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**A/CN.4/97 and Corr.1 and Add. 1-3**

**Report on Questions Relating to the Regime of the High Seas and the Territorial Sea by  
Mr. J.P.A. François, Special Rapporteur**

Topic:

**Law of the sea - régime of the high seas**

Extract from the Yearbook of the International Law Commission:-

**1956 , vol. II**

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# INTERNATIONAL LAW COMMISSION

## DOCUMENTS OF THE EIGHTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

### REGIME OF THE HIGH SEAS AND REGIME OF THE TERRITORIAL SEA

#### DOCUMENT A/CN.4/97 \*

Report by J. P. A. François, Special Rapporteur

[Original text: French]

[27 January 1956]

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#### Introduction

1. The International Law Commission is to submit to the General Assembly, at its eleventh session, a set of draft rules relating to the law of the sea. The text will include the provisional articles adopted by the Commission concerning the high seas, the territorial sea, the continental shelf, contiguous zones and the conservation of the living resources of the high seas.

2. The Commission cannot submit the various draft provisions to the General Assembly in the form in which they were respectively adopted at different times. In the first place, they will have to be recast so as to constitute a single co-ordinated and systematic body of rules; some articles will have to be revised, with a view to

harmonizing the provisions and avoiding repetition. It will then be necessary to fill the gaps which a study of the draft as a whole is bound to reveal.

3. A considerable part of the final draft will be taken up by the provisions relating to the high seas and the territorial sea. The draft articles on these two subjects have already been submitted to Governments for comment. As regards the territorial sea, the draft has already received a second reading and further comments have been requested from Governments on certain points left outstanding at the time of the first reading.

4. Governments have been requested to transmit their comments to the Secretariat before 1 January 1956. As, however, a number of these replies will probably not arrive until after that date, the Rapporteur will submit a supplementary report to the Commission after he has

\* Incorporating document A/CN.4/97/Corr. 1.

had an opportunity to peruse them. The present part of the report deals only with those questions which could already be given full consideration.

### I. Order of chapters of final report

5. We could base our plan on the notion that the dominant feature of any statement of the law of the sea must be the principle of the freedom of the seas. As that freedom is subject to certain restrictions, it would be logical to deal first with the régime of the high seas, where that freedom is enjoyed to the greatest extent, and subsequently to consider the other parts of the sea, in which these restrictions are imposed: contiguous zones, the continental shelf and the territorial sea.

6. It is equally possible, however, to follow another method and to begin with that part of the sea in which the authority of the State asserts itself to the greatest degree; the first topic would then be the territorial sea, which is regarded as subject to the sovereignty of the State. We could then proceed to consider the continental shelf, the contiguous zones and the high seas, where the authority of the State can only be exercised to a limited degree.

7. The Rapporteur is of the opinion that the second method is preferable. The question here is not the controversial issue whether the territorial sea should be regarded as a part of the high seas wherein the coastal State enjoys certain special privileges, or as an extension of the territory of the coastal State, which is bound to grant some special rights therein to other States. The only question in the present context is how to present the subject to Governments in the clearest and most readily comprehensible manner. From this point of view, it seems preferable to consider first the régime of the territorial sea and then to deal with the restrictions on the freedom of the seas in the areas adjacent thereto.

8. The Rapporteur accordingly proposes that the chapters of the final report should be placed in the following order:

- I. Introduction.
- II. The territorial sea.
- III. The continental shelf.
- IV. Contiguous zones.
- V. The high seas (including the conservation of living resources).

### II. Establishment of a central authority empowered to make regulations

9. On several occasions, the Commission has considered the desirability of establishing an authority, within the framework of the United Nations, which would study all such questions relating to the sea as might give rise to differences of opinion between the States concerned, on issues of international law. The authority's principal function would be to make regulations covering all the points where the interests of the various users of the sea might conflict. As regards the conservation of the living resources of the sea, the Commission has already provided for the establishment of

such a body. Article 3 of section III (Fisheries) of the Commission's report on the work of its fifth session reads as follows:

"States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."<sup>1</sup>

10. In the comment which follows, we read the following:

"As stated, the system thus formulated by the Commission does not differ substantially from that provisionally adopted by the Commission at its third session. Thus, it was laid down, in article 2, that a permanent international body competent to conduct investigations of the world's fisheries and the methods employed in exploiting them 'should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves'. It is significant of the present state of opinion and of the widely-felt need for the removal of what is considered by many to be a condition approaching anarchy that, in the replies sent by Governments, no opposition was voiced against the proposal then advanced by the Commission."<sup>2</sup>

11. The first objection to the establishment of such a body with competence over the entire subject is that difficulties might arise owing to the very diversity of interests with which it would have to deal. It would have to rule on all sorts of questions concerning navigation, fishing, the determination of boundaries and limits, the exploitation of the sea-bed and subsoil, and so forth. A single authority might find it difficult to deal with all these subjects. The situation is further complicated by the fact that different solutions often have to be found for different seas and parts of the world. Such an organization might tend to apply an excessively uniform standard to varying situations and fail to take adequate account of the different interests concerned.

12. The Rapporteur should point out that many organizations, each dealing with a specific sector, have already been created in this field.

13. In the first place, we should mention the Intergovernmental Maritime Consultative Organization (IMCO), which is to be established pursuant to the Convention adopted on 6 March 1948 by a large number of maritime States and likely to come into force in the near future. The purposes of the organization are, *inter alia*, to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade. Pursuant

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 94.

<sup>2</sup> *Ibid.*, para. 99.

to article 17 of the Convention, a Council consisting of sixteen members shall be composed as follows:

(a) Six shall be Governments of the nations with the largest interest in providing international shipping services;

(b) Six shall be Governments of other nations with the largest interest in international seaborne trade;

(c) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services; and

(d) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in international seaborne trade.

14. The Council shall, *inter alia*, receive the recommendations and reports of the Maritime Safety Committee; the latter shall have the duty of considering any matter within the scope of the Organization and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, and so forth.

