United Nations Conference on the Law of the Sea

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24 February to 27 April 1958

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Summary Records of the 1st to 5th Meetings of the First Committee

Extract from the *Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee (Territorial Sea and Contiguous Zone))*

SUMMARY RECORDS OF THE FIRST COMMITTEE

FIRST MEETING

Wednesday, 26 February 1958, at 4.10 p.m.

Acting Chairman:

Prince WAN WAITHAYAKON (Thailand)

Election of the Chairman

1. Mr. DEAN (United States of America) nominated Mr. Bailey (Australia).

2. Mr. BAGHDADI (Yemen) nominated Mr. Perera (Ceylon).

3. Mr. PERERA (Ceylon) thanked the representative of Yemen, but said that he was not a candidate.

4. Mr. GARCIA ROBLES (Mexico) nominated Mr. Sucre (Panama).

5. The ACTING CHAIRMAN said that, in accordance with rule 42 of the rules of procedure, there would be a vote by secret ballot.

At the invitation of the Acting Chairman, the representatives of Spain and Tunisia acted as tellers.

A vote was taken by secret ballot.

Number of ballot papers	85
Invalid ballots	3
Number of valid ballots	82
Abstentions	1
Number of members voting	81
Required majority	41
Number of votes obtained	
Mr. Bailey (Australia)	44
Mr. Sucre (Panama)	37

Having obtained the required majority, Mr. Bailey (Australia) was elected Chairman.

The meeting rose at 4.45 p.m.

SECOND MEETING

Friday, 28 February 1958, at 4.10 p.m.

Chairman: Mr. K. H. BAILEY (Australia)

Election of the Vice-Chairman

1. Mr. DEAN (United States of America) nominated Mr. Gutiérrez Olivos (Chile).

2. The CHAIRMAN, after referring to rules 51 and 53 of the rules of procedure, said that as Mr. Gutiérrez Olivos was the only candidate, he assumed the Committee would have no objection to electing him by acclamation.

Mr. Gutiérrez Olivos (Chile) was elected Vice-Chairman by acclamation.

Election of the Rapporteur

3. Mr. TABIBI (Afghanistan) nominated Mr. Koretzky (Ukrainian Soviet Socialist Republic).

4. Mr. ZOUREK (Czechoslovakia) seconded the nomination.

5. The CHAIRMAN said that as there was again only one candidate, he assumed the Committee would have no objection to following the same procedure as for the election of the Vice-Chairman.

Mr. Koretzky (Ukrainian Soviet Socialist Republic) was elected Rapporteur by acclamation.

The meeting rose at 4.15 p.m.

THIRD MEETING

Monday, 3 March 1958, at 10.30 a.m.

Chairman: Mr. K. H. BAILEY (Australia)

Organization of the work of the Committee

1. The CHAIRMAN said that the plan of work outlined in the General Committee's report (A/CONF.13/L.2, para. 12) was an innovation in United Nations conference procedure. He invited representatives to comment on the procedure suggested.

2. Mr. MUHTADI (Jordan) proposed that the Committee start its proceedings with a general debate.

3. Mr. PONCE Y CARBO (Ecuador) supported that proposal. In view of the acknowledged interdependence of the various problems of the law of the sea, however, he suggested that consideration of articles 1, 2, 3, and 66 of the International Law Commission's draft (A/3159) be postponed until a sufficiently advanced stage had been reached in the work of the Third and Fourth Committees. That would be in line with the procedure adopted at The Hague Conference in 1930, as well as with that suggested by the experts who had prepared the ground for the present conference.

4. He left it to the discretion of the Chairman to decide whether his proposal for postponement should be voted on immediately or at the close of the general debate. He wished to make it clear, however, that postponement of the discussion of articles 1, 2, 3, and 66 would concern the second stage of the proceedings only; he was not suggesting that the articles in question should not be referred to at all in the general debate.

5. The CHAIRMAN asked the Committee whether it agreed that a general debate should be held.

It was so agreed.

6. Mr. BAGHDADI (Yemen) thought that the Ecuadorian proposal should be considered after the general

debate, which might perhaps reveal other points that should be postponed.

7. Sir Claude COREA (Ceylon) said that only from the general debate would it be possible to judge whether it was advisable to postpone consideration of the articles mentioned by the Ecuadorian representative.

8. The CHAIRMAN said it appeared to be the general feeling of the Committee that the Ecuadorian proposal should be discussed at the end of the general debate.

It was so agreed.

9. Mr. RUBIO (Panama) proposed that the Committee set up a sub-committee to examine the problem of bays, and in particular the question of the legal status of historic bays. The International Law Commission's draft contained only a passing reference to historic bays — in article 7, paragraph 4 — but the Committee had before it a valuable secretariat paper on the subject (A/CONF. 13/1). The question of historic bays was of great importance, as had been recognized by eminent writers, including Bustamente and Gidel. The latter regarded the theory of historic bays as a safety valve in the law of the sea, and considered that the refusal of States to accept the theory would make it impossible to arrive at an agreement on general rules concerning maritime areas. State practice in respect of historic bays was equally important; a number of bays had been declared " historic " by international treaties or pronouncements of state authorities, and several had been recognized as such by arbitral awards.

10. It was therefore essential that the international instruments to be drafted by the Conference should deal with such questions as the definition of historic bays, the rights of the coastal State or States, the procedure for declaring a bay " historic ", the conditions for recognition by other states, and the peaceful settlement of disputes arising from objections by other states.

11. The appointment of a sub-committee specifically concerned with the law relating to bays would lighten the work of the First Committee; as to when it should be set up, he would be grateful for the Chairman's views.

