United Nations Conference on the Law of the Sea

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Summary Records of the 41st to 45th 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))*

FORTY-FIRST MEETING

Thursday, 10 April 1958, at 8.30 p.m.

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

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

ARTICLE 22 (GOVERNMENT SHIPS OPERATED FOR COMMERCIAL PURPOSES) [A/CONF.13/C.1/L.36, L.37, L.44, L.50, L.51]; ARTICLE 23 (GOVERNMENT SHIPS OPERATED FOR NON-COMMERCIAL PURPOSES) [A/CONF.13/C.1/L.34, L.36, L.37, L.48, L.50, L.51, L.93] (continued)

1. The CHAIRMAN announced that the amendment to article 23 submitted by Portugal (A/CONF.13/C.1/L.47) and that to article 23 submitted by the Federal Republic of Germany (A/CONF.13/C.1/L.48) had been withdrawn.

2. Sir Gerald FITZMAURICE (United Kingdom) formally withdrew his delegation's proposals that articles 22 and 23 be deleted from, and a new article 20 A be added to, the International Law Commission's draft (A/CONF.13/C.1/L.37).

3. Mr. DE ROBLEDO (Spain) withdrew his delegation's amendments to articles 22 and 23 (A/CONF.13/C.1/L.36), which involved mere drafting changes and could therefore appropriately be dealt with by the drafting sub-committee.

4. Mr. KRISPIS (Greece) withdrew his delegation's proposal (A/CONF.13/C.1/L.34) that article 23 be deleted, on condition that the amendment of the Republic of Korea to that article (A/CONF.13/C.1/L.50) was put to the vote.

5. Mr. SIKRI (India) withdrew his delegation's amendment to article 23 (A/CONF.13/C.1/L.93).

6. The Indian delegation wished, however, to put forward in its own name the amendment of the Federal Republic of Germany to article 23 just withdrawn by its sponsor.

7. Mr. BOCOBO (Philippines) said that his delegation was at a loss to understand the purpose of article 23. By laying down that the rules contained in sub-section A should apply to government ships operated for non-commercial purposes, article 23 implied that the rules contained in sub-section B did not apply to government ships of that kind. Sub-section B contained such rules as that laid down in article 19, paragraph 1, to the effect that no charge could be levied on foreign ships solely by reason of their passage through the territorial sea. Did article 23 therefore mean that it was possible to levy such charges on government ships operated for non-commercial purposes? The same question could be asked in respect of such rules as those in articles 20, paragraph 1, and article 21, paragraphs 1 and 2.

8. At the invitation of the CHAIRMAN, Mr. FRANÇOIS (Expert to the secretariat of the Conference) explained to the Philippines representative that the rules which he had mentioned were contained in sub-section B and therefore did not apply to government ships operated for non-commercial purposes.

ARTICLE 24 (PASSAGE OF WARSHIPS) [A/CONF.13/C.1/L.21, L.34 to L.36, L.37/Corr.2, L.43, L.47, L.48, L.51]

9. Mr. DEAN (United States of America) withdrew his delegation's proposal (A/CONF.13/C.1/L.43) that article 24 be deleted.

10. Mr. KRISPIS (Greece) withdrew his delegation's amendment to article 24 (A/CONF.13/C.1/L.34), on condition that the amendment of the Republic of Korea to article 23 (A/CONF.13/C.1/L.50) was put to the vote.

11. Sir Gerald FITZMAURICE (United Kingdom) withdrew his delegation's proposal (A/CONF.13/C.1/L.37) that article 24 be deleted, and introduced its proposal concerning the addition of a new paragraph 2 to that article (A/CONF.13/C.1/L.37/Corr.2). The language of that amendment was derived from the last sentence of paragraph 4 of the International Law Commission's commentary on article 24. The right of warships to innocent passage through straits without previous authorization or notification was an important one, and must be stated explicitly.

12. Mr. GASIOROWSKI (Poland), introducing his delegation's amendment to article 24 (A/CONF.13/C.1/L.35), recalled that, as had been pointed out at The Hague Codification Conference of 1930 by the United States representative, Mr. Miller, the right of innocent passage pertained primarily to merchant ships;[1] the coastal State could make the passage of warships subject to previous authorization if it so desired.

13. Mr. DE ROBLEDO (Spain) introduced his delegation's proposal (A/CONF.13/C.1/L.36) that articles 24 and 25 be combined, with certain drafting changes.

14. His delegation would press that proposal only in so far as it related to the text of article 24, and in particular to the second sentence thereof, which, as drafted by the International Law Commission, was not very logical. The provision that innocent passage should normally be granted subject to the observance of the provisions of articles 17 and 18 was tantamount to saying that innocent passage would be granted provided it was innocent. Hence his delegation's proposal that that sentence be amended to read that the coastal State would normally be obliged to grant passage provided there was every reason to expect that the provisions of articles 17 and 18 would be observed during the passage.

15. Mr. BOAVIDA (Portugal) withdrew his delegation's amendment to article 24 (A/CONF.13/C.1/L.47).

16. Mr. PFEIFFER (Federal Republic of Germany), introducing his delegation's amendment to article 24 (A/CONF.13/C.1/L.48), said that its effect would be to enable the coastal State to make the passage of warships through its territorial sea subject to previous noti-

[1] See Ser. L.o.N.P., 1930.V.16, p. 59.

fication, but not to previous authorization. Mere notification would be quite sufficient to meet the requirements of security. To make warships subject to the long and complicated procedure of obtaining formal authorization would be to place an unnecessary obstacle in the way of navigation. Indeed, as was pointed out by the International Law Commission in paragraph 2 of its commentary on article 24, a large number of States did not require previous authorization or notification of warships passing through their territorial sea.

17. Mr. VERZIJL (Netherlands) introduced his delegation's amendment to article 24 (A/CONF.13/C.1/L.51). His delegation could not accept the International Law Commission's text of that article. It was a customary rule of international law, recognized by such authorities as Oppenheim, Lauterpacht, Gidel, Fauchille and Scelle, that warships had the right of passage through territorial seas without let or hindrance. Netherlands warships had never notified any foreign State before passing through its territorial sea, neither had any previous authorization been required of them in such circumstances.

18. The provisions of articles 17 and 25 would afford sufficient protection to the coastal State in cases where passage was not innocent within the meaning of article 15. To make passage subject to authorization would endanger the safety of navigation ; it would make offshore navigation by the taking of bearings impracticable.

19. The Netherlands proposal restored the text which the International Law Commission had adopted at its sixth session, in 1954,[2] and which it had subsequently changed in the light of the comments made by certain governments, with the result that the final text of article 24 failed to express the existing rule of international law.

Article 25 (Non-observation of the rules) [A/CONF.13/C.1/L.22, L.36, L.47, L.51]

20. Mr. KATICIC (Yugoslavia), introducing his delegation's amendment to article 25 in document (A/CONF.13/C.1/L.22), said that it had been prompted by a remark made by the representative of Yemen in the general debate (7th meeting), drawing attention to the inadequacy of the sanctions provided in article 25 for non-compliance by a warship with the regulations of the coastal State concerning passage through its territorial sea, which limited such State to requiring the warship to leave the territorial sea.

21. Mr. BOAVIDA (Portugal) withdrew his delegation's amendment to article 25 (A/CONF.13/C.1/L.47).

22. Mr. VERZIJL (Netherlands), introducing his delegation's amendment to article 25 (A/CONF.13/C.1/L.51), said that the Netherlands Government considered that not only foreign warships but equally all other ships owned by a foreign State and operated by it for the sole purpose of exercising government functions should be covered by the provisions of that article.

23. Mr. GARCIA ROBLES (Mexico) considered that paragraph 2 of the Spanish delegation's amendment to articles 24 and 25 (A/CONF.13/C.1/L.36) involved a matter of substance, and should not therefore be transmitted direct to the drafting committee.

24. Turning to the additional article 20 A which had been proposed by the United Kingdom (A/CONF.13/C.1/L.37), and which had been withdrawn, he pointed out that a similarly worded proposal had been introduced in the Second Committee. He wondered, now that the United Kingdom amendment had been withdrawn, whether the First Committee would adopt its own definition or accept the International Law Commission's vague formula. The definition adopted by the Second Committee did not seem to him to be applicable where innocent passage was concerned.

25. The CHAIRMAN observed that what appeared to be an issue of substance when the English text of an amendment was examined often turned out to be a mere question of translation when the original text was further examined. The drafting sub-committee would naturally refer to the First Committee any amendment which it considered to be one of substance.

26. Mr. NIKOLAEV (Union of Soviet Socialist Republics) agreed with the Chairman's statement, but felt that paragraph 2 of the Spanish amendment was an amendment of substance, because it stated that " if any warship fails to comply with the rules lawfully established by the coastal State . . . " His delegation would like to know who would decide whether such rules were lawfully established.

27. Mr. DE ROBLEDO (Spain) withdrew paragraph 2 of the Spanish amendment to articles 24 and 25.

28. Mr. ITURRALDE (Bolivia) thought that, as an article worded in much the same way as that withdrawn by the United Kingdom delegation (A/CONF.13/C.1/L.37) had been adopted by the Second Committee, it was unnecessary for the First Committee to include in the articles assigned to it any definition of government ships operated for non-commercial purposes.

