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THE LEGAL FRAMEWORK FOR THE DEVELOPMENT OF OCEAN RESOURCES

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"What rights do men have to fish?"

It is my function as an international lawyer to take a national and a world view of such things. A part of the view that I have can be identified by an illustration. A recent Assistant Secretary of State of the United States, in addressing an American audience at a dinner meeting, said to them, "Now you will be going back to your homes and tomorrow morning you will be having a good breakfast, but think of 50% of the rest of the world which will not have had as sumptuous a dinner as we have just had, and furthermore they won't be eating again for one and ½ days, and when they do eat, they will have a bowl of cooked rice and perhaps a piece of fish 1-inch square." So the essential theme of my remarks relates to the problems of a scientific and technological revolution which has produced a capacity to harvest the fisheries resources of the sea and other marine resources at a time when there is also a population explosion so large that we are told that by the year 2050 of 2068, depending on whose figures you take, the population will have enlarged from its current 3.3 billion to a population of around 7 billion and this is the minimum prediction! The forecasters tell us that this population explosion in large part, 75% of it, is going to take place in the emerging and underdeveloped nations of our world. It is these nations which are obviously short in resources, including food resources. So, the point that I am suggesting is that we are on a kind of collision course—and the collision course is between famine on the one hand and a burgeoning population on the other. The question is how to resolve this kind of situation.

I have become identified with a theoretical approach to this, which I refer to as the social complex theory. This theory may be categorized under 3 headings. As category 1 are the forces of the social complex. I have mentioned already the scientific and technological revolution and also the population explosion of people. To the international lawyer there is also a population explosion of nations, the rising tide of human expectations, political-socioeconomic problems, and above all and of most importance is a sort of catalytic agent which falls within this category, namely, the tempo of our times and the quantum jumps which are taking place in all of these areas. So this is one of the elements of the theory.

Secondly, there is the factor of world institutions. One of the speakers this afternoon has already referred to the FAO (Food and Agriculture Organization of the United Nations), and I am sure that by identifying that you immediately think of a number of other specialized agencies of the United Nations including the World Health Organization, International Labor Organization, Meteorological Organization, the International Telecommunication Union, and so on. They all have a direct concern for the needs of those in the fisheries and maritime business.

Thirdly, there is the whole matter of values. This encompasses the broad subject of human rights including the problem of the allocation of scarce resources, the problem of conserving existing resources, finding additional resources and making them available to those who require them. In this theoretical approach, one arrives at the feeling—at least I do—that there is a universal and cross frontier aspect for these elements as they apply to our situation.

Now, let us return to some of the more practical aspects of my assignment.

In 1966, the United States claimed a 9-mile exclusive fishery zone in addition to an existing 3-mile territorial sea (total of 12 miles). Pursuant to Federal Legislation and also the Geneva Convention on the Continental Shelf to which the United States is a party, the U.S. exercises sovereignty over the Continental Shelf and the subsoil and the resources which are located on and below that area. The Continental Shelf is defined as the seabed adjacent to the coast outside the territorial sea to a depth of 109 fathoms (200 m), or beyond that limit to the extent of the exploitability of natural resources. But the water situated above the Continental Shelf commencing at a point 12 miles seaward from our shores constitutes a high seas fisheries area open for the exploitation of all concerned. Although what has just been said depicts accurately the present view of the United States, I wish to raise some questions about the suitability of such a regime.