15. There are many inter-governmental commissions, set up by virtue of international conventions, dealing with various aspects of sea-fishing. The list of organizations represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at the headquarters of the Food and Agriculture Organization of the United Nations in 1955, mentions the following commissions:<sup>3</sup>

General Fisheries Council for the Mediterranean;

Indo-Pacific Fisheries Council;

International Pacific Salmon Fisheries Commission;

International Pacific Halibut Commission;

International Commission for the Northwest Atlantic Fisheries;

International Council for the Exploration of the Sea;

Permanent Commission under the 1946 Convention for the Regulation of the Meshes of Fishing and the Size Limits of Fish;

Inter-American Tropical Tuna Commission;

International North Pacific Fisheries Commission;

Permanent Commission for the Exploitation of the Maritime Resources of the South Pacific;

International Whaling Commission.

16. This list, which does not even include all the organizations active in that field, shows the variety of interests involved. Such a large number of organizations could doubtless, in itself, give rise to some difficulties; a degree of centralization, or at least co-ordination, might therefore present some advantages. Maritime interests all have common features, even if each has a distinct character, and the fragmentary regulations issued by this host of organizations may fail to provide for certain

<sup>3</sup> See *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April to 10 May 1955* (United Nations publication, Sales No.: 1955.II. B.2), para. 6.

aspects which are not within the specialized purview of any one body. It will be necessary, therefore, to bring some harmony into the picture while avoiding any excessively rigid centralization. We could consider the establishment of a central body divided into several sections, each of which would deal with a specific sector of this vast subject; it might thus be possible to combine the necessary co-ordination with the equally indispensable specialization.

17. A further question which arises is whether such a body should only be of an advisory character, or whether its decisions should be binding on the parties. The draft articles relating to fisheries, adopted at the Commission's fifth session, give the decisions of the proposed authority binding force. Those regulations, however, were not intended to be applicable to sea-fishing in general but only to the conservation of the living resources of the sea. In a study entitled *Plateau continental et droit international*, our eminent colleague Professor Georges Scelle advocates the establishment of a similar authority to deal with questions pertaining to the regime of the continental shelf. The author states:

"The outstanding feature of the system recommended with regard to fisheries (or the resources of the sea) is that the powers envisaged therein are not jurisdictional but regulatory (or legislative). This represents an acceptance of functional federalism. The same progressive step could equally well be taken with regard to the continental shelf. An *international* body, organized within the framework of the United Nations, would then be required to:

(a) Specify the conditions with which concessions on the continental shelf would have to comply in order to safeguard the freedom of navigation and other rights over sea areas in common use;

(b) Act as the international *administrative authority* which would take over from the State authorities the power to grant concessions of that kind."<sup>4</sup>

18. If we wish to go even further, we could consider the possibility of setting up a body with regulatory (legislative) powers to deal not only with fisheries and the continental shelf but with all questions of public law affecting the sea. The Rapporteur feels that the establishment of such a "maritime office" is not yet feasible. The Commission should nevertheless consider the different proposals and state its views on the points they contain.

### III. Settlement of disputes

19. At various stages of the discussion, the Commission turned to the question whether the draft articles should contain clauses providing for compulsory jurisdiction or arbitration. In this connexion, the Commission adopted the following course:

20. *Territorial sea*. No provision on this subject was included.

21. *Continental shelf*. The Commission inserted article 8, worded as follows:

<sup>4</sup> Georges Scelle, *Plateau continental et droit international* (Paris, Editions A. Pedone, 1955), p. 59.

"Any disputes which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties."<sup>5</sup>

The relevant comment reads as follows:

"In the view of the Commission, there are compelling reasons which render essential a clause of this nature. As already stated (see above, paragraph 68 *et seq.*) the articles on the continental shelf represent an attempt to reconcile the established principles of international law governing the régime of the high seas with the recognition of the rights of the coastal State over the continental shelf. Any such reconciliation, based as it must be on the continuous necessity of assessing the relative importance of the interests involved, must leave room for a measure of elasticity and discretion. Thus, it must often remain a question for subjective appreciation, with the consequent possibility of disputes, whether — in the words of paragraph 1 of article 6 — the measures taken by the coastal State for the exploration and exploitation of the continental shelf constitute 'unjustifiable' interference with navigation or fishing; whether, according to paragraph 2 of that article, the safety zones established by the coastal State are at a 'reasonable' distance around the installations; whether, in the words of paragraph 5 of that article, a sea lane is a 'recognized' sea lane and whether it is 'essential to international navigation'; or whether the coastal State, in preventing the establishment of submarine cables, is, in fact, acting within the spirit of article 5 which makes such action permissible only if necessitated by 'reasonable' measures for the exploration and exploitation of the continental shelf. The new régime of the continental shelf, unless kept within the confines of legality and of impartial determination of its operation, may constitute a threat to the overriding principle of the freedom of the seas and to peaceful relations between States. For these reasons, it seems essential that States which are in dispute concerning the exploration or exploitation of the continental shelf should be under a duty to submit to arbitration any disputes arising in this connexion. It is for this reason that the Commission, although it does not propose the adoption of a convention on the continental shelf, thought it essential to establish the principle of arbitration.

"Certain members of the Commission were opposed to the insertion in the draft of a clause on compulsory arbitration on the grounds that there was no reason for imposing on States one only of the various measures laid down in current international law, and particularly in Article 33 of the Charter of the United Nations, for the pacific settlement of international disputes. They also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. Certain members raised the further objection that such a clause would give any contracting State the right to take action on any pretext against the other contracting States by a unilateral request to international tribunals, thus increasing the possibility in present cir-

cumstances of putting pressure on the weaker States and in effect curtailing their independence.

"The provision for arbitration as laid down in article 8 does not exclude any other procedure agreed upon by the parties as a means for the formal settlement of the dispute. In particular, they may agree, in matters of general importance, to refer the dispute to the International Court of Justice.

"Inasmuch as the articles on the continental shelf cover generally its exploration and exploitation, arbitration referred to in article 8 must be regarded as applying to all disputes arising out of the exploration or exploitation of the continental shelf and affecting the international relations of the State concerned. This will cover, for instance, disputes arising in connexion with the existence of common deposits situated across the surface boundaries of the submarine areas, a problem which has arisen in some countries in the relations of owners of adjoining oil deposits."<sup>6</sup>

22. *Contiguous zones.* No provision was adopted.