29. He considered that paragraph 1 of the Spanish delegation's proposal was merely an emendation of the International Law Commission's text.

30. The CHAIRMAN disagreed ; the paragraph in question raised minor but substantive issues.

31. The Second Committee had adopted a new article 33 A, defining government ships operated for non-commercial purposes in terms identical to those of the new article 20 A which the United Kingdom had submitted but subsequently withdrawn, but the First Committee must naturally decide whether such definition was acceptable in relation to the articles assigned to it.

32. Mr. GASIOROWSKI (Poland) considered that the First Committee was not bound by decisions taken by other committees, and should carefully examine the question of the definition of government ships operated for non-commercial purposes. It would be for the Conference itself to resolve any conflict between decisions reached by the various committees.

The meeting rose at 10.30 p.m.

[2] See *Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693), chap. IV, art. 26.

FORTY-SECOND MEETING

Friday, 11 April 1958, at 10.15 a.m.

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

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

ARTICLE 24 (PASSAGE OF WARSHIPS) [A/CONF.13/C.1/L.21, L.35, L.36, L.37/Corr.2, L.48, L.51] (continued)

1. Mr. BARTOS (Yugoslavia), introducing the Yugoslav amendment (A/CONF.13/C.1/L.21), said that the proposed new paragraph 2 was self-explanatory and reflected his government's belief that nuclear energy should be applied solely to peaceful ends and that international law did not authorize its utilization for military purposes. As to the proposed new paragraph 3, it was merely a statement of the accepted rule of the law of nations that warships were immune from all jurisdiction except that of the flag State. Any difficulties that might arise in connexion with their passage should be resolved through the diplomatic channel.

2. Mr. TUNCEL (Turkey) said that the amendments proposed by the delegations of the Federal Republic of Germany and the Netherlands (A/CONF.13/C.1/L.48 and L.51) were based on the assumption that the overwhelming majority of States favoured the principle of unrestricted passage even where warships were concerned. In reality, however, the view that warships needed no previous authorization and could not be required to give advance notification was held only by some States, and each government had absolute discretion in the matter. The Committee would doubtless appreciate the fact that the interests of the coastal States were not uniform, and that in certain circumstances the requirement of previous authorization or notification was not merely justified but essential. The Turkish Government had always made the passage of warships subject to authorization and he would therefore have to regard the amendments proposed by the delegations of the Netherlands and of the Federal Republic of Germany as attempts to limit the rights of the coastal State to an unreasonable extent.

3. Mr. SHUKAIRI (Saudi Arabia), speaking on the new proposal presented by the United Kingdom delegation (A/CONF.13/C.1/L.37/Corr.2), observed that until there was some juridical definition of the geographical term " strait " it would be highly dangerous to lay down any rules on the passage of warships through such areas. Straits could be territorial, international or historic, and different rules of law applied to each type. A general declaration in the form advocated by the United Kingdom might thus prove prejudicial to the security of certain States, especially if the strait concerned was a territorial one. Authorities as respected as Oppenheim and Colombos were agreed that the waters of territorial straits were on the same footing as national waters, and it was clear that the presence of a foreign warship in any such strait could constitute the gravest of threats. In those circumstances, it would be unthinkable to permit warships to traverse such areas without authorization.

4. Sir Gerald FITZMAURICE (United Kingdom) supported the Netherlands amendment, which seemed to him a more accurate reflexion of the law than the text proposed by the Commission. Furthermore, the initial saving clause afforded the fullest safeguards to the coastal State, and the last sentence made it clear that the right of passage would be subject to the provisions of article 17.

5. The opinion advanced by the Saudi Arabian representative regarding the passage of warships through straits was manifestly at variance with that of the International Law Commission which had been guided by the decision of the International Court of Justice in the Corfu Channel case. The Court had clearly stated that, in time of peace, States had the right to send their warships through straits used for international navigation.[1] The fact that the learned authorities mentioned by the Saudi Arabian representative placed the waters of a territorial sea on the same footing as national waters was wholly irrelevant, for the question before the Committee was not the territoriality of such marine areas but the innocent passage of warships. In fact, it was only when waters were territorial that the question of innocent passage ever arose.

6. Mr. BARTOS (Yugoslavia) felt that the United Kingdom amendment tended to interpret the judgment in the Corfu Channel case somewhat too widely. The Court had admittedly held that warships required no previous authorization, but there was no mention in its judgement of notification. The giving of advance notice was principally a sign of goodwill, but it also enabled the coastal State to give the proposed passage sufficient publicity to prevent alarm among the population. It was in fact precisely because of the excitement provoked in the coastal areas of Yugoslavia by the frequent presence of foreign warships during the Trieste crisis that his government had asked the International Law Commission to introduce the words appearing in the first sentence of article 24. His delegation consequently could not support the United Kingdom amendment unless its sponsors agreed to delete the words " or notification ".

7. With regard to the Netherlands amendment to article 22 (A/CONF.13/C.1/L.51/Corr.1), he recalled that, at the 40th meeting, his delegation had already expressed its views on the new article 33 A adopted by the Second Committee. He would therefore only support that amendment if the Netherlands delegation agreed to add a phrase excepting non-commercial ships used for military purposes. International courtesy extended immunity only to non-military vessels.

8. Mr. NIKOLAEV (Union of Soviet Socialist Republics) said that the International Law Commission's text of article 24 was the fruit of long and careful study, and the principle stated therein reflected the practice of many States which considered the passage of warships as a problem apart because of the element of risk involved. Even the very incident in the Corfu Channel to which the United Kingdom representative had referred showed that a coastal State was obliged to take certain measures in the interests of its security.

[1] *I.C.J. Reports, 1949*, p. 28.

9. At the preceding meeting, the Netherlands representative had cited several authorities in support of his thesis that the passage of warships should be unfettered. But an equal number of scholars held the opposite view, and it was an established fact that many States believed that the imposition of certain conditions was the sole means of safeguarding their vital interests. The Netherlands representative had also contended that the requirement of previous authorization could prove prejudicial because of possible delay. The U.S.S.R. delegation could not accept that view, since the paramount interests of a State should not be subordinated to a desire for haste in some other quarter.

10. For these reasons, his delegation would vote against the amendments of the Netherlands and the Federal Republic of Germany, and would support the first sentence of the Commission's text, which safeguarded the coastal State's interests without hampering the freedom of navigation. With regard to the second sentence of the article, he would support the logical Polish proposal (A/CONF.13/C.1/L.35).

11. Mr. URIBE HOLGUIN (Colombia) asked why the Netherlands amendment to article 24 (A/CONF.13/C.1/L.51) contained the phrase " subject to article 17, paragraph 3 ". In the form in which it had been adopted by the First Committee at its 34th meeting, the third paragraph of article 17 did not stipulate any conditions, but merely recognized a right.

12. Mr. LOUTFI (United Arab Republic) said that, in the absence of regulation, especially at a time when the international situation was disturbed, the passage of foreign warships through a State's territorial sea could cause serious complications. He would therefore find it impossible to support the Netherlands amendment, which tended to limit the coastal State's right to make the necessary regulations, and would vote at least for the first sentence of the Commission's text.

13. Mr. STABELL (Norway) said that the amendments of the Netherlands and the Federal Republic of Germany both appeared to be acceptable to his delegation. He hoped that the first proposal to be put to the vote would be that of the Federal Republic of Germany, which seemed the furthest removed in substance from the Commission's text.

14. Mr. SHUKAIRI (Saudi Arabia) felt that the amendments of the Netherlands and the Federal Republic of Germany should both be rejected as the Commission's text constituted a clear statement of existing law. The argument that warships should not enjoy complete freedom of passage was fully supported by Jessup, who compared the transit of such vessels through the territorial sea with the movement of an army across a foreign State's land territory.

15. Mr. BOCOBO (Philippines) said that he could not support the amendment proposed by the Federal Republic of Germany. Quite apart from the technicalities of international law, a warship should always ask for authority as a matter of elementary courtesy.

16. Mr. VERZIJL (Netherlands) said that the Colombian representative was perfectly correct in having drawn attention to the inconsistency between the Netherlands amendment and the text of article 17 as now adopted. The last sentence of that amendment should therefore be modified to read: " It may suspend such passage under the conditions envisaged in article 17, paragraph 3."

17. Mr. SÖRENSEN (Denmark) said that he had understood the Netherlands amendment in its original form to contain a reservation about innocent passage through straits, and as such he would have supported it. With the present modification consequential upon the changes made in article 17, paragraph 3, that issue remained unresolved and the United Kingdom proposal (A/CONF.13/C.1/L.37/Corr.2) acquired a special relevance. He was aware that certain straits were governed by special regulations which would remain unaffected whatever the outcome of the Conference, and on that score the Turkish delegation could be reassured, but for other straits no special provisions existed governing the right of passage of warships. His government adhered to the rule laid down by the International Court of Justice in its judgement on the Corfu Channel case that innocent passage through straits in time of peace could not be made subject to previous authorization. The Court had not dealt specifically with the question of previous notification and he therefore submitted that that requirement might be justifiable in special circumstances, though he did not intend to make a proposal in that sense because the concept of " special circumstances " could not be reduced to a general formula. As his government required previous notification for passage through secondary straits, he must reserve its position and abstain from voting on the United Kingdom amendment.