12. Mr. SHUKAIRI (Saudi Arabia) supported the Panamanian proposal. The International Law Commission stated in its commentary on article 7 that it had not dealt with historic bays because the data at its disposal were insufficient. That gap had now been filled by the secretariat paper. For his part, he did not regard the theory of historic bays as a mere safety valve or as subsidiary to other legal theories; it stood on its own merits and deserved to be treated accordingly. Because of its nature, it was advisable that the subject should be dealt with by a small group of experts who would draft a working paper for the Committee.

13. He suggested that the sub-committee be appointed at the earliest possible opportunity so that it would have ample time to draft a working paper.

14. Mr. BAGHDADI (Yemen) said he was in general agreement with the Panamanian proposal.

15. Sir Reginald MANNINGHAM-BULLER (United Kingdom) said that, for the sake of the better co-ordination of the Conference's work, the Panamanian proposal should be referred to the General Committee for consideration. The First Committee had a formidable programme, and it was desirable that it should concentrate on the points specifically dealt with in the draft articles referred to it.

16. Mr. SHUKAIRI (Saudi Arabia) thought that the United Kingdom suggestion was out of order: its adoption would be tantamount to vesting the General Committee with powers exercisable by the First Committee itself. In article 7 of its draft, the International Law Commission had, in effect, decided not to deal with historic bays. Since that article was one of those referred to the First Committee, it was for that committee to decide whether it would discuss historic bays.

17. Mr. BARTOS (Yugoslavia) said that the question of historic and other bays was mainly a technical one ; in such cases it was the practice of United Nations conferences to set up a sub-committee of experts. He did not agree with the views expressed by the United Kingdom representative. If the question of the appointment of a sub-committee was referred to the General Committee, an undesirable precedent would be created. The First Committee might at any time need to set up sub-committees to study specific questions, and it should be free to do so without referring the matter to any other authority.

18. Mr. GUTIERREZ OLIVOS (Chile) pointed out that under rule 46 of the rules of procedure, each committee was at liberty to set up sub-committees.

19. The CHAIRMAN thanked the representative of Panama for raising the important matter of historic bays. On the question of competence, he ruled that the Committee was competent to set up the sub-committee in question. As to when it should do so, he said that, while he agreed that the sub-committee should be given ample time to prepare a text, it was desirable, for practical reasons, to defer the matter for a few days. Early in the general debate it would probably become clear what other sub-committees would he needed, and it was desirable to consider the composition of all the sub-committees at the same time, in the light of the resources of delegations.

20. He therefore suggested that the Panamanian proposal be held over for the moment, on the understanding that he would bring it before the Committee at an early convenient date after consultation with the Panamanian representative.

21. Mr. RUBIO (Panama) expressed agreement with the procedure outlined by the Chairman.

Consideration of the draft articles adopted by the International Law Commission at its eighth session (articles 1 to 25 and 66) (A/3159)

General debate

STATEMENT BY MR. SHUKAIRI (SAUDI ARABIA)

22. Mr. SHUKAIRI (Saudi Arabia), after congratulating the Chairman on his election, raised the question whether the participation of a State in an international conference entailed recognition by that State of the other participants. In the absence of any conclusive

ruling in international law, he wished to make it perfectly clear that the participation of Saudi Arabia in the Conference was not to be construed as recognition of Israel.

23. Mr. COMAY (Israel), speaking on a point of order, said that the statement of the representative of Saudi Arabia was out of order and should not appear in the record, as the question of credentials was not before the Committee.

24. Mr. SHUKAIRI (Saudi Arabia) said that he had merely stated his delegation's reservation regarding the membership of the Conference and had not referred to the credentials of any delegation.

25. The CHAIRMAN ruled that it was out of order for the representative of Saudi Arabia to make a reservation in Committee concerning the membership of the Conference, but that his statement should appear in the record. The representative of Saudi Arabia was free to formulate a reservation at a plenary meeting of the Conference.

26. Mr. SHUKAIRI (Saudi Arabia) said that he would do as the Chairman had suggested. Turning to the text of the articles concerning the law of the sea (A/3159), he pointed out that it was only under conditions of peace that the provisions of that law could be applied. Hence, it should be expressly provided that whatever rules the Conference might adopt would be applicable in time of peace only. The United Nations should not ignore the realities of international life, but should recognize that in certain areas of the world a state of war still existed, and that new States might come into being as the result of revolutionary movements.

27. In dealing with the law of the sea, all authorities on international law drew a sharp distinction between the law of peace and the law of war; in that connexion he mentioned the draft convention adopted by the International Law Association at its thirty-fourth conference, held at Vienna in 1926, entitled " The laws of maritime jurisdiction in time of peace ". Similarly, in its report on its eighth session (A/3159), the International Law Commission had stated in paragraph 32, sub-paragraph 1, that the draft regulated the law of the sea in time of peace only.

28. In its approach to its work, the Committee should bear in mind the realities of national life and the changing international situation. The present conference was not the first to attempt to codify the law of the sea. The question of the breadth of the territorial sea had been responsible for the failure of the Codification Conference held at The Hague in 1930. The law of the sea to be drafted by the 1958 Conference should reflect the collective will of States participating as sovereign States possessing sovereign equality, and should not depend on the will of one or two nations, as had been the case in the past. The Committee should examine the articles referred to it in the spirit of the United Nations Charter; it was only after the remnants of the antiquated rules of international law had been swept away that the progressive development of that law could take place.

29. Not only the maritime Powers but all States, whether they had a sea-coast or not, should have an equal voice in discussing every aspect of the law of the sea. The newly independent States were determined to take part in the codification of the law of the sea, but they were equally determined not to renounce their vital interests. When the Committee began its study of the draft provisions, it should remember that the international community consisted of some ninety States whose vital interests must be reflected in whatever code the Conference might adopt. The Committee should not allow itself to be influenced by any outmoded rules of international law which were based on the custom and usage of one or two States only.