23. *The high seas.* The Rapporteur feels that, in this connexion, the following questions should be considered: (1) Is it advisable to insert clauses concerning the settlement of disputes? (2) If the answer is in the affirmative, should the compulsory jurisdiction of the International Court of Justice be accepted with regard to every dispute arising from the interpretation of the rules of the law of the sea? (3) Is it preferable to adopt a general arbitral clause? (4) Or else, should the jurisdiction of the Court or of the arbitral tribunal be strictly limited to disputes on previously specified questions? (5) Could the authority envisaged in section II above be vested with judicial powers?

(1) The question whether the provisions should contain rules concerning the settlement of disputes has given rise to differences of opinion among the members of the Commission on every occasion when it was proposed that a clause conferring jurisdiction or providing for arbitration should be inserted in any of the chapters.

On the one hand, it was argued that the question of jurisdiction was outside the competence of the Commission, whose task was of a purely legislative nature. The members who supported this point of view thought that the question of the settlement of any disputes to which the rules might give rise should be left to States, which would apply the general rules governing disputes arising between them.

On the other hand, it was shown that the legislative rules proposed by the Commission on this subject were inevitably couched in such vague terms that any dispute regarding their application in specific cases would necessitate interpretation by a judicial body. Several States would doubtless be unwilling to accept them without this guarantee. A compulsory jurisdiction or arbitration clause is thus an essential feature of the regulations. At earlier sessions, the majority of the Commission supported the insertion of such clauses. The Commission will now have to express a final opinion on this point bearing in mind

<sup>5</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 62.*

<sup>6</sup> *Ibid.*, para. 87-90.

the possible repercussions of its decision on the adoption of the draft provisions.

(2) and (3) The Commission, while fully aware of the advantages to be derived from a reference to the Court rather than to an arbitral Tribunal, will have to consider whether, in view of the strictly technical character of many disputes in this field, arbitration should not be given pride of place.

(4) The Commission will perhaps wish to consider the possibility of limiting compulsory arbitration to certain issues where there is special need for an objective interpretation and where the technical character of the dispute calls for an inquiry by a duly qualified body. The Commission adopted that line in providing for the establishment of an arbitral commission to determine disputes concerning the conservation of the living resources of the high seas. The Commission has also proposed an arbitral body to settle disputes concerning the continental shelf, although, in this particular case, the composition of the arbitral tribunal has not been stated. It might be possible to insert a clause providing for jurisdiction or arbitration in general terms and thus to make possible the constitution of special arbitral bodies to adjudicate on disputes of a highly technical character.

(5) If it should become possible to establish a central authority empowered to make regulations, as described in section II above, a division or chamber of that authority could be vested with judicial functions.

In any event, the Commission will have to consider the question of the settlement of disputes as a whole and co-ordinate the relevant provisions inserted in the different drafts.

#### IV. Contiguous zones and the continental shelf

24. As regards contiguous zones, the Commission adopted at its fifth session, as part of the work on the régime of the high seas, the following single article:

“On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the base line from which the width of the territorial sea is measured.”<sup>7</sup>

25. It is stated in the comment that apart from some qualifications and reservations, the principle underlying this article encountered no opposition on the part of Governments. The Commission believes this principle to be in accordance with a widely adopted practice.

26. Under this article, the contiguous zone shall extend over a distance of twelve miles, measured from the base line from which the width of the territorial sea is measured. The base line in this case is the normal base line referred to in article 4 of the draft articles on the régime of the territorial sea,<sup>8</sup> except where the special circumstances referred to in article 5 allow a State to employ the system of straight base lines.

27. In fixing the limit of the contiguous zone at twelve miles, at its fifth session, the Commission did not intend to prejudice the results of its subsequent examination of the question of the limits of the territorial sea. Certain members of the Commission nevertheless submitted that, in their opinion, the adoption of the article on the contiguous zones prejudged the decision on the outer limit of the territorial sea.

28. The Rapporteur cannot share this opinion. As the Commission has rejected the suggestion that the territorial sea can lawfully be extended beyond twelve miles, the article cannot, in the Rapporteur's view, give rise to any difficulties merely because the Commission has not specified the outer limit of the territorial sea within that twelve-mile belt. At The Hague Codification Conference of 1930, there was no question of allowing States a contiguous zone measured from the outer limits of the territorial sea independently of the breadth of the latter. The idea underlying the institution of contiguous zones was that in present circumstances, especially having regard to the speed of vessels, a belt of sea of three, four, six or even eight miles was no longer sufficient to enable States to exercise certain powers necessary for the protection of their interests. It was agreed that, for that purpose, they required a maritime zone extending up to twelve miles from the coast. Those twelve miles were set as a maximum, regardless of the breadth of territorial sea claimed by the coastal State. It follows, therefore, that the article is perfectly consistent with the one provisionally adopted by the Commission with regard to the breadth of the territorial sea. A State which claims a territorial sea twelve miles broad has no right, in the Commission's view, to claim any further contiguous zone, as it can exercise within that territorial sea all the rights which the Commission intended to concede to States in contiguous zones.

29. Another question is what rights a State may in fact exercise in the contiguous zone. The Commission stated that the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. The rights of the coastal State in the contiguous zone do not, therefore, include any rights in connexion with security or the right to prevent foreign nationals from fishing. On the other hand, with regard to measures for the conservation of the living resources of the sea, the State may take any of the measures permitted under the provisions adopted by the Commission at its seventh session. It is to be hoped that when these proposals are adopted the question of excluding foreign fishermen from the contiguous zone will become less acute.

30. The controversial question of “security” remains unresolved. This question should not, however, necessarily preclude agreement. It will have to be accepted that, in the majority of cases, the exercise of customs control will afford a sufficient safeguard. As to defence measures against an imminent and direct threat to its security, it is clear that a State has an inherent right to take certain protective measures both within the contiguous zone and outside it. For this reason, it seems unnecessary, and even

<sup>7</sup> *Ibid.*, para. 105.