18. In the light of the provisions contained in the text of articles 17 and 18 as adopted by the First Committee at its 34th and 36th meetings, he could accept the Polish amendment (A/CONF.13/C.1/L.35).

19. The solution proposed in the amendment of the Federal Republic of Germany (A/CONF.13/C.1/L.48) satisfied his delegation because it did not preclude the possibility of previous notification being required for passage through the territorial sea and through international straits which were subjected to the same régime but did not admit a requirement of previous authorization.

20. Mr. NIKOLAEV (Union of Soviet Socialist Republics) observed that the Netherlands amendment as modified was diametrically opposed to the Commission's text and to the conditions laid down in article 17, paragraph 3. The fundamental defect of that amendment lay in its first sentence, and his delegation remained opposed to it. Nor could it support the amendment of the Federal Republic of Germany.

21. He could not agree with the Norwegian representative about the order of voting, because he considered the Netherlands amendment to be the furthest removed from the original text inasmuch as it did not admit the possibility of either previous authorization or notification.

22. Mr. LAMANI (Albania) said that both the German and the Netherlands amendments were unacceptable because the passage of warships through the territorial sea must be subjectod to prior authorization without

which passage was not innocent, but a threat to the security of the coastal State. The reason was that the great Powers had used sea-lanes for non-peaceful purposes and had violated the territorial sea of other States. In the Corfu Channel case, the International Court had condemned the violation by the United Kingdom warships of the Albanian territorial sea. He would vote for the Commission's text.

23. Mr. AGO (Italy) believed in the greatest possible freedom for navigation in the territorial sea and was anxious that the articles should be drafted as simply as possible. It followed that he preferred the amendment of the Federal Republic of Germany. If that amendment were rejected he would, albeit with some reluctance, support the Netherlands amendment although it was open to differing interpretations. He agreed with the Norwegian representative that the German amendment, being furthest removed from the original because it allowed only the requirement of previous notification, should be voted on first. Once the fate of those two amendments had been decided, he would be in a position to see what stand to take on the United Kingdom amendment.

24. Mr. SHUKAIRI (Saudi Arabia) referring to the wording adopted by the Commission at its seventh session and reproduced in paragraph 4 of the commentary to article 24, asked whether it might not be prudent to insert the word " normally " after the word " straits " in the United Kingdom amendment, and also to state specifically that it applied " in time of peace ". There was no harm in repeating that proviso in an article dealing with the passage of warships.

25. Sir Gerald FITZMAURICE (United Kingdom) said that in order to make his amendment more consistent with the Court's decision in the Corfu Channel case and to meet some of the views expressed during the discussion, he would withdraw the words " or notification ". But he was unable to accept the Saudi Arabian representative's first suggestion, because the Court had declared that States had the right " to send their warships through straits used for international navigation ".[2]

26. He was also unable to accept the second suggestion because though the words " in time of peace " had been used by the Court,[3] the whole draft convention under discussion was covered by that proviso and it would only cause confusion to mention it in a single article.

27. In reply to the Albanian representative, he pointed out that the Court had given judgement against Albania involving a large sum for damages, but that country was one of the few — if not the only one — which had failed to comply with a judgement of the Court or its predecessor.

28. Mr. GARCIA ROBLES (Mexico) opposed the German, Netherlands and Polish amendments because each of them destroyed the important balance established in the Commission's draft.

29. The CHAIRMAN decided that the amendment of the Federal Republic of Germany, since it denied any possibility of requiring previous authorization, should be voted on first.

The proposal of the Federal Republic of Germany (A/CONF.13/C.1/L.48) was rejected by 35 votes to 22, with 8 abstentions.

The Netherlands proposal (A/CONF.13/C.1/L.51) was rejected by 38 votes to 17, with 10 abstentions.

The Polish proposal (A/CONF.13/C.1/L.35) was rejected by 28 votes to 18, with 21 abstentions.

The United Kingdom proposal (A/CONF.13/C.1/L.37/Corr.2) was rejected by 27 votes to 25, with 13 abstentions.

30. Sir Gerald FITZMAURICE (United Kingdom) asked whether the Yugoslav delegation wished to maintain its proposal (A/CONF.13/C.1/L.21) for the addition of a new paragraph 2, now that with the rejection of the amendments voted upon the Committee had endorsed the principle laid down in the Commission's text that the passage of warships must be subject to previous authorization.

31. Mr. BARTOS (Yugoslavia) maintained his amendment, but indicated that the word " ship " should be corrected to read " warship ".

The Yugoslav proposal (A/CONF.13/C.1/L.21) for the addition of a new paragraph 2 was rejected by 33 votes to 7, with 22 abstentions.

The Yugoslav proposal for the addition of a new paragraph 3 was adopted by 26 votes to 4, with 33 abstentions.

32. The CHAIRMAN observed that, apart from certain amendments of form for re-arranging articles 24 and 25, one of the changes in paragraph 1 of the Spanish proposal (A/CONF.13/C.1/L.36) apparently involved a small modification of substance.

33. Mr. DE ROBLEDO (Spain) said that the purpose of the change had been to eliminate a contradiction in the Commission's text; but, as the Polish amendment had been rejected, he would withdraw his proposal.

34. The CHAIRMAN put to the vote the Commission's text for article 24 as amended.

Article 24, as amended, was adopted by 54 votes to 5, with 8 abstentions.

Establishment of a drafting committee

35. The CHAIRMAN proposed that a representative drafting committee be set up to examine all drafting points and questions of form which had arisen in regard to the articles referred to the Committee. He had consulted delegations about its composition and suggested that it consist of the following members: Mr. Ba Han (Burma), Mr. Gutiérrez Olivos (Chile), Mr. Liu (China), Mr. Sörensen (Denmark), Mr. Ruedel (France), Mr. García Robles (Mexico), Mr. Gasiorowski (Poland), Mr. Nikolaev (Union of Soviet Socialist Republics), Mr. Loutfi (United Arab Republic), Sir Gerald Fitzmaurice (United Kingdom), and Mr. Dean (United States of America). The committee would be presided over by the Chairman or one of the Committee's officers.

36. It might subsequently be found necessary to estab-

[2] *I.C.J. Reports, 1949*, p. 28.

[3] *Ibid.*

lish a separate working group to simplify amendments that gave rise to special difficulties — for instance, those to article 5.

The Chairman's proposal was adopted.

The meeting rose at 1 p.m.

FORTY-THIRD MEETING

Friday, 11 April 1958, at 2.45 p.m.

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

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

ARTICLE 22 (GOVERNMENT SHIPS OPERATED FOR COMMERCIAL PURPOSES) [A/CONF.13/C.1/L.37, L.44, L.50, L.51/Corr.1] ; ARTICLE 23 (GOVERNMENT SHIPS OPERATED FOR NON-COMMERCIAL PURPOSES) [A/CONF.13/C.1/L.37, L.48, L.50, L.51, L.155] (continued) [1]

1. The CHAIRMAN put the Romanian amendment (A/CONF.13/C.1/L.44) to article 22 to the vote.

The Romanian amendment was rejected by 28 votes to 10, with 14 abstentions.

2. The CHAIRMAN put to the vote the Korean proposal (A/CONF.13/C.1/L.50) to add a new paragraph to article 22.

The Korean amendment was rejected by 37 votes to 6, with 11 abstentions.

3. Mr. VERZIJL (Netherlands), introducing his delegation's revised amendment to article 22 (A/CONF.13/C.1/L.51/Corr.1), said that his delegation considered that article 22 should be redrafted to emphasize that the right of the coastal State defined in articles 20 and 21 should not be exercised in respect of ships owned or operated by a foreign State and used only on government non-commercial service in the sense of article 33 A adopted by the Second Committee at its 27th meeting.

4. Mr. SÖRENSEN (Denmark) believed that the Netherlands proposal should relate not to article 22, but to article 23, since article 22 as drafted by the International Law Commission referred to government ships operated for commercial purposes.

5. In view of the fact that various amendments submitted to article 22 had been rejected, he doubted whether it was necessary to retain such an article. Subsection B, comprising articles 19, 20 and 21, applied to merchant ships irrespective of ownership ; a specific provision that sub-sections A and B applied to government ships operated for non-commercial purposes was therefore redundant. The proposal that article 22 be deleted — originally made by the United Kingdom delegation but subsequently withdrawn — was a logical one, and he felt that the Committee should simply vote against Article 22 as it now stood and thus delete it.

6. Mr. URIBE HOLGUÍN (Colombia) failed to understand the meaning of the Netherlands amendment to article 22, since articles 20 and 21, mentioned therein, related to merchant ships alone.

7. Sir Gerald FITZMAURICE (United Kingdom) said that as the Netherlands amendment was intended to apply to government ships operated for non-commercial purposes, it did not relate to article 22. He believed that the effect of the amendment would be the precise opposite of what the Netherlands delegation would have wished, because certain paragraphs of articles 20 and 21 defined cases in which a coastal State might not exercise jurisdiction even in respect of ordinary merchant ships. *A fortiori,* such paragraphs would apply, at any rate by implication, to government ships operated for non-commercial purposes which enjoyed a measure of State immunity.