Let us consider for a moment the contiguous zone concept that found its way into the 1958 Geneva Convention on territorial waters and contiguous zones. The Convention made provision for a 12-mile zone, and has to do with exclusive rights of the Littoral State to exercise protective measures in the area in so far as health, sanitation, tax, quarantine, rum running, and customs violations were involved. So we have a claim on the part of the Littoral State for some rather exclusive controls in that area. Then take the problem of the commercial air flights which come into the United States. The U.S. and a number of other states have identified what is known as an Air Defense Identification Zone. The ADIZ, prescribed by our Government, requires that foreign commercial aircraft destined for the U.S. must iden-

tify themselves at 1 hour flying time from our shores. So we have now an extension of U.S. claims to exercise a certain amount of jurisdiction in these areas. Then during World War II, before the U.S. became a participant, we asserted the right to control the high seas about 1,200 miles off the coast of Panama with the provision that we wanted the warring nations to stay out of those areas at that time. Then, an illustration relating to the high seas and to the air above those seas, was the 1962 maritime quarantine of Cuba, or more particularly, the quarantine of the shipment of offensive missiles on the part of the Soviets into Cuba. At that time, we identified a perimeter of some 500 miles around Cuba. As to this high seas area we said we would not permit particular vessels carrying these particular types of goods to enter.

What I am suggesting is that we may be obliged to review our thinking as to the nature of the claims relating to the oceans which nation states are going to be making in future years. In particular, we must reconsider the nature of both national and community claims as to exclusive or possibly cooperative rights in the oceans going well beyond the specific areas which I have just identified.

Having taken a look at the situation as it may evolve in the future, let us look back to the beginning of the 17th century. At that time, several very noted writers began to explore the problems of control, sovereignty and jurisdiction over the seas. The Dutch writer Grotius, writing in 1609, wrote a book entitled *Mare Liberum*, the freedom of the seas. A British writer, John Selden, issued a tract, 9 years later, which was in fact a legal brief. In replying to the Grotian position, he urged that there should be a closed sea, *mare clausum*. This exchange has been referred to by the commentators as a "battle of the books." In reality, this was a battle of national interests. Many have believed that this battle of interests was resolved in the Geneva High Seas Convention in 1958, which identified the high seas as free seas for the several purposes of navigation, fishing, laying of pipe lines and cables, and freedom of flight over such high seas. As to these matters, the Convention went so far as to say that the treaty merely codified the preexisting customary international law. Despite this, I am willing to venture the belief that we once again are challenged to revise our thinking respecting the freedom of fishing on the seas, going beyond the territorial waters and going beyond the exclusive fishing rights which are now claimed. This has been influenced by the claims which were made by the U.S. in 1945, the Truman Declaration, with respect to the natural resources of the sea bed and the subsoil of the Continental Shelf. You will remember at that time that the claim was made based upon apparent military and security needs relating essentially to oil and natural resources of that kind. This was followed in 1953 by the U.S. outer Continental Shelf Lands Act. This national legislation helped to give rise to the 1958 treaty on the Continental Shelf.

There are those who believe that geology may have some role in determining what the Continental Shelf may be. I would like to keep an open mind on that particular contention for I am not entirely sure that the geological formations of the land area of the sea bed and the subsoil below the sea bed, has any meaning with respect to the ultimate definition of Continental Shelf. But at least, we know at this point that the Continental Shelf is this sea bed which goes out to a depth of 200 meters—109 fathoms. There is an important open ended clause in the Convention which says the shelf extends beyond that point to a point where it is feasible to exploit and use the resources to be found. Again, this ties back to my social complex theory and particularly the scientific and technological revolution which we have seen which makes such exploitation feasible. It is becoming increasingly more feasible to go further out than the 200-meter line, including the areas of the continental slope just outside the 200-meter line, go really into the high seas, below the high seas, in order to exploit existing resources. And so my question is whether or not the people possessing the capability of exploring and exploiting these resources are going to sit back and not do anything in terms of such exploitation.