<sup>8</sup> *Ibid.*, Tenth Session, Supplement No. 9, chap. III.

undesirable, to mention any special right connected with security among the rights which the coastal State may exercise in the contiguous zone.

31. Another question which may be raised is that of the exact nature of the right which a State may exercise in the contiguous zone. It is a right of sovereignty, analogous to the right which a State exercises over its territory and territorial sea? Sir Gerald Fitzmaurice has disputed that contention; the record of the discussion on the right of pursuit, at the Commission's 291st meeting, reads as follows:

"Sir Gerald Fitzmaurice wished to draw attention to one important point concerning the distinction between the territorial sea proper and the contiguous zone. He agreed with Mr. Amado that the third sentence in paragraph 1<sup>9</sup> represented a very considerable extension of the concept of the high seas. The territorial sea as such was subject to the jurisdiction of the coastal State. That State had no jurisdiction over the waters of the contiguous zone, but possessed certain rights in respect of vessels traversing it. It was therefore open to question whether the doctrine of hot pursuit was applicable to the contiguous zone in the same way as to the territorial sea; if it were, its application must clearly be limited to the particular rights exercised in that zone. (A/CN.4/SR.291, para. 41.)

"As he saw it, foreign vessels in the territorial sea were subject to the laws of the coastal State, whereas in the contiguous zone international law recognized that the coastal State had a right to enforce certain of its laws if it could, but also that foreign vessels had no actual obligation to obey. The position was, in some respects, analogous with that of the rights of warships of belligerent States to enforce laws concerning contraband in respect of neutral vessels. If the doctrine he had expounded was correct, it was logical to allow hot pursuit against an infringement of the law of the coastal State committed within its territorial sea, but the situation was not the same in the contiguous zone, where it was legitimate for foreign vessels to avoid, if they could, the enforcement of laws by vessels of the coastal State." (A/CN.4/SR.291, para. 48.)

32. The majority of the Commission showed that it did not support Sir Gerald's views, by rejecting a proposal to delete the words "if the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any

<sup>9</sup> Sir Gerald Fitzmaurice was referring to article 29, paragraph 1, of the draft articles relating to the régime of the high seas contained in the sixth report of the Special Rapporteur on the régime of the high seas (A/CN.4/79). The paragraph reads as follows:

"The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inland waters of the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any interest for the protection of which the said zone was established."

interest<sup>10</sup> for the protection of which the said zone was established". It was thus the majority opinion that the rights exercised by the coastal State in the contiguous zone are not essentially different from the rights exercised in the territorial sea.

33. It seems difficult to substantiate any other view. In the Rapporteur's opinion, the Codification Conference never intended, in formulating the concept of the contiguous zone, to create any special rights of the type suggested by Sir Gerald. The Rapporteur readily concedes that Sir Gerald gave a true statement of the position of warships of belligerent States in relation to neutral vessels carrying contraband, but it is impossible to accept the contention that the same rules apply to vessels traversing the contiguous zone in peace time. In the Rapporteur's opinion, the coastal State's right in the contiguous zone is intrinsically no different, in this respect, from the rights which the coastal State exercises in its territorial sea. There is nothing in the work of the Codification Conference to show an intention to establish a special régime. Neither the comments of the Preparatory Committee nor the report of the Second Committee of the Conference contain any indication to that effect.

34. In the Rapporteur's opinion, therefore, the correct view is that the coastal State enjoys certain specified rights over a twelve-mile belt, even where that belt extends beyond its territorial sea into the high seas, and that it can exercise control over that zone, in customs and sanitary matters, in the same manner as in the territorial sea. Foreign vessels in that zone are obliged to obey the instructions given by the public vessels of the coastal State in the lawful exercise of those rights. If a different point of view were accepted and a foreign vessel came to be boarded by a vessel of the coastal State, the resulting situation would be incompatible with the relations prevailing between Powers at peace with each other.

35. In the article already referred to in paragraph 17, our eminent colleague, Professor Georges Scelle, asks the following:

"How can the upholders of the theory of the contiguous zones (logical though that theory is *per se*) reconcile their idea with that of the continental shelf... Should we conclude that the continental shelf can be regarded as a further contiguous zone, of an extremely variable breadth, within which States may take measures for the protection of the resources of the sea? In what respect does control in customs, fiscal or other matters differ from control or sovereignty over the continental shelf? We have not had even a hint of an answer to any of these questions. Do the territorial sea, the contiguous zone and the continental shelf represent three successive stages of encroachment upon the high seas? If so, we are not told how these régimes differ from each other or whether they fall within a common pattern?"<sup>11</sup>

36. In the Rapporteur's opinion, the régime of the continental shelf, as suggested by the Commission, confers on the coastal State *no* right to exercise customs and fiscal

<sup>10</sup> The word "interest" was subsequently superseded by "right".

<sup>11</sup> Scelle, *op.cit.*, pp. 15 and 16.

control in the sea over the continental shelf. If there is any such right to exercise customs or fiscal control beyond the limits of the territorial sea, it can only derive from the concept of the contiguous zone.

37. The only question which the Commission should consider in this connexion is whether a contiguous zone twelve miles broad, intended as a customs vigilance zone, is sufficient to protect the fiscal interests of the coastal State in cases where a much wider continental shelf, extending opposite its coast, is used for the installation of drilling equipment and for the shipment of the wealth obtained therefrom. The Commission will have to decide whether, in such a case, the contiguous zone should be extended beyond twelve miles and, if the answer is in the affirmative, what should be the limit of that extension.

### V. Regulation of fisheries

38. The systematic classification of the provisions concerning fishing raises certain difficulties. Questions concerning fishing arise: (a) in the territorial sea; (b) in contiguous zones; (c) in the sea over the continental shelf; (d) on the high seas.