8. He felt that articles 22 and 23 would be unnecessary if the headings of sub-sections A, B and C were appropriately reworded, and it was for that reason that his delegation had suggested their deletion (A/CONF.13/C.1/L.37). His delegation had not in fact withdrawn that proposal, but only that relating to a new article 20 A defining government ships operated for non-commercial purposes, in the light of the fact that the Second Committee had already adopted such a definition. Provided his delegation's proposals concerning the re-wording of the headings were adopted, he could support the Danish representative's proposal that article 22 be deleted.

9. Mr. VERZIJL (Netherlands) said that he would not press his amendment to article 22 provided the headings of sub-sections A, B and C were changed in the manner proposed by the United Kingdom delegation.

10. Mr. STABELL (Norway) said that if the Committee deleted articles 22 and 23 and amended the heading of sub-section B to read " Rules specially applicable to all ships except warships and government ships operated for non-commercial purposes ", as proposed by the United Kingdom delegation, it would be plain that a ship operated for government purposes would not benefit from the immunities provided for in articles 20 and 21. He therefore considered that the Netherlands proposal, which he thought should be construed as an amendment to both articles 22 and 23, deserved further consideration. The wording proposed by the Netherlands delegation had the merit of avoiding the equivocal situation which would naturally arise under the International Law Commission's text as it stood at present, and which would equally arise if the United Kingdom delegation's proposals were adopted *in toto.*

11. The Netherlands delegation was correct in providing that the right of the coastal State, defined in articles 20 and 21, should not be exercised in respect of ships owned or operated by a foreign State and used only on government non-commercial services in the sense of article 33 A. It was true that articles 20 and 21 had been drafted to convey in negative terms the implication that a coastal State might not exercise certain jurisdiction except in certain specified cases, but they did give the coastal State the positive right of jurisdiction in those cases. The Netherlands amendment would make it clear that such restricted jurisdiction could not be

[1] Resumed from the 41st meeting.

exercised by the coastal State in respect of ships owned or operated by foreign States and used on government non-commercial service; it should therefore be very carefully considered, since both the International Law Commission's text and the United Kingdom proposals as a whole suffered from the shortcomings to which the Philippine representative had drawn attention at the 41st meeting.

12. Mr. FATTAL (Lebanon) could not accept the United Kingdom proposals concerning the headings of sub-sections A, B and C and the deletion of articles 22 and 23.

13. Sir Gerald FITZMAURICE (United Kingdom) suggested that, apart from any substantive issue which would have to be settled by the Committee itself, his delegation's proposals regarding the headings of sub-sections A, B and C and the deletion of articles 22 and 23 (A/CONF.13/C.1/L.37) should be referred to the Drafting Committee for consideration and report.

It was so agreed.

14. Mr. KRISPIS (Greece) recalled that at the 41st meeting he had withdrawn his proposal regarding article 24 (A/CONF.13/C.1/L.34) on condition that the Korean proposal to article 23 (A/CONF.13/C.1/L.50) was put to the vote. Unless that were done, he would be obliged to reintroduce the Greek amendment.

15. Mr. GUTIERREZ OLIVOS (Chile) asked whether the Netherlands amendment was to be considered as relating to article 22 or to article 23.

16. The CHAIRMAN considered that the Netherlands amendment could not be referred to the Drafting Committee, because it raised substantive issues. While the Netherlands representative had said that, on certain conditions, he would not press his amendment, if he reconsidered his position he would naturally inform the Committee whether, in view of the statements made by the Danish and Norwegian representatives, it should be considered as an amendment to article 22, as an amendment to article 23 or as a proposal for a new article to replace both those articles.

17. Mr. GARCIA ROBLES (Mexico) said that the Committee should first dispose of articles 22 and 23 as drafted by the International Law Commission; the question whether their content could best be indicated by a rearrangement of the titles of the three sub-sections could then be left to the Drafting Committee.

18. He introduced the three-power proposal relating to article 23 (A/CONF.13/C.1/L.155) sponsored by the Argentine, Chilean and Mexican delegations. The Second Committee having adopted in general terms a definition of government ships operated for non-commercial purposes, it was necessary for the First Committee to establish a classification of such ships for the purposes of innocent passage. Only some of those ships were assimilated to warships by existing rules of international law, and it was therefore necessary to distinguish between them and ships operated for civilian purposes.

19. Mr. AGO (Italy) said that the statement in paragraph 2 of the three-power proposal (A/CONF.13/C.1/L.155) was incomplete. The rules in sub-section A applied to all ships, and therefore not to government ships in category (*a*) alone, but to government ships in category (*b*) also.

20. Mr. GARCIA ROBLES (Mexico) said that the point made by the representative of Italy seemed valid; it could best be dealt with by the Drafting Committee.

21. Mr. ZAKARIYA (Iraq) pointed out that some of the terms used in the three-power proposal, such as "auxiliary purposes of a military character", and "operated indirectly", required definition.

22. Sir Gerald FITZMAURICE (United Kingdom) said that the United Kingdom Government would find it very difficult to sign any convention containing article 24, as drafted by the International Law Commission, which made the passage of warships through the territorial sea liable to previous authorization. The three-power proposal would only increase its difficulty by making other vessels liable to such a requirement.

23. His government had no record of any prior authorization having been required from its warships in time of peace, by any country, for the purpose of passage through the territorial sea. Moreover, to his knowledge, there had never been a case in which such authorization had been sought. It was therefore all the more unacceptable that such a restrictive system should be extended to supply ships and other craft which had no military potential and which could not be alleged to constitute a danger to the coastal State.

24. He shared the views expressed by the representatives of Italy and Iraq about the inadequacy and ambiguity of some of the terms used in the three-power proposal. He would like to know, for example, in which of the two categories hospital ships would be placed.

25. Mr. GUTIERREZ OLIVOS (Chile) said that the adoption of article 24 had made it necessary to distinguish between various categories of government ships. Existing rules of international law treated some of those ships as warships, and it was essential to specify that the passage through the territorial sea of those ships, and not that of other government ships operated for non-commercial purposes, could be made subject to prior authorization.

26. Mr. GARCIA ROBLES (Mexico) said that such questions as that asked by the United Kingdom representative about hospital ships could only be answered with reference to a specific case.

27. For his part, he would like to know what ships were included in the category (iii) — "vessels employed in services of a similar character to (i) and (ii)" — in the new article 33 A adopted by the Second Committee.

28. Mr. YINGLING (United States of America) said that the three-power proposal seemed to create more problems than it solved. In addition, the definition in that proposal contradicted the definition of a warship given in article 32, paragraph 2. Tankers and other craft were often chartered as supply vessels for warships; they were manned by civilian crews, and were unarmed. It was difficult to imagine any reason why such ships should be assimilated to warships.

29. Mr. STABELL (Norway) said that, at that late stage, the three-power proposal introduced an entirely new distinction between categories of government vessels operated for non-commercial purposes, which would call for careful examination by naval experts before delegations could usefully take a stand on it. It had been suggested that existing rules of international law assimilated certain auxiliary ships to warships; if that were so, the three-power proposal was redundant, and he urged its sponsors to withdraw it.

30. Mr. GUTIERREZ OLIVOS (Chile) denied that the three-power proposal was superfluous. In the absence of such a text, the definition of government ships operated for non-commercial purposes adopted by the Second Committee would apply for the purposes of innocent passage. So far as the Chilean delegation was concerned, the purpose of the three-power proposal was to make it clear that that definition did not so apply. If it was possible to reach the same result by other means, his delegation would be glad to re-consider the matter.

31. The CHAIRMAN, referring to the remarks of the Norwegian representative, said that he did not intend to put the three-power proposal to the vote until the next meeting.

32. Sir Gerald FITZMAURICE (United Kingdom) said that the Korean amendment to article 23 (A/CONF.13/C.1/L.50) went even further than the three-power proposal; it would make all government ships operated for non-commercial purposes subject to prior authorization. It would therefore be desirable to postpone the vote on that proposal as well.

33. In reply to the Mexican representative's question, he said that category (iii) of the United Kingdom definition of government ships operated for non-commercial purposes included such craft as convoy rescue ships and icebreakers. He would be interested to know whether the sponsors of the three-power proposals would regard such ships as civilian or military.

34. The CHAIRMAN agreed that the Korean amendment to article 23 should also be voted on only at the next meeting.

ARTICLE 25 (NON-OBSERVATION OF THE REGULATIONS) [A/CONF.13/C.1/L.22, L.51/Corr.2] (continued) [2]

35. The Chairman pointed out that the Committee had before it the revised Netherlands proposal (A/CONF.13/C.1/L.51/Corr.2). In view of the comment appended to it by the sponsor, he would defer its consideration until the Committee had before it the report of the drafting sub-committee on questions of form, headings and general arrangement of the articles.

36. He then put to the vote the Yugoslav amendment to article 25 (A/CONF.13/C.1/L.22).

The Yugoslav amendment to article 25 was rejected by 22 votes to 4, with 32 abstentions.

ESTABLISHMENT OF A WORKING PARTY TO DEAL WITH AMENDMENTS TO ARTICLE 5

37. The CHAIRMAN said that many amendments had been proposed to article 5, and it was essential to try to reduce their number. He proposed that that task be entrusted to a working party composed of all the sponsors of the amendments, together with the delegation of Sweden which had declared its intention of submitting amendments to that article. The working party could be presided over by the Vice-Chairman or the Committee who, as Chilean representative, would be one of its members.

