing to co-exist.»⁹⁸

At the same time, the International Court of Justice explains that the preferential rights of a coastal State in a special situation

93. *Ibid.*, at 26-27, and 194.

94. *Ibid.*, at 27, and 196.

95. *Ibid.*, at 27-28, and 196.

96. *Ibid.*, at 30, and 199.

97. *Ibid.*, at 30, and 199.

98. *Ibid.*, at 30, and 199.

are not «a static concept, in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment.»⁹⁹ Although this statement is veracious, it is a truism, because it is obvious that the preferential rights, which are a function of the exceptional dependence of a coastal State on the fisheries in adjacent waters, change respectively as the extent of that dependence changes. It should be observed that neither right is an absolute one, because: 1) on the one hand, the preferential rights of the coastal State are limited pursuant to the extent of its special dependence on the fisheries and by its obligation to take into account the rights of other States and the needs of conservation; 2) on the other hand, the established rights of other fishing States are limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take into account the rights of other States, and the needs of conservation.¹⁰⁰ It follows from both these rights that both States have an obligation to take into consideration each other's rights as well as any fishery conservation measures the necessity of which is shown in a given area.

As indicated earlier, the extent of preferential rights, which imply a certain priority, cannot be established unilaterally and according to the uncontrolled discretion of the coastal State. It must be determined by the negotiations between the coastal State in a special situation and other fishing State or States. The Court states that it is implicit in the concept of preferential rights that negotiations are required with a view to define or delimit the extent of those rights.¹⁰¹ The obligation to negotiate them, which has been recognized in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, as the Court indicates, flows «from the very nature of the respective rights of the Parties.»¹⁰² The mentioned resolution provided for the establishment through collaboration between the coastal State and any

99. *Ibid.*, at 30, and 199.

100. *Ibid.*, at 31.

101. *Ibid.*, at 32, and 201.

102. *Ibid.*, at 32, and 201.

other State fishing in the area, of agreed measures to secure just treatment of the special situation.¹⁰³ On the other hand, any disputes arising from the delimitation of the extent of the preferential rights between the interested States should, under Article 33 of the Charter of the United Nations, be solved by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

In the Fisheries Jurisdiction Cases on merits, the International Court of Justice found that there could be no doubt of the exceptional dependence of Iceland on its fisheries, and the situation appeared to have been reached when it was imperative to preserve fish stock in the interests of rational and economic exploitation.¹⁰⁴ However, the fact that Iceland was entitled to claim preferential rights did not suffice to justify her claim unilaterally to exclude British and West German vessels from all fishing beyond the limit of 12 miles agreed to in the 1961 Exchanges of Notes.¹⁰⁵ Since, in the case of both Applicants, whose vessels had been fishing in Icelandic waters as long ago as the end of the nineteenth century, there too the economic dependence and livelihood of whole communities were affected and the Applicants shared the same interests in fishing in the disputed waters, Iceland's 1972 Regulations were not, therefore, opposable to the United Kingdom and to the Federal Republic of Germany. Those Regulations disregarded the established rights of those States, and also the 1961 Exchanges of Notes, and they constituted an infringement of the principle contained in Article 2 of the 1958 Geneva High Sea Convention of reasonable regard for the interests of other States, including the Applicants.¹⁰⁶

In the opinion of the Court, with a view toward reaching an equitable solution of the disputes in the Fisheries Jurisdiction Cases, it was necessary that the preferential rights of Iceland

103. *Ibid.*, at 32, and 201.

104. *Ibid.*, at 26-27, and Reports 1972, at 16.

105. *Ibid.*, Reports 1974, at 28, and 196-197.

106. *Ibid.*, at 29, and 198.

should be reconciled with the traditional fishing rights of the United Kingdom and the Federal Republic of Germany through the appraisal at any given moment of relative dependence of either State on the fisheries in question, while taking account of the rights of other State or States and the needs of conservation. Thus, Iceland was not under law entitled unilaterally to exclude United Kingdom and West German vessels from areas to seaward of the limit of 12 miles agreed to in the 1961 Exchanges of Notes, or unilaterally to impose restrictions on their activities. However, that did not mean that the United Kingdom and the Federal Republic of Germany were under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. Both Parties had the obligation to keep under review the fishery resources in those waters and to examine together, in the light of the information available, the measures required for the conservation and development, and also equitable exploitation, of those resources, taking account of any international agreement that might at present be in force or might be reached after negotiation.

The Court held that the most appropriate method for the solution of the dispute was clearly that of negotiations with a view to delimiting the rights and interests of the Parties and regulating equitably such questions as those catch-limitations, share allocations, and related restrictions. The obligation to negotiate flows from the very nature of the respective rights of the Parties and corresponds to the provisions of the Charter of the United Nations concerning peaceful settlement of disputes. The task before them would be to conduct their negotiations on the basis that each must, in good faith, pay reasonable regard to the legal rights of the other, the facts of the particular situation, and to the interests of other States with the established fishing rights in the area.