(a) Fishing in the territorial sea may be regulated by the coastal State, which may reserve all the fishing rights to its own nationals. The question arises, however, whether States, or an international authority dealing with questions of fisheries, should be empowered to intervene if the fishing operations in such waters constitute a threat to the conservation of the living resources of the sea. The rules adopted by the Commission at its seventh session do not provide for this contingency. It would seem that such a right of intervention would not be unreasonable if it were vested in States having a special interest in the maintenance of the productive capacity of the living resources in such waters. This would require an extension of the provisions of article 30 of the rules concerning the high seas.<sup>12</sup> A State having a special interest in the conservation of living resources in the sea of another State should have the right to request that other State to take the necessary measures to ensure conservation. Failing satisfaction, the requesting State should be entitled to submit the dispute to arbitration.

(b) As the Commission does not recognize the existence of a contiguous zone for purposes of fishing, fisheries in such zones are governed by the régime of the high seas. The provisions concerning the conservation of the living resources of the high seas are also applicable therein.

(c) As to the sea area covering the continental shelf, the applicable rule is contained in article 24, according to which all States may claim for their nationals their right to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the Commission's proposals concerning conservation of the living resources of the high seas.<sup>13</sup> Fishing will not give rise to any difficulties as long as there are few installations for the exploitation of the sea-bed. If the number of

such installations increases, it is possible that they may interfere with fishing in some areas. This case is, however, envisaged by article 6, paragraph 1, of the draft articles on the continental shelf, which reads as follows:

"The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, *fishing or fish production*."<sup>14</sup>

### VI. Sedentary fisheries

39. In the report on the work of its third session,<sup>15</sup> the Commission made the régime of the continental shelf applicable only to mineral resources and proposed special provisions for sedentary fisheries. Under that plan, the provisions applicable to sedentary fisheries would have been included in the chapter concerning fisheries. At its fifth session,<sup>16</sup> the Commission decided, after considerable discussion, to retain the term "natural resources" rather than "mineral resources". The Commission came to the conclusion that the products of sedentary fisheries, to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term "natural resources". It was then pointed out in the comment that the coastal State must respect, in this connexion, the existing right of other States. It might be desirable to insert a provision to that effect in the articles themselves. It might also help if an explicit statement in the comment confirmed that attachment to the sea-bed is a necessary condition for the application of that provision, thus clearly showing that the article did not cover the removal of roving species. With the text thus amplified the only "sedentary fisheries" requiring separate provisions would be those situated outside the continental shelf. In view of the fact, however, that according to the Commission's definition the continental shelf includes the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of 200 metres and that, to the best of the Commission's knowledge, sedentary fisheries are never encountered at a depth exceeding 200 metres, it seems unnecessary to mention sedentary fisheries other than those already governed by the provisions concerning the continental shelf.

40. There is, however, one aspect on the question which the Commission has overlooked; this was pointed out by Mr. Mouton in his lecture at the Academy of International Law at The Hague in 1954,<sup>17</sup> and by Mr. Viktor Böhmert in an article entitled "Meeresfreiheit und Schelfproklamationen".<sup>18</sup> In the report on the work of its third session, the Commission stated:

"the proposals refer to fisheries regarded as sedentary because of the species caught or the equip-

<sup>14</sup> *Ibid.*, Eighth Session, Supplement No. 9, para. 62.

<sup>15</sup> *Ibid.*, Sixth Session, Supplement No. 9.

<sup>16</sup> *Ibid.*, Eighth Session, Supplement No. 9, chap. III.

<sup>17</sup> M. W. Mouton, "The Continental Shelf", *Recueil des cours de l'Académie de droit international*, 1954, I, p. 445.

<sup>18</sup> *Jahrbuch für internationales Recht*, Vol. 5, 1954 (Göttingen, Vandenhoeck & Ruprecht, 1955), p. 19.

<sup>12</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, chap. II.

<sup>13</sup> *Ibid.*

ment used, e.g., stakes embedded in the sea-floor".<sup>19</sup>

In the report on the work of its fifth session, the Commission states:

"The Commission, however, came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term 'natural resources'. It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there."<sup>20</sup>

41. It follows from the above that the products of fisheries regarded as sedentary fisheries because of the equipment used are not included in the expression "natural resources" and that such fisheries do not fall within the scope of draft article 2. The equipment used, even if it is embedded in the sea-floor, is not devoted to the exploration or exploitation of the natural resources of the continental shelf. There is consequently no provision in the Commission's last draft concerning fisheries of this nature.

42. The Rapporteur suggests that the original article 3 concerning sedentary fisheries should be reintroduced in the chapter dealing with fisheries, subject to an express exception with regard to natural resources permanently attached to the bed of the sea. The article would thus be worded as follows:

"1. The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals.

"2. The provisions of the preceding paragraph shall not apply to fisheries on the high seas over the continental shelf, where the products are natural resources permanently attached to the bed of the sea. These fisheries shall be governed by the provisions of article 2, subject to the proviso that the existing rights of nationals of other States must be respected."

## VII. Points on which discussion was deferred at the seventh session

### A. RIGHT OF PASSAGE IN WATERS WHICH BECOME INTERNAL WATERS WHEN THE STRAIGHT BASE-LINE SYSTEM IS APPLIED

43. At the seventh session, the question arose whether in waters which become internal waters when the straight base-line system is applied the right of passage should not be granted in the same way as in the territorial sea. The Commission did not feel called upon to take a deci-

sion on this subject, and proposed to refer to it at a later date.