The Chairman's proposal was adopted.

The meeting rose at 5.10 p.m.

FORTY-FOURTH MEETING

Saturday, 12 April 1958, at 10 a.m.

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

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

ARTICLE 23 (GOVERNMENT SHIPS OPERATED FOR NON-COMMERCIAL PURPOSES) (continued)

1. Mr. GARCIA ROBLES (Mexico), on behalf of the sponsors of the joint amendment to article 23 (A/CONF.13/C.1/L.155), asked that its consideration be deferred, because they might be willing to withdraw it if an impending decision in the Second Committee would allow that.

It was so agreed.

ARTICLES 1, 2, 3 and 66 (JURIDICAL STATUS OF THE TERRITORIAL SEA; JURIDICAL STATUS OF THE AIR SPACE OVER THE TERRITORIAL SEA AND OF ITS BED AND SUBSOIL; BREADTH OF THE TERRITORIAL SEA; CONTIGUOUS ZONE) [A/CONF.13/C.1/L.4, L.6, L.13, L.54, L.55, L.57, L.63, L.77/Rev.1, L.78 to L.81, L.82 and Corr.1, L.83, L.84, L.118, L.131 to L.141, L.144, L.149, L.152, L.153] (continued) [1]

2. Mr. SHUKAIRI (Saudi Arabia) said that many jurists, international institutions and conferences had tried to tackle the problem of the breadth of the territorial sea, and such early authorities as Meadows and Azuni had declared that, there being no universally recognized rule of law in that regard, the limit of State sovereignty over the territorial sea should be fixed by international treaty. However, there was no ground for alarm even if the Conference ended in failure in this respect, since international law would none the less continue to develop.

3. The crucial change, that had occurred since the Conference for the Codification of International Law held at The Hague in 1930, which had been attended by forty-two as opposed to the eighty-seven delegations participating in the present conference, was that the number of sovereign States had almost doubled and that ancient peoples which had now acquired statehood had become masters over their coasts and fisheries. As after

[2] Resumed from the 41st meeting.

[1] Resumed from the 40th meeting.

the fall of the Roman Empire, so once again with the dissolution of other empires and the birth of national States the breadth of the territorial sea had become a live issue and was a matter not solely of national aspiration, but of law.

4. The acid test in deciding which of the amendments and proposals before the Committee were acceptable was whether the three-mile limit constituted an existing rule of international law. He submitted that there had never been any uniform international practice in that regard, and that the Canadian representative's complaints about the diverse claims that had been made in recent years were without foundation, since throughout history each State had determined the limit in the light of historic, geographic, economic and security considerations. In support of his assertion, he quoted the opinions of Bartolus, De Casaregis, Bertodano, Sarpi, Galiani, Meadows and Valin. More interesting still had been the declaration in the treaty of peace of 1783 between the United States and Great Britain to the effect that the boundaries of the former comprehended all islands within twenty leagues of any part of its shores. Meyer had categorically stated that though those two countries were generally supposed to have established a three-mile limit, neither had actually done so.[2] Such weighty evidence demolished the case of both those delegations which had in fact only exposed the contradictions in each other's arguments.

5. Thus, despite the statement of the United Kingdom representative that according to international law the maximum breadth of the territorial sea was three miles, there was no such rule, and it had only been recognized and invoked by the United Kingdom in regard to other States but had not been applied to its own territorial sea. His charge was corroborated by Meyer who had stated that the United Kingdom did not reserve to itself three miles but found it expedient to grant it to others. Nor had the United Kingdom representative strengthened his thesis by the cautious proviso that for 200 years or so the United Kingdom adhered to and maintained the three-mile limit, since in 1878 the Lord Chancellor, when introducing a bill concerning territorial waters in the House of Lords, had stated clearly that if, for purposes of defence, trade or commerce, three miles were not sufficient, the coastal State could extend the zone. Again, parliamentary speakers in the debate on a similar bill in 1909 had denied that the three-mile limit was a rule of international law and the same argument had been put forward at the Permanent Court of Arbitration at The Hague in 1910 when the United Kingdom delegation, on being confronted with the 1882 International Convention for the Purpose of Regulating the Police of the Fisheries in the North Sea outside Territorial Waters, which referred to the three-mile limit, had ingeniously contended that the limit being fixed by treaty was precisely proof that it was not a rule binding on other States. He appealed to the United Kingdom representative to give careful thought to such a devastating refutation of his case out of the mouth of his own government.

6. Both the United Kingdom and the United States representatives had also sought to defend the three-mile limit on economic grounds, and the former's argument that a twelve-mile limit would adversely affect the food supply available for the population and his country's balance of payments was indeed a weighty one which, in fact, supported the proposal for the twelve-mile limit, since other coastal States emerging from a condition of poverty in Asia, Africa and Latin America also had to feed many millions and to balance their economies; they, surely, had prior rights to exclusive fishing off their coasts.

7. However, the main objection put forward by the United Kingdom and United States representatives against a twelve-mile limit was that it endangered the freedom of the high seas, but there again their position called for very frank comment. He would refer to only a few of the instances when those two countries had violated that principle. Wilson, in his valuable book on international law,[3] had mentioned the United States effort to establish a *mare clausum* in the Bering Sea. In 1864, the United States Secretary of State had asked the British ambassador in Washington whether it might not be advisable to extend the territorial sea to five miles, owing to the increase in the range of cannon. During negotiations for the regulation of fisheries in the Sound in 1874, it had been declared that four miles must be the minimum breadth if the territorial sea was to be limited by international convention. In 1896, the United States Government had indicated to the United Kingdom Government that it would not be unwilling to reach agreement on a delimitation of six miles. In reply to a protest in 1948 by the United Kingdom Government against a delimitation of nine miles in the Gulf of Mexico under a treaty between the United States and Mexico, the United States had declared that third parties had no just cause of complaint. Finally, the United States Supreme Court in 1804 had referred to the United States customs limit of four leagues as proof that a State might extend its control over the territorial sea as far as circumstances reasonably made it necessary, and had indicated that though, in waters like the English Channel, the limit might have to be narrower, that could not prevent extensions on the United States coast.

8. Finally, in order to prove that the two Powers in question were not solely actuated by the desire to protect the freedom of the seas, he pointed out that their attitude was largely dictated by the wish to have as wide an area as possible for naval operations during times of war, so that it was not only a monopoly of fisheries and communications in time of peace that they were anxious to secure. Those evils should be resisted by all States which genuinely loved freedom.

9. For all the foregoing reasons, his delegation opposed any reduction of the territorial sea to less than twelve miles, and had submitted its amendment (A/CONF.13/C.1/L.152) to article 3 as a saving clause; the amendment sought to insert the phrase "save in historic waters" in any proposal for article 3 which the Committee might eventually adopt. His delegation's main proposal (A/CONF.13/C.1/L.153) had been put forward, in case agreement was not reached on a twelve-mile limit, in order to keep the way open for eventual

[2] Christopher B. V. Meyer: *The Extent of Jurisdiction in Coastal Waters,* Leyden, Sijthoff, 1937.

[3] G. G. Wilson: *International Law, New York, 1935.*

settlement. It had accordingly set out in its draft resolution well-established, uncontroversial principles of international law which, if adopted, would provide a breathing-space before further negotiations were undertaken.

10. In conclusion, he declared that his own country had established a twelve-mile limit in accordance with established principles of international law, and the consent of other States to that limit was not required.

11. Mr. PETREN (Sweden) said that if agreement could not be reached on the crucial issue under discussion, the value of the Conference's work would be seriously diminished; and he too was anxious that it should not follow The Hague Conference of 1930 and end in failure. Even if a provision were adopted on the breadth of the territorial sea, but the whole draft convention was subsequently not ratified by a sufficient number of States including those with major maritime interests, no progress would have been achieved in the development of international law. Certain countries might thereby be encouraged to make greater claims than were now allowed by international law, but those claims would not be recognized by other States and that division was not as had been suggested solely between the great maritime Powers and others, for there were many small countries like his own which were totally unwilling to subscribe to a convention endorsing, for example, a width of twelve miles. His delegation had already explained (at the 6th meeting) the reasons for that attitude and for its belief that it was justified in rejecting such claims. If international law was to be changed, it must be by means of a convention freely accepted.

12. The long discussions had confirmed his conviction that above all it was necessary to safeguard the great principle of the freedom of the sea which had such a long history and which had contributed so remarkably to the progress of mankind. The legitimate interests of States which had prompted them to make claims contrary to that principle could be protected by other means, particularly conservation measures of the type under discussion in the Third Committee.

13. In view of the serious and weighty objections raised in recent years and in the Conference itself to new claims for extensions of the territorial sea, the claimants, instead of pushing their national aspirations, should content themselves with results which though more limited, would be acceptable to others. Only through such wise moderation would the Conference succeed, and he commended his delegation's proposal (A/CONF.13/C.1/L.4) for a maximum limit of six miles which was not very different from the proposals of Italy, Ceylon and the United Kingdom.