30. The Arab States were attending the Conference not merely as a voting group, but because their vital interests were at stake. The Atlantic Ocean and the Mediterranean Sea washed the shores of Arab lands. The Suez Canal was in the heart of Arab territory. The Red Sea, the Gulf of Suez and the Strait of Bal el-Mandeb touched Arab lands at every point. The Gulf of Aqaba came under exclusive Arab jurisdiction. The waters of the Arabian Sea washed the southern shores of Arabia, and those of the Persian Gulf the eastern coast of the Arabian peninsula.

31. He hoped that harmony and co-operation would prevail in the Committee's discussions, and that its efforts would be crowned with success.

The meeting rose at 1.5 p.m.

FOURTH MEETING

Tuesday, 4 March 1958, at 10.30 a.m.

Chairman: Mr. K. H. BAILEY (Australia)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (articles 1 to 25 and 66) (A/3159) *(continued)*

General debate (continued)

STATEMENTS BY MR. AMADO (BRAZIL), MR. BA HAN (BURMA), MR. SÖRENSEN (DENMARK), MR. BOCOBO (PHILIPPINES) AND MR. FATTAL (LEBANON)

1. Mr. AMADO (Brazil) said that the International Law Commission had not been able to surmount the difficulties associated with the delimitation of the territorial sea; it was hard to codify the law on that matter, because the practice of States was not uniform.

2. With regard to certain unilateral claims made by States anxious to prevent the destruction and possible extinction of certain marine species along their coasts, he pointed out that the problem of the territorial sea was becoming more and more subject to technical considerations. The International Law Commission had taken that fact into account in its draft; in that respect it owed a considerable debt to the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1955.

3. The States which still adhered staunchly to the traditional doctrine of absolute freedom of the high seas themselves admitted an important exception to that doctrine in connexion with the continental shelf. It was evident that international law was making great strides under the influence of economic factors, and its progress could not be arrested. The Rome Conference and the International Law Commission had acknowledged a new legal principle — that of the privileged position of the coastal State in respect of the regulation of fisheries in the high seas beyond its coasts. According to the Commission's draft, a coastal State, even if its nationals did not fish in an area of the high seas in which it had a special interest in conservation, had the right to regulate fisheries there by virtue solely of its geographical position. In a sense, therefore, the rights vested in the coastal State were actually more extensive than the claims made by certain States to jurisdiction over large sea areas.

4. That being so, the Conference should perhaps consider the idea of separating the question of the territorial sea from that of fisheries and conservation. In his opinion, that course alone would enable it to make progress. States claiming a territorial sea of only three miles also claimed for their nationals the right to fish to seaward up to the three-mile line off the coasts of other States. It was unlikely that they would renounce that right. Intensive fishing, however, could result in the depletion of fish stocks, and even threaten the well-being of the population of coastal States, as had been recognized in Iceland and also in Peru and the other countries of South America bordering on the Pacific Ocean. As yet, the only solution to such problems had been found in regional agreements.

5. The problem of the breadth of the territorial sea was a thorny one, and one that demanded a solution. It could not, however, be solved by measures tending to extend unduly the limits of the absolute sovereignty exercised by States over their territorial sea.

6. Mr. BA HAN (Burma), after congratulating the Chairman on his election and the International Law Commission on its work on the law of the sea, said that in the past international law had been a body of rules and usages adopted by powerful States. However, the international situation had changed, and new sovereign independent States had emerged, keenly conscious of their liberty.

7. His delegation wished to support the progressive codification of international law, and was in general agreement with many of the principles embodied in the articles referred to the Committee for study. There were certain matters of great concern to Burma, first and foremost among which was the question of the breadth of the territorial sea. In his delegation's opinion, that breadth should vary according to the economic, geographical, biological, technical, political and defence needs of the State concerned. Secondly, his delegation considered that article 10 called for some clarification, since insurmountable difficulties would arise if an island belonging to one State was situated in the territorial sea of another State.

8. He suggested that it might be advisable for the First and Third Committees to hold joint meetings to discuss any articles of common concern to them.

9. Mr. SÖRENSEN (Denmark) emphasized his country's great interest in the problems before the Committee. The straits connecting the Baltic Sea with the North Sea and the Atlantic Ocean passed along Danish coasts and between Danish islands. Ships of Denmark's merchant marine carried cargoes in the service of many nations. In certain parts of the Kingdom of Denmark, the Faroe Islands and Greenland, the local population was wholly dependent on the sea for a livelihood, because of the meagre resources of the land.

10. Only on the basis of generally recognized rules would it be possible for the ever-growing family of nations to reap the maximum benefit from the utilization and exploitation of the sea. A trend which, over the past few decades, had weakened rather than strengthened the authority of the international law of the sea should be halted, and Denmark would co-operate wholeheartedly with other nations in restoring the authority of the law.

11. Referring to his government's comments on the articles concerning the law of the sea (A/CONF.13/5, section 6), he said that the fact that the breadth of the territorial sea was not uniform was regrettable. The primary task of the Conference should be to make a serious attempt to harmonize the practice of States. Denmark claimed a territorial sea of four miles for customs purposes, but had gradually accepted the three-mile limit, especially in the case of fisheries. It seemed that, if there was to be any hope of working out an agreement at the Conference, some extension of that limit might be necessary. Should efforts to reconcile the differences in state practice prove unsuccessful, Denmark would have to reconsider its position. Whatever might be the outcome of the Committee's deliberations, nothing should be done to weaken the authority of the opinion expressed by the International Court of Justice in the Anglo-Norwegian fisheries case, to the effect that the validity of any delimitation of the territorial sea by the coastal State depended on international law.[1]

12. He emphasized the close connexion between the delimitation of the territorial sea and other problems, in particular those relating to the contiguous zone and to the right of the coastal State to take conservation measures in the areas of the high seas adjacent to its territorial sea.