For these reasons, the International Court of Justice, by ten votes to four,

1. found that the Regulations concerning the Fishery Limits of Iceland promulgated by the Government of Iceland on 14 July 1972 and constituting a unilateral extension of the

exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein were not opposable to the Government of the United Kingdom and the Federal Republic of Germany;

2. found that, in consequence, the Government of Iceland was not entitled unilaterally to exclude United Kingdom and West German fishing vessels from areas between the fishery limits agreed to in the Exchange of Notes of 11 March 1961¹⁰⁷ and the limits specified in the Icelandic Regulations of 14 July 1972, or unilaterally to impose restrictions on the activities of those vessels in such areas;

3. held that the Government of Iceland on the one hand, and the Governments of the United Kingdom and the Federal Republic of Germany on the other, were under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified in subparagraph (2);

4. held that in these negotiations the Parties were to take into account, **inter alia**:

a) that in the distribution of the fishing resources in the areas specified in subparagraph (2) Iceland was entitled to a preferential share to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development;

b) that by reason of its fishing activities in the areas specified in subparagraph (2), the United Kingdom and the Federal Republic of Germany also had established rights in the fishery resources of the said areas on which elements of its people depended for their livelihood and economic well-being;

c) the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources;

107. The Exchange of Notes between Iceland and the Federal Republic of Germany dated July 19, 1961.

d) that the above mentioned rights of Iceland and of the United Kingdom as well as of the Federal Republic of Germany should each be given effect to the extent compatible with the conservation and development of the fishery resources in the areas specified in subparagraph (2) and with the interests of other States in their conservation and equitable exploitation;

e) their obligation to keep under review those resources and to examine together, in the light of scientific and other available information, such measures as might be required for the conservation and development, and equitable exploitation, of those resources, making use of the machinery established by the North-East Atlantic Fisheries Convention or such other means as might be agreed upon as a result of international negotiations.¹⁰⁸

RESUMO

Os recursos biológicos do mar há muito fascinam o homem, cuja atividade de pesca é uma das primeiras ocupações.

A crescente pressão demográfica em muitos lugares no mundo, o aumento da exploração dos recursos naturais e facilidades de deslocamento e comunicação são fatores que intensificam a exploração dos recursos biológicos de vastas áreas do globo cobertas pela superfície marítima. Embora exista a possibilidade dos Estados cooperarem na exploração dos recursos do mar, estes próprios recursos transformam-se em fonte de conflitos entre os Estados. Assim, no alto mar existe confronto de interesse de Estados ou de grupo de Estados.

O caso em questão envolveu interesse da Islândia, Reino Unido e a República Federal da Alemanha. Era de interesse da Islândia estender a zona de sua jurisdição pesqueira exclusiva para uma área de 50 milhas náuticas, que cobriam a plataforma continental. Com protestos do Reino Unido e da República Federal da Alemanha foi levado o caso à Corte Internacional de Justiça

108. I.C.J., *Fisheries Jurisdiction*, Reports 1974, at 34-35, and and 205-206.

(Corte Internacional de Justiça — Caso da Jurisdição de Áreas Pesqueiras — Reino Unido v. Islândia e República Federal da Alemanha v. Islândia).

No presente artigo é considerada a liberdade do alto mar como estando sujeita à consideração de que deverá ser usufruída por todos os Estados tendo em vista a reciprocidade dos direitos a serem usufruídos. A tarefa dos Estados será, pois, conduzir as negociações sob as diretivas de que cada um deverá, de boa fé, respeitar e atentar para os direitos do outro, em fatos que mereçam atenção particular, bem como salvaguardar os interesses de outros Estados que possuam direitos adquiridos de pesca na área.

RESUMO

Os recursos biológicos do mar há muito fasciam o homem, a existência da pesca é uma das atividades essenciais para a sobrevivência humana. A crescente pressão demográfica em terras férteis no mundo o aumento da exploração dos recursos naturais e facilitadas de deslocamento e comunicação são fatores que intensificam a exploração dos recursos biológicos de vastas áreas do globo cobertas pela superfície marítima. Embora existam possibilidades de Estados cooperarem na exploração dos recursos do mar, estes próprios recursos tornam-se em fonte de conflitos entre os Estados. Assim, no alto mar existe conflito de interesse de Estados ou de grupo de Estados.

O caso em questão envolve interesse da Islândia, Reino Unido e a República Federal da Alemanha. É de interesse da Islândia estender a zona de sua jurisdição pesqueira exclusiva para uma área de 50 milhas náuticas que cobrem a plataforma continental. Com o protesto do Reino Unido e da República Federal da Alemanha foi levado a caso à Corte Internacional de Justiça.