14. Sir Claude COREA (Ceylon) said that the reasons for his delegation's amendment (A/CONF.13/C.1/L.149) to article 66 had already been explained at the 37th meeting.

15. Mr. TUNCEL (Turkey) said that, while he agreed with the proposal in the Danish (A/CONF.13/C.1/L.81), Yugoslav (A/CONF.13/C.1/L.57) and United Kingdom (A/CONF.13/C.1/L.134) amendments that article 1 should mention internal waters, he preferred the United Kingdom wording because it contained the word "beyond", which would remove any danger of the provision being interpreted to mean that the exercise of sovereignty over internal waters was also subject to the subsequent articles in the draft.

16. He could not support the Greek amendment to article 1, paragraph 2 (A/CONF.13/C.1/L.63) because neither conditions nor restrictions could be imposed upon the exercise of sovereignty by the coastal State. Similarly, he could not support the Netherlands amendment to article 1 (A/CONF.13/C.1/L.83), because the coastal State had absolute sovereignty over the bed and subsoil of its territorial sea.

17. The purpose of his own amendment (A/CONF.13/C.1/L.145) was to make it clear that sovereignty was exercised subject to the right of innocent passage, in conformity with the other articles.

18. Sir Gerald FITZMAURICE (United Kingdom) found himself obliged to reply very briefly to the Saudi Arabian representative's statement, which had contained a number of misrepresentations and had left him unconvinced, as was the case with all statements which attempted to prove too much.

19. The assertion that the United Kingdom did not now and had not for a long period applied the three-mile limit to its own coasts was not only a falsehood but a patent absurdity which would gain credence nowhere. To quote from the *obiter dicta* of judges and the unofficial utterances of members of parliament counted for nothing, for it was the official policy of a country alone which determined its attitude.

20. Turning to the criticisms which had been directed against the United Kingdom proposal (A/CONF.13/C.1/L.134), he pointed out that most of those had come from the representatives of countries with which the United Kingdom enjoyed special relations. It was therefore distressing to his delegation that some of the remarks made could be interpreted as calling in question the honesty and good faith of the United Kingdom Government. Looking at those criticisms objectively, it seemed to him, in the first place, that some of the reproaches had virtually cancelled each other out. One representative, for example, had sought to prove that the United Kingdom proposal was not a genuine six-mile proposal, but a disguised three-mile one, while another had obviously regarded it as, all too regrettably, a proposal for a six-mile limit.

21. He wished to stress that his delegation's proposal, whatever its merits or otherwise, could not be said to serve any direct United Kingdom interest. His delegation realized that it was in the general interest that the Conference should not break down on the question of the breadth of the territorial sea and that a solution should be found, but the adoption of a six-mile limit would in practice cause the United Kingdom only inconvenience and loss.

22. The same could not be said of some of the proposals submitted by the critics of the United Kingdom. For example, the proposal for a three-mile limit coupled with a twelve-mile fishery zone was directly in the fishery interests of the country which had originated it. It had been put forward expressly to serve those interests and, while that was entirely natural, the United Kingdom could not accept from that quarter any reflexions on the disinterestedness of its own proposal.

23. Those remarks did not apply to certain other countries which had supported or separately put forward the same proposal for a three-mile limit with a twelve-mile fishery zone. Some of them at least stood to lose heavily by its adoption and had been inspired solely by the desire to reach a reasonable compromise. In that connexion, it was significant that practically all the willingness to compromise had come from the three-mile countries — or, in certain cases, the six-mile countries — and virtually none at all from the twelve-mile countries or those wishing to claim twelve miles. It would seem, indeed, that the majority of the Committee was intent on adopting a proposal which it knew in advance would be unacceptable to most of the maritime States. The advocates of that proposal should bear in mind that no rule would be binding on any country which had not become a party to the convention or otherwise accepted it. Moreover, the adoption of a rule which the countries owning between them around 90% of the world's shipping tonnage and conducting the major part of its deep-sea fisheries could not accept or adhere to would hardly bring the Conference great credit.

24. With regard to the United Kingdom proposal itself, he stressed that it was genuinely a proposal for a six-mile limit of territorial sea. There was, admittedly, a reservation of passage rights, but in principle that was nothing new. Passage rights through the territorial sea had always existed, yet that had not meant that the coastal State did not enjoy sovereignty over that area or that its laws and jurisdiction did not apply therein. In the same way, under the United Kingdom proposal — and subject only to certain additional passage rights outside three miles — the coastal State would have full sovereignty over the six miles of territorial sea and in the air space above it, and its laws and jurisdiction would be applicable accordingly. It would also have exclusive fishery rights within that limit, while the sea-bed and subsoil under the six miles of territorial sea would belong absolutely to the coastal State on a territorial sea and not merely on a continental shelf basis.

25. It was consequently clear that the United Kingdom proposal was a six-mile proposal and nothing else. Its adoption would admittedly involve certain technical difficulties in connexion with the Chicago Convention of 1944 on International Civil Aviation, but those could be adjusted in due course. The participants at the Chicago Conference had been chiefly concerned with flight over the land territory of a State and the whole matter had been dealt with on the assumption that there was a relatively narrow belt of territorial sea where the absence of any right of overflight would not cause any serious inconvenience or impediment to navigation. If the Chicago Conference had envisaged anything approaching a twelve-mile belt of territorial sea, the effects of the absence of the right of overflight on freedom of air communication through international straits or in narrow waters would have been immediately apparent. Even an extension to six miles involved a serious restriction on the freedom of air communication, and that was why the United Kingdom had made the express reservation to its six-mile proposal.

26. In conclusion, he again expressed the hope that the United Kingdom proposal might provide the basis for an agreement.

27. Mr. EL ERIAN (United Arab Republic) said that the many proposals relating to article 3, which all showed a commendable desire to arrive at a common standard, could be classified into several groups. The two extreme positions, neither of which seemed likely to afford a satisfactory basis for agreement, were that of the delegation of Greece (A/CONF.13/C.1/L.136), which favoured a strict limit of three miles, and that of the Peruvian delegation (A/CONF.13/C.1/L.133), which mentioned no specific distance whatever. The Greek proposal was clearly unsatisfactory as a three-mile limit was inconsistent with modern security needs, while the Peruvian proposal was at variance with the recommendation made by the International Law Commission in article 3, paragraph 4, that "the breadth of the territorial sea should be fixed by an international conference".

28. Some States wished to limit the territorial sea proper to three miles but would concede to the coastal State exclusive fishing rights in a somewhat wider zone. The two principal examples of that school of thought were the proposals of the United States (A/CONF.13/C.1/L.140) and of Canada (A/CONF.13/C.1/L.77/Rev.1), which rightly recognized the economic needs of coastal States but failed to provide for their security requirements.

29. The United Kingdom proposal (A/CONF.13/C.1/L.134) doubtless went a step further and represented a welcome effort at conciliation. Unfortunately, it tended to limit the sovereign rights of the coastal State to an intolerance extent, and in fact sought to establish one system for an inner zone and another for a outer zone.

30. Another group of States believed that a solution could only be found by a total departure from the three-mile limit and the establishment of some standard more in accord with the practice of States. The individual solutions proposed within that group varied considerably, but all seemed to accept certain principles which his delegation regarded as essential.

31. There was no denying the need for a stable rule. Apart from the general question of the codification and progressive development of international law, the absence of agreement in the matter could only give rise to friction and disputes. No rule would be realistic, however, unless it recognized the fact that most States had in practice long rejected outmoded doctrines and had fixed the territorial belt within limits varying between three and twelve miles. For those reasons, the delegation of the United Arab Republic felt bound to support the joint Indian-Mexican proposal (A/CONF.13/C.1/L.79).

32. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that, after studying all the proposals on article 3, he had come to the conclusion that many of them represented no effort to arrive at a compromise but merely sought to impose a formula that would benefit only a few States. The two most defective proposals were those of the United Kingdom and Canada, which were juridically unsound and disregarded the basic facts of international life. The United Kingdom amendment purported to propose a limit of six miles, but the provisos were so substantial that every ship would be free to roam the seas within three miles of a foreign coast. The United Kingdom proposal thus showed a flagrant

disregard for a State's right to protect its security interests. To a country like the Ukraine, which had often been the victim of assaults from the sea, that fault was sufficient to make the whole proposal worthless. The same criticism could be levelled against the Canadian proposal, which would oblige many coastal States to abandon certain rights which they had long exercised.

33. The Ukrainian delegation believed that no proposal would stand a chance of success unless it took into account the fact that most coastal States had already fixed the breadth of their territorial sea in the light of all the varied historical and economic considerations applicable to their particular coasts. It consequently favoured the proposals which confirmed a State's right to fix the breadth at any distance between three and twelve miles. A formula along those lines would harmonize the principle of the freedom of the high seas with that of the coastal State's sovereign rights over the waters washing its shores.

34. Mr. BEQIRI (Albania) stressed how important the problem of the breadth of the territorial sea was to his country, which had a sea border some 250 miles long. His government believed that the régime of the territorial sea had a double significance, for the area concerned was vital both as a source of wealth and as a defence zone.