44. The same question had already been raised by the United Kingdom Government in its comments on the provisional articles concerning the régime of the territorial sea as adopted by the Commission at its sixth session. Her Majesty's Government stated the following:

"The measurement of the territorial sea from base lines has, even where justified, two main consequences as compared with the measurement of the territorial sea from the low-water mark. The first is that the *internal* waters of the coastal State are extended. In other words, there is a greater area of water from which it may be argued that, in principle, under present rules, the coastal State may exclude foreign shipping. The second consequence is that, though the actual area of *territorial* waters is not increased — the belt of territorial waters remains a three-mile belt whether it is measured from the low-water mark or from base lines — the outer limit of territorial waters is pushed further out to sea than would otherwise be the case. In other words, the total area of high seas is reduced. In these circumstances, Her Majesty's Government regard it as imperative, in any new code which would render legitimate the use of base lines in proper circumstances, it should be clearly stated that the right of innocent passage shall not be prejudiced thereby, even though this may involve that, in certain cases, this right shall become exercisable through internal as well as through territorial waters. Her Majesty's Government consider that the Commission would be performing a most useful function if it were to give mature consideration to the problem how the use of base lines is to be reconciled with existing rights of passage. For their part, Her Majesty's Government can only say at this stage that, in their view, in case of conflict, the right of passage, as a prior right and the right of the international community, must prevail over any alleged claim of individual coastal States to extend the areas subject to their exclusive jurisdiction."<sup>21</sup>

45. At the Commission's 299th meeting, Sir Gerald Fitzmaurice again raised this question. He recalled the following:

"... that at the sixth session Mr. Lauterpacht had introduced a proposal concerning the right of passage in internal waters; a proposal which he had subsequently withdrawn while reserving the right to reintroduce it. He (Sir Gerald Fitzmaurice) now wished to propose the insertion of a similar article, which could well find its place after article 21, and which would read as follows:

"The principle of the freedom of innocent passage governing the territorial sea shall also apply to areas enclosed between the coastline and the straight base line drawn in accordance with article 5."

"The judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway had recognized the right of a country such as Norway, the coast

<sup>19</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9, annex, Part II, article 3, first paragraph of comment.*

<sup>20</sup> *Ibid., Eighth Session, Supplement No. 9, para. 70.*

<sup>21</sup> *Ibid., Tenth Session, Supplement No. 9, pp. 43-44.*

of which was deeply indented or cut into, to measure the breadth of its territorial sea from straight base lines drawn from headland to headland, or from headland to island under certain conditions.

“That judgement had been concerned only with the method of measuring the breadth of the territorial sea and its effect on the extent thereof. It had, however, had a secondary effect which the International Court had not contemplated, and, indeed, had been under no compulsion to consider, in delivering its judgement on the fisheries issue. That effect was that the waters between the straight base lines and the coast acquired a new legal status: instead of territorial waters, they were now internal waters. Until that time, internal waters—where no right of passage existed—had covered only rivers, lakes, estuaries and certain deep bays, that was, waters almost exclusively behind the coastline. The new internal waters were on the seaward side of the coast, and were now to be excluded from the régime of the territorial sea. Hence his proposal concerning the recognition of the right of innocent passage in those waters which, upon straight base lines being drawn in front of them, had ceased to be part of the territorial sea and had technically become internal waters.

“The waters which were thus now technically known as internal waters were geographically part of the sea and necessary to navigation. The right of innocent passage therein must therefore be protected, at least in cases where the waters concerned had always been used by international shipping.

“When the subject had been discussed in the sixth session, the Special Rapporteur had pointed out that most of the waters enclosed within the Norwegian base lines were in any event too dangerous to be navigated, so that the question of the right of passage therein would not arise in practice. That was not always the case: the Norwegian base lines enclosed, and had thus transformed into internal waters, the important traditional shipping lane between the islands and the Norwegian coast known as the Indreleia. Moreover, the concept of base lines resulting from the International Court of Justice’s judgement in the Norwegian Fisheries Case could well be applied by States other than Norway. It was true that so far only Iceland, and Denmark with regard to Greenland, appeared to have done so, but it was always open to any State with a rugged coastline to invoke the principle in question. It was therefore extremely important that the Commission should lay it down as a general principle that where territorial waters were thus abruptly transformed into internal waters, following the drawing of straight base lines, the right of innocent passage in such waters should persist, to allow international shipping to continue to use them without let or hindrance.” (A/CN.4/SR.299, paras. 85-89.)

46. At the Commission’s 316th meeting, the Special Rapporteur made certain observations on this subject. He stated he could not accept that proposition.

“That suggestion proceeded from the erroneous assumption that the essential purpose of the straight base line system was to extend the outer limit of the

territorial sea. In fact, the system was primarily aimed at increasing the zone of internal waters wherein navigation might be restricted by the coastal State. That such was the primary consideration in Scandinavia — an example particularly pertinent to the issue — was shown by the Swedish Government’s comment on article 5, in which the point was made that article 5 appeared to be based on the same idea as that expressed in Swedish law concerning internal waters.

“The Commission could not, after giving the coastal State the right to draw straight base lines, take away the main corollary of that right by making provision for the right of passage. He quoted the French legal dictum: ‘*donner et retenir ne vaut*’.

“Furthermore, the United Kingdom proposal would give rise to a complex situation in which there would be three types of waters:

- “1. Internal waters properly so called;
- “2. Internal waters subject to right of passage;
- “3. Territorial waters;

“It would be extremely difficult to draw a demarcation line between the first and second of those two categories of waters, particularly in the case of a deeply indented coastline.

“For all those reasons, he felt that the United Kingdom Government’s suggestion could not be entertained.” (A/CN.4/SR.316, paras. 25-29)

47. In his reply to those observations, Sir Gerald said that, in his opinion, there was no difficulty:

“The area of water involved was simply that lying between the new straight base lines and the old limit of the internal waters. The latter limit, by and large, only enclosed waters which were actually behind the coastline, such as those of estuaries, lagoons and certain deep bays.” (A/CN.4/SR.316, para. 53)

48. The Commission will have to decide between these different points of view.

#### B. THE EXPLORATION AND EXPLOITATION OF THE SEA-BED AND SUBSOIL OF THE HIGH SEAS OUTSIDE THE CONTINENTAL SHELF

49. In the report on the work of its seventh session, the Commission pointed out that it had not studied this problem in detail.<sup>23</sup> It seems to the Rapporteur that the Commission will not have to consider the freedom of States to explore or exploit the subsoil of the high seas outside the continental shelf. The construction of permanent installations for that purpose in sea areas where the depth exceeds 200 metres is at present impossible, and is likely to remain so for some considerable time.

#### C. SCIENTIFIC RESEARCH ON THE HIGH SEAS OUTSIDE THE CONTINENTAL SHELF

50. The Commission also pointed out that it had not studied the problem of scientific research in detail at its seventh session.<sup>24</sup> It accordingly expressed no opinion on

<sup>22</sup> *Ibid.*, annex, section 13.