In this regard, I must mention to you some very interesting things that I had a hand in back in Geneva in July of this year at the World Peace Through Law Conference. At that Conference a proposition was put forth and adopted unanimously, to the effect that the United Nations ought to assume sovereign control over the sea bed underlying the high seas. This has now been presented to the U.N. in the form of a very long talk by the U.N. Delegation from Malta, Mr. Prado. He is now stirring a lot of imaginative approval as well as a lot of opposition with respect to the possibility that the U.N. should exercise the right to license the use of these resources and also to dispose of any income which is received from licensing and other procedures. With this in mind the question is presented whether to go one step further. Bearing in mind the claims for the ADIZ, for 12 mile exclusive fishing rights, for the 1,200 mile security zone during World War II, and for the 500 mile perimeter surrounding Cuba in 1962, as well as Continental Shelf claims, is it not feasible to think that someone one of these days is going to propose that the high seas be placed under the command of an international organization, and that that international organization would have the disposition of these resources, license, control, authorize, and so on, the taking and harvesting of marine resources. Also involved is the prescribing of what actions should be taken in conserving the resources and in the long haul, probably endeavoring to produce—as has been done recently with rice in Japan, a new hardy strain that produces 3 to 4 times as much as in the past—possibly a new strain of fish or marine life which would support in a better fashion the individuals who are living in the developing nations and whose populations are growing so rapidly.

Now, while we are thinking about the matter of conservation, I would like to call to your attention Article 3 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. This provides, and I quote, "A state whose nationals are engaged in fishing any stock or stocks of fish or other living marine resources in any area of the high seas where the nationals of other states are not thus engaged," and of course, this would mean within the 12 mile exclusive fishery zone of the U.S., "shall adopt, for its own nationals, measures in that area when necessary for the purpose of the conservation of the living resources affected." So it seems to me that by reading this and understanding it, it is simply the function of the U.S. to take special conservation measures in the areas lying beyond the 12 mile exclusive fishing limit. Let me call to your attention Section 4 of the 1966 Statute. We as Californians are particularly interested in this. It says, "Nothing in this act shall be construed as extending the jurisdiction of the states to the natural resources beneath and in the waters within the fisheries zone established in this act, or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the U.S." And then according to the legislative history on this particular section, it was said in the committee report that such language intended to make it clear that the jurisdiction of the coastal states to regulate fisheries within the territorial sea of the U.S. or to the natural resources beneath and in the waters of the territorial sea would not be extended nor diminished by this legislation. So, the 1966 legislation does not modify in any way, shape or form the rights which the State of California previously had and now has in the 3-mile area.

But coming back to the problem of conservation in the 4–12 mile zone, it is my argument that since under the 1966 statute a littoral state, namely California, in this instance, has no direct control over such areas for conservation purposes, it now appears that such states have the right and the duty to insist that the national government take all necessary action in this regard. I think we should start moving on that, so the conservation of fisheries and marine resources in these areas will be suitable to our economic needs and also in order to forestall the possibility, it's a remote possibility, but nonetheless within the range of legal contemplation, for some other country to come along off our 12-mile area and start conserving fish there and claiming that they by reason of this conservation activity, have a right to harvest the resources which are available there. This is easier to say than it is to develop in detail and I would want to add as a condition to what I have just said, that the Convention on the Conservation of the Natural Resources of the Sea is rather complicated and involves the possibility of a considerable amount of international diplomacy and negotiation before anything as extreme as someone else endeavoring to conserve the fish off our immediate 12-mile area could possibly take place.

A number of interesting treaties and statutes have developed since the 1945 Truman Proclamation. From the international point of view one contest has been whether the king crab is a resource of the Continental Shelf or whether it is a fisheries resource, and as such could be harvested by anyone who happened to have the ability to effect the capture, whereas if it's a resource of the Continental Shelf, then it pertains to that nation which owns the Continental Shelf, namely the United States, off the coast of Alaska. Several treaties have been entered into. The Soviet Union has conceded to us that king crab is a resource of the Continental Shelf. We in turn have conceded to them the right to fish there for a while initially taking not more than 185,000 cases of king crab during one year. This has just been revised downward to around 120,000 cases for the year we are now in, 1967, with the proviso that it will be revised periodically after that. So there has been a little give and take on that.