35. History showed that each State was free to establish its own territorial limits in the light of the conditions peculiar to the area. Since such conditions varied, a lack of uniformity in the practice of States was only natural. The majority of States, however, had set limits somewhere between three and twelve miles, and any contention that the three-mile rule represented the applicable law was wholly erroneous. That rule had been refuted by history, and already at The Hague Conference of 1930 its advocates had met with a rebuff. In the modern world, therefore, the three-mile limit was clearly indefensible. That point of view was fully confirmed by the Commission, as article 3, paragraph 2, implicitly stated that any State could extend its territorial sea to a distance of twelve miles.

36. For those reasons, the Albanian delegation would resist any restrictive proposals and would support that of the Soviet Union (A/CONF.13/C.1/L.80), which would provide the fairest solution.

37. Mr. SHUKAIRI (Saudi Arabia) said that he had never intended to attack the United Kingdom representative personally, but had merely sought to expose the weakness of the United Kingdom proposal. He therefore regretted the United Kingdom representative's heated assertion that his (the Saudi Arabian representative's) statement had been a tissue of misrepresentations. The provisions of treaties, the position of the official United Kingdom delegation at the Permanent Arbitration Court at The Hague in 1910 and the statement of a sometime Lord Chancellor were, after all, a matter of public record.

38. Mr. HOOD (Australia) recalled that his delegation had always favoured the " mixed " type of formula which distinguished between the territorial sea proper and a wider zone wherein the coastal State enjoyed exclusive fishing rights. A formal proposal along those lines had since been submitted by Canada (A/CONF.13/C.1/L.77/Rev.1), and the Australian delegation, having studied all the other suggestions before the Committee, was still convinced that such a formula seemed the most likely to serve the general interest of both the coastal State and the international community.

39. Much had been said of the interest of smaller States and of the benefits which they would derive from a flexible provision authorizing extensions up to twelve miles. His delegation felt that the proponents of that view placed somewhat exaggerated emphasis on sovereignty and not enough on reality. All States were users of the high seas and all had an equal interest in preserving the freedom of communications. That being so, they should all strive to establish a régime of the sea which would prove enduring; they should remember that, however attractive extensions of the territorial sea might be as assertions of sovereignty, effective control could in practice only be exercised over a relatively narrow belt.

40. The question of fishing was something strictly distinct. Fishing rights could be secured without extensions of the territorial sea proper and it was precisely because it offered a fair solution on that very point that the Canadian formula seemed the most suitable. It also had the essential quality of unambiguity and would cause the minimum disarrangement of existing practice. Nor should it be regarded solely as an effort at conciliation, for it was also a generous offer to surrender certain long-established rights and to risk at least temporary inconvenience. Exclusive fishing rights having never been recognized by international law, the Canadian proposal, which sought to affirm them, could not be viewed as a mere paper compromise.

41. Mr. ULLOA SOTOMAYOR (Peru) asked whether the Soviet Union delegation's proposal (A/CONF.13/C.1/L.80) meant that, as a rule, the territorial sea should only be fixed within the limits of three to twelve miles but that, in certain special circumstances, a State might be justified in exceeding the twelve-mile maximum. The text also seemed to suggest that the various conditions and interests which would justify a given breadth within the generally admissible limits would also be the decisive factors when it came to an exception.

42. Mr. NIKOLAEV (Union of Soviet Socialist Republics) replied that the normal limits of three to twelve miles reflected the conclusions of the International Law Commission. The words " as a rule " merely recognized that special cases might on occasions arise. Lastly, the purpose of listing the various factors which should be taken into account had been to stress that, in fixing their territorial sea, States should at all times respect the general interests of international navigation.

43. Mr. FATTAL (Lebanon) said that his delegation would have to oppose the Soviet Union proposal because it set no genuine limit and merely sought to give statutory authority to the existing state of anarchy. Many such formulae had already been proposed in the International Law Commission, but each had at least made some provision for the settlement of eventual disputes. Without the proper machinery to deal with violations of the freedom of navigation and with the conflicts to which the vagueness of the formula would inevitably

give rise, the Soviet Union proposal would be wholly valueless.

44. The Lebanese delegation would vote for the Indian-Mexican proposal, although it realized its imperfections. In a time of real peace it would have preferred a standard six-mile rule, but in the prevailing international conditions that proposal would afford surer guarantees to coastal States.

The meeting rose at 1 p.m.

FORTY-FIFTH MEETING

Saturday, 12 April 1958, at 3 p.m.

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

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

ARTICLE 23 (GOVERNMENT SHIPS OPERATED FOR NON-COMMERCIAL PURPOSES) (continued)

1. Mr. GARCIA ROBLES (Mexico) said that the Second Committee had just voted, at its thirty-second meeting held that day, to reconsider its decision taken at the 27th meeting concerning the definition of government ships operated for non-commercial purposes. Since the three-power proposal for article 23 (A/CONF.13/C.1/L.155) had been introduced as a consequence of the adoption of that definition by the Second Committee, it was desirable to await the final decision of the Second Committee before proceeding with the discussion of article 23.

2. The CHAIRMAN said that the Committee would await the result of the deliberations of the Second Committee on that point before proceeding with article 23.

ARTICLES 1, 2, 3 and 66 (JURIDICAL STATUS OF THE TERRITORIAL SEA; JURIDICAL STATUS OF THE AIR SPACE OVER THE TERRITORIAL SEA AND OF ITS BED AND SUBSOIL; BREADTH OF THE TERRITORIAL SEA; CONTIGUOUS ZONE) [A/CONF.13/C.1/L.4, L.6, L.13, L.54, L.55, L.57, L.63, L.77/Rev.1, L.78 to L.81, L.82 and Corr.1, L.83, L.84, L.118, L.131 to L.141, L.144, L.145, L.149, L.152, L.153] (continued)

3. Mr. POVETIEV (Byelorussian Soviet Socialist Republic) said that his delegation considered article 66, as drafted by the International Law Commission, generally acceptable.

4. His delegation supported the proposals of the Philippines (A/CONF.13/C.1/L.13), Poland (A/CONF.13/C.1/L.78) and Yugoslavia (A/CONF.13/C.1/L.54) concerning security measures in the contiguous zone. Some States had fixed the breadth of their territorial sea at less than twelve miles, and they should have the right to adopt security measures up to a limit of twelve miles from their coasts.

5. His delegation was in favour of a territorial sea of twelve miles; consequently, it fully agreed to the recognition of the exclusive fishing rights of the coastal State up to a distance of twelve miles.

6. His delegation could not, however, support the proposals of Canada (A/CONF.13/C.1/L.77/Rev.1) and the United States (A/CONF.13/C.1/L.140) because those proposals linked the recognition of such exclusive fishing rights with a territorial sea of three miles. Although those proposals had been presented to the Committee as a serious concession to closer international co-operation, their aim was not solely to protect those interests which made it necessary for many coastal States to extend the breadth of their territorial waters to twelve miles. In fact, the adoption of those proposals would entail a serious restriction on the rights of the coastal States whose territorial waters already extended to a breadth of twelve miles, a restriction not only of their sovereignty over their territorial waters, but also of their security interests in the contiguous zone, interests which were provided for in the proposals of other delegation such as those of Poland, the Philippines and Yugoslavia.

ARTICLE 4 (NORMAL BASELINE) [A/CONF.13/C.1/L.6, L.58, L.62, L.63, L.81, L.85, L.87, L.89, L.90, L.94, L.143]

7. Mr. RUEDEL (France) introduced his delegation's amendment to article 4 (A/CONF.13/C.1/L.6). The purpose of the amendment was to clarify the meaning of the provisions of article 4. The term " low-water line " was somewhat vague; that line varied considerably with the tide. For that reason, his delegation proposed that that expression should be supplemented with the words " or isobath zero with reference to the datum sounding line ". In addition, his delegation proposed the deletion of the term " large-scale ", and that the reference should be simply to those nautical charts published or officially adopted by the coastal State. In practice, large-scale charts were issued only for harbours and certain special sea areas.

8. Sir Gerald FITZMAURICE (United Kingdom) introduced his delegation's amendment to article 4 (A/CONF.13/C.1/L.62) which was largely a drafting amendment. Its effect would be to replace the reference to bays and islands by a reference to article 7. Islands were mentioned in article 10, but that article did not provide for a delimitation of the territorial sea of an island which was in any way different from that applied in the mainland.

9. The CHAIRMAN said that the United Kingdom amendment would be referred to the Drafting Committee.

10. Mr. DE ROBLEDO (Spain) introduced his delegation's amendment to article 4 (A/CONF.13/C.1/L.90). His delegation proposed that articles 4 and 6 should be combined into a single article dealing with the inner and outer limits of the territorial sea. It proposed the introduction of the term " lower low-water line ", which had the same meaning as the expression used in the French amendment (A/CONF.13/C.1/L.6). Lastly, his delegation proposed the deletion of the proviso concerning article 5 because article 4 contained the general rule. It was article 5 which constituted an exception.

11. The CHAIRMAN said that perhaps the Spanish amendment might be referred to the Drafting Committee.

12. Mr. TUNCEL (Turkey) said that the title of the Spanish proposal referred to the inner and outer limits of the territorial sea. The proposal itself combined the provisions at present contained in articles 4 and 6. Those articles, however, did not contain all the provisions relating to the inner and outer limits of the territorial sea. Articles 5, 7 and 8, for example, dealt with the inner limits and articles 6, 9, 11 and 12 with the outer limits.