13. He thought it might be worth while for the Committee to examine whether the legitimate economic needs of coastal States necessarily called for large extensions of the territorial sea in general, or whether other solutions might be found. One possibility was the recognition of a contiguous zone for fishery purposes, distinct from the zone recognized for customs, fiscal and sanitary purposes in article 66. A second possibility, proposed by the International Law Commission, would be to recognize areas of conservation outside territorial limits. In the first case, he would take the recognition of a contiguous zone for fishery purposes to mean that the coastal State would be entitled to reserve the exploitation of the resources of the sea in that zone to its own nationals. In the second case, the coastal State would have the right, subject to the procedure stipulated in article 54 to 59, to take conservation measures en-

[1] See *I.C.J. Reports, 1951,* p. 132.

forceable against its own nationals and against foreigners without discrimination.

14. If the economic interests of the coastal States were adequately safeguarded by measures of the kind he had mentioned, the problem of the territorial sea would appear in a different light. In that case, the interests of Denmark might not require any extension of the territorial sea proper, or only a very moderate extension, up to four or possibly six miles. He hoped that other countries would be equally conciliatory and prepared to seek agreement on those lines.

15. Another great problem relating to the delimitation of the territorial sea was that of straight baselines, regarding which he thought that the Conference should endeavour to establish generally applicable rules. The system of straight baselines had great practical advantages wherever the coastline was indented or irregular. It made it easier to define the outer limit of the territorial sea exactly on a chart; it facilitated navigation and inspection and supervision by the authorities of the coastal State, and would therefore reduce the number of controversial incidents. The draft rules on the subject submitted by the International Law Commission were very useful, but the system of straight baselines should not be considered as a " special régime ", as suggested in article 5, but rather as the normal method of delimitation where geographical conditions rendered it applicable.

16. His delegation had not overlooked the strength of the argument against the system, but wished to point out that the baseline would not necessarily have the dual function of serving both as a point of departure for determining the outer limit of the territorial sea and as a dividing line between the territorial sea and internal waters. The outer limit might be measured from the baseline, but a different line could serve as the line of demarcation between internal waters and the territorial sea. Even if that solution was not accepted — and he admitted that it was a departure from traditional ideas — the International Law Commission had supplied a second and definitive solution in article 5, paragraph 3. On condition that the right of passage was safeguarded, in the manner provided for in that clause, there could be no legitimate objection to the general application of the straight baseline method.

17. Referring to the Danish Government's comments on the right of passage through international straits connecting two parts of the high seas, he said that his government did not wish to question the right of innocent passage through such straits, and would respect it as a principle essential to the freedom of navigation. He would, however, ask members of the Committee to consider the problem from the point of view of the coastal State whose vital means of communication passed across such straits from one coast to the other. His government agreed that there should be no suspension of the right of passage through an international strait, and accepted the principle, confirmed by the judgement of the International Court of Justice in the Corfu Channel case, that the passage, even of warships, could not be made conditional on prior authorization.[2] The Danish Government also agreed that the coastal State should not interfere with the innocent passage of warships through the usual fairways in straits, but did not draw the conclusion, which the International Law Commission had drawn in paragraph 4 of its commentary on article 24, that it was never proper, in any circumstances, for the coastal State to require prior notification of such passage. Such prior notification would, in fact, serve to indicate that the intended passage was innocent.

18. In conclusion, he said that his government recognized that not all States viewed the problems he had outlined in the same way. There must, however, be a spirit of " give and take " if the Conference was to succeed, and it was in that spirit that his delegation would approach its task.

19. Mr. BOCOBO (Philippines), after congratulating the Chairman on his election, said that the Conference should approach the draft articles on the law of the sea in a progressive spirit and with a readiness to compromise.

20. Paying a tribute to the work done by the International Law Commission, he said that the articles it had drafted not only reaffirmed the established rules of international law, but set forth in a concise manner new principles that had been forming in the minds of international jurists for twenty years. It would be regrettable if an unduly conservative attitude on the part of the Conference caused such new ideas to be excluded from the convention which, it was to be hoped, would result from its work.

21. International law was changing constantly; mutual concessions would have to be made if the Conference was to be a success. Many conflicts of opinion were more apparent than real; and even those Powers which so firmly maintained the principle of freedom of the high seas were not opposed to the new ideas concerning the contiguous zone, the continental shelf and the special interest of the coastal State in maintaining the productivity of the living resources of the high seas adjacent to its territorial waters.

22. While supporting the new ideas embodied in the draft articles before the Committee, the Philippine delegation was not unmindful of the reasons underlying the old rules of international law, such as the three-mile limit. Those were the considerations which would determine his delegation's position during the debate on particular provisions.

23. Mr. FATTAL (Lebanon) recalled that the International Law Commission had excluded from the scope of its draft the law of the sea in time of war (A/3159, para. 32). Its Special Rapporteur, Mr. François, in reply to a question put to him in the Sixth Committee during the eleventh session of the United Nations General Assembly, had explained that, if the Commission had taken up that subject when just beginning its work, public opinion might have interpreted its action as indicating a lack of confidence in the efficacy of the means at the disposal of the United Nations for maintaining peace (A/CONF.13/19, vol. I, pp. 45-46). He had added, however, that in some respects the situation in time of war would have a bearing on the rules applicable in time of peace. In particular, Mr. François had said that, in advocating a particular breadth for the

[2] See *I.C.J. Reports, 1949,* pp. 29 and 30.

territorial sea in time of peace, governments would inevitably take into account the war-time implications of their recommendations.

24. So distinguished an authority as Professor Gidel had expressed the opinion that it was precisely the war-time implications of a uniform delimitation of the territorial sea which had largely accounted for the failure of the 1930 Codification Conference. Accordingly, before discussing the draft article by article, the Committee, should consider the possible effect of an armed conflict or a breach of the peace on the rules to be incorporated in a future convention on the law of the sea.