<sup>23</sup> *Ibid.*, chap. II, comments on article 2.

<sup>24</sup> *Ibid.*

the question whether the freedom of the seas includes the freedom of each State to engage in any form of scientific research it desires, even if, as a consequence thereof, large sea areas used by others for purposes of navigation or fishing become closed to shipping. Attention has been drawn to this problem principally by research into the effects of atomic or hydrogen bombs.

51. Two articles published in *The Yale Law Journal* of April 1955 set forth the arguments both for and against hydrogen bomb tests on the high seas. The article, "The Hydrogen Bomb Experiments and International Law", by Mr. Emanuel Margolis, a member of the American Society of International Law, denounces such experiments as inconsistent with the freedom of the seas;<sup>25</sup> the other article, by Mr. Myres S. McDougal and Mr. Norbert A. Schlei, entitled "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security" defends the experiments.<sup>26</sup> Mr. McDougal has published his opinion, in an abridged version, in *The American Journal of International Law* of July 1955;<sup>27</sup> he summarizes his views as follows:

"What is most relevant in prior prescriptions from the régime of the high seas and can be applied without irrational extrapolation to this new problem of the hydrogen bomb tests, is simply the test of *reasonableness* — the test by which the decision-makers of the world community have in modern times adjudicated all controversies involving conflicts between claims to navigation and fishing and other claims."<sup>28</sup>

52. Recognizing the soundness of this argument and recalling that the International Law Commission has frequently introduced the concept of "reasonableness" in its draft articles, the Rapporteur would suggest, as a basis for discussion, the following statement of principle:

"The freedom of the high seas does not include the right to utilize the high seas in a manner which unreasonably prevents other States from enjoying that freedom. Scientific research and tests of new weapons on the high seas are only permitted subject to this qualification."

#### D. SCIENTIFIC RESEARCH ON THE HIGH SEAS COVERING THE CONTINENTAL SHELF

53. The Commission's proposals concerning the continental shelf have caused some anxiety among the scientific unions, which felt that the freedom to engage in scientific research on the high seas was being threatened.

54. The International Council of Scientific Unions, at its General Assembly held at Oslo in August 1955, adopted a resolution which, in its final form, reads:

<sup>25</sup> *The Yale Law Journal*, Vol. 64, No. 5 (April 1955), pp. 629-647.

<sup>26</sup> *Ibid.*, pp. 648-710.

<sup>27</sup> Myres S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea", *The American Journal of International Law*, Vol. 49 (1955), pp. 356-361.

<sup>28</sup> *Ibid.*, p. 361.

"The International Council of Scientific Unions, met in General Assembly at Oslo, August 9—12, 1955,

"*Resolves* to ask the Director-General of UNESCO to transmit to the Secretary-General of the United Nations its request, namely, that the International Law Commission consider the incorporation, in the 'Comments on the Draft Articles' contained in the report which the Commission will submit to the United Nations for 1956, of the form and meaning of the resolution of the ICSU already transmitted to the Secretary-General of the United Nations, together with the supporting resolutions of the International Union of Geodesy and Geophysics and of the International Union of Biological Sciences; and

"*Resolves further* that the adhering organizations in these countries represented on the International Law Commission, namely, Brazil, Mexico, Netherlands, USA, USSR, UK, India, Sweden, France, Greece, be instructed to impress upon their representative on the Commission the urgency of framing and incorporating such a comment in the 1956 report."

55. The Council's resolution adopted in April 1954 read as follows:

"The Tenth Meeting of the Bureau of the International Council of Scientific Unions, met in London in April 1954;

"*Considering* that the United Nations Educational, Scientific and Cultural Organization is the principal organ of the United Nations in the domain of international scientific relations;

"*Considering* that it has, in that capacity, recognized the International Council of Scientific Unions as the competent authority in matters concerning the international organization of science, by concluding a formal agreement with the ICSU;

"*Notes* the terms of the draft articles on the continental shelf adopted at the fifth session of the International Law Commission;

"*Views* with alarm the possible consequences to fundamental research in the geophysics, submarine geology, and marine biology of the sea-bed and subsoil of the continental shelf;

"*Asserts* that fundamental research by any nation carried out with the intention of open publication is in the interest of all;

"*Requests* the Director-General of UNESCO to transmit the substance of this resolution forthwith to the Economic and Social Council with the urgent plea that it be brought to the notice of the General Assembly of the United Nations at the earliest opportunity;

"*Expresses* the hope that the Assembly will so amend the draft articles before they become law as to ensure that such fundamental research at sea may proceed without vexatious obstruction."

56. In the Rapporteur's opinion, as far as physical oceanography is concerned, the freedom to engage in research in the waters covering the continental shelf is in no way affected by the proposed rules. The coastal State

will not have the right to prohibit purely scientific research such as, for instance, research concerning the conservation of the living resources of the sea. The coastal State's consent will, however, be necessary before any research is undertaken relating to the exploration or exploitation of the sea-bed and subsoil. It does not seem unreasonable to require such authorization as actual exploitation will inevitably require the co-operation of the Government concerned. It also seems advisable not to permit experiments with atomic and hydrogen bombs except with the prior consent of the coastal State.

57. The Commission might consider the possibility of including a provision designed to eliminate all misunderstanding in this connexion. Such a provision might be worded as follows:

"On the high seas covering the continental shelf, States other than the coastal State may engage in scientific research with the same freedom as on the high seas; provided that scientific research bearing on the exploration or exploitation of the sea-bed or subsoil and tests with new weapons may only be conducted with the approval of the coastal State."