The Japanese, on the other hand, have not been willing to make the concession that the king crab is a natural resource of the Continental Shelf. They regard it as a free swimming fishery, although it doesn't have a swimming fin. We have been negotiating with them and as a result of these negotiations, they have also agreed to take only a limited harvest over a period of time, but they insist that they have traditional rights to capture the king crab in the waters in the Bering Sea. They are preserving what the lawyers for fishermen would call historic rights, and it remains to be seen what the ultimate outcome will be. This will be negotiated. However, it is also clear that the U.S. has put a little teeth into its beliefs in this respect. Detailed sanctions are set forth in the 1964 Bartlett Act. This statute does provide rather categorically in the language of the 1958 Convention that the king crab is a resource of the Continental Shelf and therefore appertaining to our control.

Now, in coming back to the thought that there may be a trend in the future toward the international organization of the high seas for fisheries purposes, one can readily imagine that this would call for the use of an international body. It need not be the U.N. It could be the FAO. It could be any effective organization. If such a regulatory instrumentating were to be utilized, it is my hope that it would regard itself as a trustee for the totality of the nations in the world and that they would be able to organize it so that it would possess a stable corporate structure. It would be the function of this organization—at least in part—to procure economic security to those engaged in fishing. It is feasible, under plans which you could readily imagine yourselves, for the fisherman who is fishing out of San Diego or Long Beach or San Pedro, to be just as protected and secure in his employment and the boat owners and operators would be just as secure in their investments and so on, as they are at the present time, which I gather is not quite as precise and exact as they would like to have in the most perfect of all perfect worlds.

Let me just conclude then very quickly. It seems to me that the "battle of the books", or the battle of

opposing interests for competing preferred uses of the ocean's resources will continue. The principal contest is over exclusive national rights or inclusive community rights. This involves not only the right of the resource states to capture but the basic needs of the nonresource states. This contest may require the revision of existing international conventions. I wouldn't be at all surprised to see another U.N. sponsored General Conference on the Law of the Sea which would modify both the Continental Shelf and the High Seas Conventions, as well as the other two. Such formal revisions, or informal ones, will be widely influenced by the factors which I have identified under the social complex theory headings. Such factors and forces indicate that there will be substantial demands for the more efficient use of the resources of the oceans. The best way to do this is through international agreements involving the assumption by states of common and mutual responsibilities rather than through the processes of unilateral claims involving special privileges.

DISCUSSION

ISAACS: You have quoted evidence from military operations and possibilities for great extensions of some sorts of rights, and I was wondering regardless of whether this goes in the direction of U.N. or some world court, is it not possible, considering the temper of the times as we might look at them in the future, that the development for utilization of fisheries in the high seas might be one of the strongest forms of *ethics*? rather than military restrictions for some eventual adjudication of rights of the high seas?

CHRISTOL: I would agree to that. I would think there are many important modifications which would support this outcome and it might even be that we could capture the imagination of the people of the world and say, "Look, here are some elements we can struggle against and some resources we can fight for or we can develop. Let's fight along these lines instead of fighting each other, and make these resources available and substitute this sort of contest for the contest of war and the like."

ISAACS: This might be considered as one supereconomic feature in the developments of high seas fisheries by the nations.

CHRISTOL: Yes, I think this is exactly true. I could foresee a great spinoff, a large number of peripheral benefits which would be derived from this and if the population goes up as I have suggested, we might just as well put these additional bodies to work doing this sort of thing rather than something else. Probably better.

POWELL: Dr. Christol, in relation to international law of the high seas, what weight is given to traditional or historical fishing rights?

CHRISTOL: It has a very substantial significance.

POWELL: Is it a tacit one, or is it a really legal one?