25. Any attempt to arrive at a single set of rules to cover the totally different conditions of peace and war would only lead to a deadlock. In view of the warning example of the 1930 Conference, it would be inexcusable if the present conference came to grief over the same difficulties as had beset its predecessor.

The meeting rose at 12.20 p.m.

FIFTH MEETING

Wednesday, 5 March 1958, at 10.30 a.m.

Chairman: Mr. K. H. BAILEY (Australia)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (articles 1 to 25 and 66) (A/3159) *(continued)*

General debate (continued)

STATEMENTS BY MR. ULLOA SOTOMAYOR (PERU) AND SIR REGINALD MANNINGHAM-BULLER (UNITED KINGDOM)

1. Mr. ULLOA SOTOMAYOR (Peru) said that he would state the position of his delegation with regard to the draft Articles concerning the Law of the Sea as a whole, because the work of the First Committee, concerned as it was with the question of the delimitation of the various maritime zones, would have a decisive influence on the entire work of the Conference.

2. In its valuable report (A/3159), the International Law Commission had taken note of the problems facing the South American countries bordering on the Pacific, of which Peru was one. It would, perhaps, have been unduly sanguine to expect the Commission, which was composed of eminent jurists trained in the traditional schools, to accept the new formulas put forward by those countries. It would be a long time before the slow process of the progressive development of international law absorbed such new principles.

3. It had been asserted that the countries in question disregarded traditional international law. That was not so; they were merely putting forward new rules based on situations and concepts which had not existed hitherto — rules which were based on the modern trend towards regarding human beings as subjects of international law. Those rules were also based on the novel concept of the conservation of marine species; it had previously been considered that the living resources of the sea were inexhaustible, and could therefore be subjected to unlimited exploitation.

4. Peru, Chile, Ecuador, Costa Rica and El Salvador — the countries which had proclaimed their sovereignty over the maritime zones adjacent to their coasts for the purposes of conservation and utilization of marine resources — had not been the first to abandon the traditional rules in favour of new international law. The trend had been started by the countries which had first claimed rights over the continental shelf and adopted measures for the conservation of fisheries. It was unreasonable for those same countries now to resist the logical consequences of the movement which they themselves had initiated.

5. The freedom of the seas had been asserted in the seventeenth century as a reaction against earlier exaggerated claims based on the principle of sovereignty over sea areas. The world was at present witnessing a similar reaction against claims based on allegedly unrestricted freedom of the seas. It was significant that certain important maritime States had started by asserting their rights of dominion over the sea, having become advocates of the freedom of the seas only when their growing merchant navies had begun to navigate seas remote from their shores. An exception was the United States of America, which had always asserted the freedom of the seas even when it had possessed only a small navy and mercantile marine.

6. From the very beginning, the freedom of the seas had been limited by the notion of the territorial sea, an area subject to the sovereignty of the coastal State. There were other limitations of the freedom of the seas which showed that the notions of freedom and State jurisdiction could be perfectly reconciled — namely, the jurisdiction of States over their ships on the high seas; international action against piracy and the slave trade; the right of hot pursuit; and the right to lay submarine cables. Lastly and more recently, there had been the rights of sovereignty proclaimed by coastal States over the continental shelf.

7. In time of war, the freedom of the seas had been curtailed and ultimately totally ignored by the great Powers, out of sheer necessity, and the smaller States had had to accept that situation. It was therefore unfair to force upon the latter, in time of peace, an exaggerated interpretation of the freedom of the seas merely because that interpretation suited the interests of the great Powers.

8. Originally, the freedom of the seas had been associated with that of navigation and trade. The right to fish had been invoked only much later, long after the freedom of the seas had been universally accepted. Fishing, at first a limited coastal occupation, had become a lucrative industry when the nationals of certain States had begun to fish far beyond the shores of their own countries. When the freedom of the seas was invoked in that context, the real purpose was to afford protection to commercial fishing and hunting, at times of an indiscriminate character. It was significant that the very countries which engaged in such far-flung activities had found it necessary, in certain particular sea areas, to enter into agreements for the conservation of marine species.

9. The so-called three-mile rule had never commanded

general acceptance; neither had it been embodied in a collective international instrument; it had merely been mentioned in a number of bilateral or regional agreements. In practice, every State determined the breadth of its own territorial sea in accordance with its own requirements. States had, moreover, proclaimed contiguous zones extending beyond the territorial sea for the purpose of safeguarding their fiscal, sanitary and other interests.

10. The doctrine of the continental shelf entailed an extension of the sovereignty of the coastal State beyond the territorial sea, for in many areas the continental shelf extended far beyond territorial waters. The need to erect installations to exploit the resources of the territorial shelf meant that sooner or later rights would have to be asserted over the superjacent waters. The doctrine of the continental shelf, if universally and uniformly applied, would result in an injustice to those States which had only a narrow shelf, since it would debar them from exploiting the resources of submarine areas off their coasts.

11. The action taken by the South American countries of the Pacific in proclaiming their sovereignty, for purposes of conservation and utilization of the resources of the sea, over a sea area adjacent to their coasts was based on the urgent needs of those States, particularly the need to feed their peoples. It had been argued that the States which challenged those claims were similarly protecting a human interest — namely, the right of their nationals to fish. But that right, exercised more often than not for gain, could not prevail over the vital interests of the peoples living in the vicinity of the marine resources concerned.

12. In the case of Peru, there was a remarkable phenomenon which was worth mentioning in that connexion. The guano deposits on the islands off the coast were built up by aquatic birds which fed on anchovies. Overfishing in the area could therefor result, and was resulting, in a decrease in the numbers of those birds, which had an adverse effect on the region's whole economy, because guano was essential — as manure — to Peruvian agriculture. Thus, in the case of Peru, conservation of the living resources of the sea was vital to conservation of the land as a source of food.