13. The CHAIRMAN said that the Turkish representative's observations would be referred to the Drafting Committee.

14. Mr. GARCIA ROBLES (Mexico) explained that the Mexican delegation's amendment (A/CONF.13/C.1/L.89) affected the Spanish text only. Its purpose was to provide a correct rendering of the English term " low-water line ".

15. Mr. YINGLING (United States of America) introduced his delegation's amendment to article 4 (A/CONF.13/C.1/L.87). The purpose of the amendment was to improve the drafting of article 4.

16. Mr. KATICIC (Yugoslavia) said that the United States proposal involved a point of substance in so far as it referred to " the low-tide on the mainland " ; it made no reference to islands, whereas the International Law Commission's draft referred to " the coast ", thereby covering both mainland and islands.

17. Mr. YINGLING (United States of America) said that islands were covered by article 10.

18. The CHAIRMAN referred to the proposals submitted by Denmark (A/CONF.13/C.1/L.81), Greece (A/CONF.13/C.1/L.63), China (A/CONF.13/C.1/L.85), and Turkey (A/CONF.13/C.1/L.94), to Yugoslavia's proposal to add a new article after article 5 (A/CONF.13/C.1/L.58), and to the terms of the letter from the Chairman of the Second Committee (A/CONF.13/C.1/L.143). Apart from the Danish proposal (A/CONF.13/C.1/L.81), all those proposals substantially reproduced the provisions of article 26, paragraph 2, and could therefore be conveniently referred to the Drafting Committee.

19. Mr. SÖRENSEN (Denmark) introduced his delegation's proposal to insert a new article 2 A defining internal waters (A/CONF.13/C.1/L.81).

20. By paragraph 1 of the new article proposed by his delegation, areas of the sea within the normal base line were declared internal waters unconditionally.

21. By virtue of paragraph 2 of the proposed provision, areas of the sea lying between the normal baseline and straight baselines could be declared internal waters by the coastal State, with the proviso that any part of those areas which had normally been used for international traffic would be considered in all circumstances as belonging to the territorial sea. A proviso of that type would meet the objections made to the drawing of straight baselines on the grounds of interference with the freedom of navigation. The adoption of the proposal would make it possible to dispense with article 5, paragraph 3, which provided for a right of innocent passage through internal waters normally used for international traffic.

22. Mr. CARMONA (Venezuela) said that a Venezuelan enactment of 1956 clearly specified that waters within the baseline of the territorial sea were internal waters, both in the case of waters within the normal baseline and in the case of water within straight baselines. The drawing of straight baselines was a century-old practice and had not been initiated by the decision of the International Court of Justice in the Anglo-Norwegian fisheries case in 1951.[1] The waters within such baselines had always been regarded as internal waters and the Venezuelan delegation could not support any other view.

23. Mr. LIU (China) introduced his delegation's proposal for the addition of a new paragraph to article 4 (A/CONF.13/C.1/L.85). The definition of inland waters was not in its place in article 26, which concerned the high seas ; it belonged to the section dealing with the territorial sea, in which there were several references to internal waters.

24. Mr. TUNCEL (Turkey), introducing the Turkish delegation's amendment to article 4 (A/CONF.13/C.1/L.94), quoted the International Law Commission's commentary on article 26, paragraph 2. The proposed provision should appear at the end of the clauses dealing with the inner limits of the territorial sea.

25. Mr. KATICIC (Yugoslavia) felt that the amendments proposed by Greece (A/CONF.13/C.1/L.63), China (A/CONF.13/C.1/L.85), Turkey (A/CONF.13/C.1/L.94) and Yugoslavia (A/CONF.13/C.1/L.58) were not wholly drafting amendments.

26. The Yugoslav amendment had been submitted in order to emphasize the fact that waters within the base line of the territorial sea should be considered as internal waters. That provision should be included in article 5, or in a new article to follow article 5.

27. Sir Gerald FITZMAURICE (United Kingdom), referring to the French delegation's amendment to article 4 (A/CONF.13/C.1/L.6), said that it involved a technical problem as did the amendments submitted by the Spanish delegation (A/CONF.13/C.1/L.90) and the delegation of Mexico (A/CONF.13/C.1/L.89). He suggested that they should be referred to technical experts. Citing article 4, he said that, according to his information, the datum line of the normal chart was actually fixed considerably lower than what was called " isobath zero " in the French proposal or the " lower low-water line " in the Spanish amendment. If that was the general practice, it might well be that the wording of article 4 as drafted would be adequate.

28. Mr. AGO (Italy) said that his delegation did not object to the definition of internal waters appearing in a separate article, to be inserted after article 5, instead of in article 26. But the question of internal waters should not be discussed until after the submission of

[1] *I.C.J. Reports, 1951,* p. 116.

the report of the working party dealing with amendments to article 5.

29. Mr. KRISPIS (Greece) referring to the new article 2 A proposed by the Danish delegation (A/CONF.13/C.1/L.81), pointed out that a statement to the effect that " areas of the sea within the normal baseline " were considered internal waters would be correct if it were found in a scientific legal book, but, in view of the text of the International Law Commission, it seemed that there existed no sea waters within the normal baseline, as defined in article 4. There were sea waters only within the straight baseline (article 5 of the text) as well as within the closing line of a bay (article 7, paragraph 3, of the text). The Danish proposal might mean that areas of the sea within the closing line of a bay were considered internal waters.

30. Mr. SÖRENSEN (Denmark) said that he would be grateful for any drafting suggestions which would make the meaning of the proposed article 2 A clear.

31. Referring to the Italian representative's suggestion, he felt that it would be difficult for the Committee to reach a decision on the principles of application of a system of straight baselines without knowing what decision would be taken regarding the waters included within such baselines. The two problems of the principle of straight baselines and that of the status of the waters within them could not be considered separately, but should be studied by the same working group. The fact that the Danish proposal regarding a new article 2 A involved a slight consequential amendment to article 5 was another important reason why those two problems should be considered together.

32. Sir Gerald FITZMAURICE (United Kingdom) said that it was not his delegation's wish to dispute the view that the waters to landward of baselines were internal waters, but it greatly sympathized with the idea underlying the Danish proposal for a new article 2 A, and especially with the idea behind paragraph 1 of that proposal.

33. Until comparatively recently there had been little doubt as to what were internal waters since they were generally regarded as being waters situated behind the coastline, such as rivers, estuaries, canals, lakes, and so forth. In the case of bays the water behind the straight baseline was also considered as internal waters.

34. The institution of straight baselines was a comparatively modern innovation, the drawing of which had been sanctioned by the International Court of Justice in the Anglo-Norwegian fisheries case in connexion with certain types of coasts. An entirely different situation had thus arisen, and waters situated behind a straight baseline which was nevertheless in front of a coast had also been classified as internal waters.

35. He felt that the Conference might be confronted with the question whether some kind of distinction should not be drawn between the two categories of internal waters, and pointed out that the problem of the right of passage might arise in the case of internal waters which were in front of a coastline but behind a straight baseline. The point might perhaps be discussed with experts.

36. Mr. PETREN (Sweden) said he could not agree with the United Kingdom representative's statement, and suggested that the Committee should defer further discussion of articles 4 and 5 until it received the report of the working group.

37. Mr. STABELL (Norway) said he could not agree with the United Kingdom representative that there were two categories of internal waters. The internal waters which were enclosed by straight baselines, such as those which had been at issue in the Anglo-Norwegian fisheries case, did not differ in any respect from other internal waters.

38. He felt that the Danish proposal for a new article 2 A introduced a new aspect into the international law regarding the marginal seas. A problem which might arise if that proposal was adopted concerned the status of internal waters which, on the entry into force of any convention adopted by the Conference, might already be enclosed behind straight baselines. He wondered whether their status would be changed in any way or whether the rule in the Danish proposal applied only to such parts of the high seas or territorial waters as might in the future be enclosed by straight baselines.

39. The CHAIRMAN suggested that the representative of Turkey should become a member of the Working Party dealing with amendments to article 5.

It was so decided.

The Committee decided to refer the proposal of the Danish delegation (A/CONF.13/C.1/L.81) and that of the Turkish delegation (A/CONF.13/C.1/L.94) to the Working Party dealing with amendments to article 5.

The meeting rose at 5.15 p.m.

FORTY-SIXTH MEETING

Monday, 14 April 1958, at 3.30 p.m.

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

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

ARTICLE 8 (PORTS) [A/CONF.13/C.1/L.97, L.101]

1. Mr. STABELL (Norway), introducing the amendment proposed by the Norwegian delegation (A/CONF.13/C.1/L.97), said that the mandatory expression " shall be regarded " was too categorical. The permissive term " may " would be more appropriate, as a State could not reasonably be required to advance the baseline or outer limit of its territorial sea against its will.

2. Mr. BOAVIDA (Portugal) said that the new paragraph proposed by his delegation (A/CONF.13/C.1/L.101) merely stated a rule of existing international law; it was fully consistent with the text of article 27 (Freedom of the high seas) adopted by the Second Committee at its 22nd meeting.

3. Mr. SHUKAIRI (Saudi Arabia) thought that the Norwegian amendment would leave the text open to various interpretations and detract from its clarity. The