CHRISTOL: It is a legal right. Law involves both written statements and ideas which are spelled out from those written statements—statements by way of implications. It also has to do with practices which have emerged and developed over the years, and I must say that this question strikes a responsive chord, because as a lawyer, I know that it is very nice to go to a statute book and pick out what I am looking for. Even then, one has to be alert as to whether this is still good law. Maybe the courts have changed it, but at the international level, it is not quite so easy to go to the statute books because there hasn't been a sophisticated type of world organization that has spelled out and spun out this type of legislation. So we have to look at practices, long ranging practices, or short ranging practices, as the case may be. If we see that there have been claims that certain practices are permitted, an acknowledgment on the part of other countries that these practices are permitted, that there are mutual tolerances accepting these practices, then the international lawyer says, "we have got enough to go on, this is the law." Then, we hope that after this has been acknowledged in a customary form just to make it a little more tangible, a little firmer, that we'll have a convention or a conference. At that point, we'll put it down in black and white and call it a treaty. We'll call it an international agreement. We'll call it an executive agreement, something of that sort. Then we've got something we can walk into court with and say, "Look, your honor, we have something in writing." But the international lawyer knows that the fact that it's in writing doesn't make a particle of difference. If it is a customary rule, it is just as sound as if it was put down in writing.

POWELL: What period of time constitutes historic fishing rights?

CHRISTOL: This, again, is not easy to respond to, but let me say that a practice that has been honored over a period of time may be regarded as long enough. A good illustration of this is the claim that the Norwegians had with respect to the fisheries off the coast of Norway. They took the British to court, you remember, in the Anglo-Norwegian fisheries case, and they were able to show that these claims that they had been asserting from time to time from about 1825–1830 on were good enough to stand up when the case came up in the 1940's. Now it needn't be that long. One writer says that the formulation of the customary law is like the glacier, moves very slowly. To this I respond, utter nonsense. It may be that in certain areas it is slow, but in other areas, it can be very fast. In terms of the development of a law of outer space, the first Sputnik went up, as you remember, in October 1957. It is my contention that by 1963 at the latest, there was a customary rule of international law calling for the peaceful uses of outer space and this might be an analogy to what I was saying earlier, in the sense that both the oceans and outer space have to be used peacefully for the benefit of all mankind. My argument to you this afternoon was to the effect that the high seas ought to be used for the benefit of all mankind. In the case of outer space, the 1967 treaty put into writing the practices which had emerged between 1957 and 1963. A short period of time will support rights where there are security involvements.

ISAACS: If I remember prescriptive rights on land are achieved by utilizing it freely over time immemorial, which is defined as 7 years.

CHRISTOL: This varies. It can be longer.

QUESTION: How specific is traditional use, for instance, if you had been using or were fishing albacore on Erben Bank, which is 100 miles off, how would that apply to the use of hake?

CHRISTOL: I think that my response there would be very nationalistically oriented, assuming that we want to take hake. The fact that you are fishing in the area is the important thing, not the kind of fish taken. This may be something we ought to research, but this would be my off-the-cuff response. Note, however, the fact of historic *fishing* would not support the taking of something else, such as a Continental Shelf Resource.

SCHMITT: How do you view present Congressional prospects for international pressure groups?

CHRISTOL: Oh, I think that the pressure groups, if I read them, that have come out of the Maltese proposal are going to be so critical of the thought that an international institution should have the resources of the sea bed that if this particular idea which I mentioned to you this afternoon were to be presented to the Congress, the first reaction would be negative. They would say, well what are we giving up and what are we getting in return? And then, of course, those fishing interests who feel they have more to gain by continuing the freedom of the seas, freedom of the fisheries on the high seas, will start to argue. But in listening to the remarks of an eastern speaker relating to the Soviet Union's application of science and technology to fishing, and you gentlemen know a great deal more about this than I do, if you can herd fish, if you can put them into given areas, I see no reason why there couldn't be a conservation responsibility allocated to a group of states on the high seas and since they put their resources in support of this, they should be entitled to treat this just like my grandfather's 160 acres of wheat out in South Dakota. Why not let fishermen who have conserved the resources have the benefits of this?

SCHMITT: Do you foresee a correctional evolution?

CHRISTOL: I think this is bound to come. I can't believe that man, with his scientific and technical capabilities is going to permit an area not being used when it does have potential.