13. The principle of equality required that all States should play their part in the formulation of international law. Rules of international law had sometimes been unilaterally created in the interests of great Powers; it was therefore reasonable for certain rules of law to be initiated by small States in their legitimate interests. The era of domination and territorial penetration was past. It was inadmissible that a sort of colonialism of the high seas should be allowed in the name of the freedom of the seas. The sea areas over which the South American countries of the Pacific were claiming jurisdiction were insignificant by comparison with the immense expanse of the Pacific Ocean. They were also very small by comparison with the areas claimed by the opponents of those countries on the basis of the doctrine of the continental shelf or for purposes of fisheries conservation.

14. It was significant that the great Powers which were at present resisting the rights claimed by coastal States had, in fact, during the Second World War, demanded that the small countries of Latin America exercise, over a vast sea area, rights of jurisdiction and control which included the obstruction of navigation and trade; what was more, they had obtained satisfaction. Since the setting up of the United Nations, however, the great Powers no longer treated the smaller States as pawns, but sought their co-operation — a co-operation which could only rest on understanding.

15. It would be an abuse for non-coastal States to claim the right to fish indiscriminately to the detriment of coastal States. The Declaration of Santiago, issued by three South American countries of the Pacific, was aimed at preventing such an abuse. The Declaration was of a defensive character, and its sole object was the conservation of the living resources of the sea for the benefit of the populations of those countries. It was not, as had been asserted, an arbitrary or aggressive instrument. The principles embodied in the Declaration of Santiago had been endorsed by the Tenth International Conference of American States held at Caracas in 1954. In the Principles of Mexico City, proclaimed in 1956 by the Inter-American Council of Jurists,[1] the right of a coastal State to adopt conservation measures, and to exercise certain exclusive rights of exploitation, were clearly recognized.

16. It was not the intention of the Peruvian delegation to put forward an unrealistic, uniform system to cover all cases; it merely claimed that where a special situation obtained, a special system must be devised.

17. Sir Reginald MANNINGHAM-BULLER (United Kingdom) said that one of the main objects of the Conference was to eliminate, or to reduce to the greatest possible extent, differences of opinion between nations as to international law concerning the sea. Unless the Conference succeeded in resolving such differences, they would continue to be a major source of international friction and dissension. If the time of the Conference was not to be wasted, representatives should exercise restraint, and refrain from putting forward proposals so extreme that they stood no chance of acceptance or, even if accepted by the will of the majority, were unlikely to command general approval.

18. There would be no point in drawing up a convention if its provisions were so provocative as to preclude its winning any large measure of acceptance, or if they were such as to rule out the possibility of some or all of the principal maritime countries acceding to the convention. At earlier meetings, he had heard allegations that seemed well calculated to produce that effect, for instance, that the principle of the freedom of the seas had been used merely as an instrument of domination and economic exploitation. If ever a policy had been calculated to throw the seas open for the common use of all mankind, to promote freedom of communication and intercourse between countries and to institute a régime of the greatest liberality, it had been that pursued by the maritime powers during the nineteenth century and subsequently. All mankind had benefited from that policy.

19. The effect of some of the courses he had heard

[1] See *Final Act of the Third Meeting of the Inter-American Council of Jurists*, Mexico City, 17 January-4 February 1956 (Washington, D.C., Pan American Union, 1956), p. 36.

advocated would be to carve up the seas, or very large areas of them, into enclaves and enclosures under the domination of particular Powers or groups of Powers in which the nations of the world would enjoy no freedom other than that accorded at their discretion by the coastal States concerned. No more retrograde step could be imagined. He did not suggest that States should not have regard to their own interests, but he hoped that, for the general good, representatives would approach their task unbiased by parochial considerations.

20. After paying a tribute to the work of the International Law Commission, whose report was a most valuable and important document, he said that he would later comment in detail on most of the articles. But he wished to make certain points at once.

21. The wording of article 1 could be improved. As it stood, the article did not clearly bring out the distinction between the character of the rights a coastal state exercised over its land and that of the rights it exercised over its sea territory.

22. With regard to article 2, his government did not dissent in principle from the rule that the sovereignty of the coastal State extended to the air-space above its territorial sea. It was correct to speak of " sovereignty ", for there was no general right of innocent passage for aircraft through that air-space corresponding to the rights of innocent passage through the territorial sea itself — a situation which was recognized by the relevant provision of the 1944 Convention on International Civil Aviation. That position was very largely based on the view that the territorial sea consisted of a relatively narrow belt of waters of such a kind that the absence of a right to fly through or along the air-space above them would not seriously impede air traffic or endanger the general freedom of international air communications. However, should the breadth of the territorial sea be increased, the absence of any right of innocent passage might become a matter of serious concern in regard to the freedom and development of air communications. His government would have difficulty, for instance, in admitting that flying rights over the high seas, which at present existed and had long been exercised by countries, could suddenly be taken away by unilateral extension — or indeed by any extension — of the territorial sea without the consent of those countries.

23. As to article 3, his delegation considered that the International Law Commission had been right in laying down in paragraph 2 that claims to a territorial sea of more than twelve miles were contrary to international law. It was clear from article 3 as a whole, and also from paragraphs 7 and 8 of the commentary, that the Commission had not intended to license claims up to and including twelve miles. In the United Kingdom delegation's view, it would have been greatly preferable if the Commission had stated unequivocally that, considered as a purely legal question, the correct breadth of the territorial sea was three miles and no other distance. One of the matters which would be discussed by the Conference was whether the limit should remain three miles. But for such a discussion to have any meaning at all, its starting point must be based on law. In his delegation's view, that starting point could only be the three-mile rule, which was not only the traditional rule, observed by a very great number of States over a very long period, but was also the only one which had commanded any general measure of agreement, practical application and recognition. No one who considered the facts impartially could doubt or seriously dispute that if something other than the three-mile rule had been advocated at certain times, what had then been discussed had been a departure from an existing rule, or that unilateral proclamations of extension of the territorial sea were simply that and nothing more, and had in themselves no kind of validity as against any other country that did not choose to recognize them.

24. It was even less possible, as a matter of law, to accept the view that international law laid down no maximum breadth for the territorial sea, and that it was open to each country to proclaim whatever distance suited its particular circumstances. That doctrine had no legal foundation, and, carried to its logical conclusion, would make complete nonsense of the principle of freedom of the seas. As the representative of Denmark had pointed out at the previous meeting, that idea had been directly controverted by an important passage in the judgment of the International Court of Justice in the Anglo-Norwegian fisheries case — namely: " The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is compentent to undertake it, the validity of the delimitation with regard to other States depends upon international law." [2] International law must impose a maximum, for without one there was no limitation and no governance by international law. There was no maximum distance which had ever had any traditional, historical or wide general acceptance and application except the three-mile limit. It therefore remained the rule, and in his delegation's view constituted the existing law on the subject.

25. In his opinion, the problem of the breadth of the territorial sea fell into two parts, and he gathered from the statement of the representative of Peru that he too was inclined to that view. First, what was the existing international law on the breadth of the territorial sea; and, secondly, should any amendment be made to it? If the Committee could keep the two parts separate, the chances of progress would be greater. Any proposed amendments or changes should be considered on their merits; but they should be recognized for what they were, and should not be represented as existing law. His delegation's views on the legal situation did not in any way mean that it failed to understand the positions of other countries or that it did not sympathize with the economic considerations which preoccupied them.

26. He noted the importance attached by the representative of Peru to the question of fisheries conservation; the demand for exclusive fishing rights seemed to be based on either (1) a desire to secure enough fish for the coastal State, or (2) the need for fishery conservation, or (3) a desire to secure limited extension of sovereignty. The real problem, however, was that of conservation. Over-fishing must be prevented and adequate measures of protection taken, so that yields increased. The problem called for international co-opera-

[1] *I.C.J. Reports, 1951,* p. 132.

tion extending over the stocks of fish throughout their migratory cycle, which was commonly very wide-ranging and was not often confined to the borders of a single State. If the Conference could concentrate on conservation and devise measures which would give all countries confidence that stocks of fish would be maintained at an adequate level, and that everyone would receive a fair share of them, the need for exclusive rights should no longer make itself felt.

27. The position of the coastal State was provided for in a number of ways. There was, for instance, the principle of the contiguous zone for customs purposes, which the United Kingdom Government had not yet formally accepted, but which it could accept as part of a generally satisfactory agreement. The doctrine of the continental shelf was yet another means by which the position of the coastal State was recognized, and through which its legitimate aspirations could be met. Thus, the coastal State was placed in a position of considerable privilege, to which the United Kingdom Government had no objection so long as it did not involve interference with the rights of other States or with the freedom of the seas.

28. He then referred to the principle of straight baselines and to the principle that drying rocks situated within the normal limit of the territorial sea as drawn from the mainland could be made a point of departure for a further extension of the territorial sea. That was acceptable so long as the breadth of the territorial sea remained narrow.

29. It should be one of the Conference's aims to diminish friction; but that aim could not be achieved by making claims or attempting to assert rights which by their nature were virtually guaranteed to bring the State doing so into conflict with other States. His delegation felt that a certain realism in that matter was highly desirable.

30. Articles 4 and 5 were broadly acceptable, although his delegation wished that article 5 had placed some kind of limitation on the maximum length of baselines. It must be remembered that the effect of drawing a straight baseline was to enclose what might be large stretches and to convert them into internal or national waters; the areas in question would previously have been territorial waters through which a right of innocent passage existed, or even part of the high seas. It seemed very doubtful whether a coastal State could deprive other countries of established rights by action of that kind.

31. Referring to article 7, he said that it was the United Kingdom delegation's view that the ten-mile rule still represented the correct closing limit for bays, since it was based on a definite practical consideration: that five miles was about the limit of normal vision at sea, so that it would be possible to see both extremities of the bay from a vessel at about the middle of the line. If that test were abandoned, it might well prove impossible to replace it by another practical test.

32. His delegation was perfectly ready to regard a bay as a historic bay if the facts giving it that status could be established, but it did not think that a study of the subject by a sub-committee could serve any useful purpose. He doubted whether there was any set of principles by which a historic bay could at once be recognized. The question was rather one of establishing, in respect of any given bay, whether or not its waters had for sufficiently long been treated as internal waters of the country concerned, and whether other countries had accepted or otherwise recognized the position.

33. With general reference to section III of the articles, he had been concerned at some remarks made at earlier meetings, which suggested that the right of innocent passage was in some way subordinate to the rights of the coastal State in respect of its territorial sea. The right of innocent passage was an independent right, in no way subordinate to any other, and was of particular importance in the case of international straits. In his delegation's view, no established and customary right of passage or access could be done away with by the unilateral action of any of the neighbouring coastal States. The articles of section III, if incorporated in a suitable instrument, would clarify and give permanence to certain principles of international law which were well established and generally acceptable. His government was broadly in agreement with the principles embodied in those articles, and with the views and intentions of the International Law Commission as explained in the commentaries. Some of the articles were, however, drafted in very general terms, and needed to be made more precise.

34. It was not easy to define what was meant by " innocent passage ". Account must be taken of the position of the coastal State, yet it must also be remembered that the right was one necessary to navigation which it was in the interests of the coastal State itself to afford. His delegation would have certain specific criticisms to make of articles 15 to 18 at a later meeting.

35. Referring to article 21, which covered matters that were the subject of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, he said that the United Kingdom Government, which was about to ratify that convention, would be reluctant to see brought into being, and indeed could not accept, two sets of international rules on the same subject which differed in some respects in the obligations they imposed. His delegation would therefore propose that, where the subject of an article drafted by the International Law Commission was already adequately covered by an international convention, the Conference should not normally attempt to produce a new set of rules, but should limit itself, if it saw fit, to recommending to States that they adhere to the existing instrument.

36. The United Kingdom Government accepted the principle of articles 22 and 23, which applied different rules of innocent passage to government ships operated for commercial purposes and to government ships operated for non-commercial purposes. His government could, however, only agree to accept those articles if they were amended to make it clear that article 22 embraced all government ships operating in international trade in the customarily accepted sense of that term.

37. As it stood, article 24, relating to the passage of warships, did not reflect existing international law quite correctly. Nevertheless, in so far as it might do so, it was based entirely upon the assumption of the rules on which the passage of warships was based, an assumption

which had originally been valid and had remained so for a very long time — namely, that territorial waters comprised a belt of sea strictly limited in breadth. In those circumstances, some States might consider that the passage of warships ought to be subjected to certain conditions. Matters would, however, be very different if the territorial sea came to embrace anything like the areas which had been the subject of some recent claims. The effect in many cases, and in many areas of the world, would be to place impediments upon legitimate naval movements for which there could be no reason or justification.

38. He did not wish to make any specific comment on article 66 at the present stage. The point to which his government attached importance was that whatever rights the coastal State might be entitled to exercise within the contiguous zone, the status of the waters concerned would not thereby be changed. They were, and would remain, high seas. The contiguous zone was not part of the territorial sea of the coastal State. It was not under its sovereignty or even, in the proper sense, under its jurisdiction. The legal consequences of that fact implied a limitation both on the character and on the scope of the rights which could be exercised in the contiguous zone, and also on the manner of exercising those rights.

39. In conclusion, he hoped that it would be possible for all representatives to deal with the articles before the Committee from a largely technical and non-political point of view, with the object of introducing into them such improvements as seemed desirable in order to fit them to serve as a basis for a really satisfactory regime of the territorial sea, which would be clear and precise in its terms and generally acceptable, and which would reduce, if not eliminate, the possibilities of friction between the nations of the world.

The meeting rose at 12.55 p.m.

SIXTH MEETING

Thursday, 6 March 1958, at 10.30 a.m.

Chairman: Mr. K. H. BAILEY (Australia)

Consideration of the draft articles adopted by the International Law Commission at its eighth session (articles 1 to 25 and 66) (A/3159) *(continued)*

General debate (continued)

STATEMENTS BY MR. PETRÉN (SWEDEN), MR. VERZIJL (NETHERLANDS), MR. BOAVIDA (PORTUGAL), MR. MONACO (ITALY) AND MR. AYCINENA SALAZAR (GUATEMALA)

1. Mr. PETREN (Sweden), after paying a tribute to the work of the International Law Commission, recalled the wording of Article 13 of the United Nations Charter, and emphasized the difference between the " progressive development " of international law and its " codification ". In practice, the development of law and its codification could not easily be separated. Certain changes were almost always brought about involuntarily in codifying law, whereas the development of law must necessarily take existing law as a base. Any conventions which might be drafted by the Conference, whether they related to the codification or to the development of law, would therefore necessarily be of a mixed nature, containing both old rules of law and new ones. Those two kinds of law had not at all the same legal effect. The old rules, if they were based on customary law, bound all mankind independently of the new conventions to be concluded, whereas the new rules, which would come into being only through the conventions, would bind only those States which signed and ratified those conventions. Other States would not be bound to recognize or observe them.

2. The Swedish delegation therefore felt that the Conference should proceed with caution, and should not depart too radically from existing law. It would be useless to draft conventions that would have no chance of ratification and would bind only a small number of States, which would have to recognize the old rules where other States were concerned. The Swedish delegation recognized that opinion was far from unanimous as to the content of existing law. So far as the problem before the Committee was concerned, however, there was one principle which seemed to be unchallenged: that was the great principle of freedom of the seas, which must be upheld in the interest of all mankind.

3. Turning to the question of the territorial sea, he emphasized that its breadth must be fixed by international law. If States were free arbitrarily to extend their territorial sea, the fundamental rule that no State might subject any part of the high seas to its sovereignty would be violated. Although the International Law Commission had dealt with the breadth of the territorial sea in article 3 of its draft, that article was a description of the present situation rather than a draft law.

4. It was true that international practice in respect of the breadth of the territorial sea was not uniform. Doubtless, it was also true that international law did not permit the territorial sea to be extended beyond twelve miles; and it might be added that even the claims of certain States to have extended their territorial sea up to twelve miles had met with serious objections. It was also true that certain States had refused to recognize any extension of the territorial sea beyond three miles. The question whether that refusal was sound in law had not been decided by the International Law Commission, but it would have to be settled if a rule was to be laid down on the breadth of the territorial sea.

5. It was plain that the Commission's comments on the subject could not be translated into a rule of law forthwith. If the extension by a State of the breadth of its territorial sea to between three and twelve miles was not considered a violation of international law, it followed that such a breadth must be recognized by other States; for a rule of international law granting one State the right to a territorial sea of a certain breadth necessarily implied for other States the duty to respect that breadth.

6. The question was whether such a rule existed in international law. In view of the frequent disputes which had arisen, there might be doubts about the matter. It was unnecessary, however, for the rule to lay down a uniform limit. As the Commission had stated, international practice itself was not uniform. The three-mile limit, for example, had enjoyed neither the general application nor the preponderant authority which its