### VIII. Omissions and ambiguities noted in recent publications

#### A. THE RIGHTS OF THE COASTAL STATE OVER THE CONTINENTAL SHELF

58. In his work entitled *L'évolution juridique de la doctrine du plateau continental*, the Brazilian author Mr. Ceccatto states:

"It seems that the restriction of the rights of the State to the exploration and exploitation of the natural resources of the continental shelf is somewhat at variance with the spirit of the principles previously stated. To accept such a restriction would imply acceptance of the principle that if a coastal State is unable effectively to exploit the continental shelf it has no sovereign rights over it, and that any other State can acquire those rights by engaging in the exploitation of the area's resources. In other words, we would be reverting to the notion of occupation which the International Law Commission has expressly rejected. The present attitude, besides being unduly restrictive, seems ambiguous and wanting in that positive character which is so essential in legal relationships. Consequently, taking into account the earlier reasoning and the fact that the Commission considers that the geographical phenomena of propinquity, contiguity, continuity, appurtenance or identity of the submarine areas in question with the contiguous land affords a sufficient basis for the principle of sovereign rights of the coastal State, it is possible to conclude that article 2 of the draft articles should be worded as follows: *The coastal State exercises sovereign rights over the continental shelf*. This would represent an unqualified recognition of the rights of the sovereign State and preclude any possibility of conflict arising

from the interpretation of restrictive clauses." <sup>29</sup>

59. The present text was adopted by the Commission after a very exhaustive discussion. The Rapporteur nevertheless believes that the attention of the members of the Commission should be drawn to Mr. Ceccatto's observations. An explanation in the comment on the articles might perhaps dispel all misunderstanding on this topic.

#### B. INSTALLATIONS IN THE TERRITORIAL SEA

60. The Netherlands author Mr. Mouton <sup>30</sup> has raised the question whether the coastal State is allowed to build installations for the exploitation of the subsoil in its own territorial sea in such a way that innocent passage becomes impossible. Under article 6 of the draft articles on the continental shelf, <sup>31</sup> neither the installations themselves, nor the safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation. That article applies to the continental shelf and therefore not to the territorial sea but to the high seas. Nevertheless, in the Rapporteur's opinion, the same principle should be followed as regards innocent passage through the territorial sea. In narrow channels or on recognized sea lanes essential to international navigation, innocent passage must not be impeded. A provision to that effect might be included in the draft articles.

#### C. SEISMIC EXPLORATIONS

61. Mr. Mouton <sup>32</sup> is of the opinion that the Commission has paid insufficient attention to the question of the destructive effect on marine life of seismic explorations undertaken to ascertain the existence of oil deposits. He feels that article 6 is insufficient in this respect. The first paragraph of that article reads as follows:

"The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing, or fish production."

62. In the Rapporteur's opinion, it will be sufficient if this point is mentioned in the comment.

#### D. POLLUTION OF SEA-WATER BY INSTALLATIONS AND PIPELINES

63. In this connexion, Mr. Mouton <sup>33</sup> is of the opinion that article 6 <sup>34</sup> may not cover the point; he reproaches the Commission for not even mentioning oil pollution in the comments.

64. Mr. Scelle shares these misgivings:

"The question of pipelines raises the no less important problem of the escape of oil into the superjacent waters. No other accidental occurrence is as destructive of marine life through its poisoning effects. This dan-

<sup>29</sup> Gastão Nascimento Ceccatto, *L'évolution juridique de la doctrine du plateau continental* (Paris, Editions A. Pedone, 1955), p. 132.

<sup>30</sup> Mouton, *loc. cit.*, p. 390.

<sup>31</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 62.

<sup>32</sup> Mouton, *loc. cit.*, p. 392.

<sup>33</sup> *Ibid.*, p. 394.

<sup>34</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 62.

ger, already common because of the passage of oil tankers, should certainly not be rendered even greater by untimely drilling, by the bursting of pipelines and by transshipment on floating installations. All these disadvantages of exploration and exploitation, which we have merely listed without going into details, seem to outweigh the somewhat problematic blessings which such operations will allegedly bring to mankind.”<sup>35</sup>

65. The Rapporteur would suggest the insertion of a special paragraph on this subject in the comment on article 6, showing that the provision is also designed to guard against the danger of pollution of sea-water by oil.

#### E. SAFETY ZONES AROUND PIPELINES

66. Mr. Mouton proposes the insertion of the following paragraph:

“The coastal State is entitled to establish a safety zone of 250 metres on either side of these pipe-lines in which ships are not to anchor and trawlers are forbidden to fish.”<sup>36</sup>

67. The Rapporteur believes that such a prohibition would constitute a further encroachment on the freedom of navigation and fishing and that it is consequently unjustified. It would prove very difficult, in practice, to mark the limits of such a zone. In the Rapporteur’s opinion, the provisions of article 35 of the draft articles on the régime of the high seas are sufficient. The article is worded as follows:

“Every State shall take the necessary legislative measures to provide that the breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communications, or the breaking or injuring of a submarine pipe-line in like circumstances, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such break or injury.”<sup>37</sup>

#### F. DISTINCTION BETWEEN INNOCENT PASSAGE IN THE TERRITORIAL SEA AND ACCESS TO PORTS

68. Mr. Philip C. Jessup has made the following observation on this subject:

“The result of these three paragraphs seems to be that a vessel passing through territorial waters en route to or from a port of the coastal state is considered to be exercising the right of innocent passage. It is believed that the contrary view expressed in the Comment

to Article 14 of the Harvard Research Draft on Territorial Waters is the correct one. This was the view strongly stated by the United States delegate at the 1930 Hague Codification Conference and supported by Great Britain. Other delegates, however, such as those from Belgium, Norway, Germany and Japan wished to include vessels en route to or from a port. The British delegate then modified his proposal to include vessels leaving the port for the high seas. The text finally recommended included passage to or from inland waters. However, as the Belgian delegate made clear, he and others were influenced by the desire to avoid being more restrictive than the 1923 Statute on the International Régime of Maritime Ports. Access to ports should, however, properly be considered a topic separate from innocent passage. The jurisdictional rights of a coastal state are different in the two cases, exercise of jurisdiction over ships entering or leaving ports being in many instances reasonable or even necessary, while such exercise over a vessel in innocent passage could not be justified. The point is not discussed in the Comment on Article 17 of the International Law Commission draft or in the Report of the Rapporteur to the Commission. Either modification of the text or supporting argument in favor of the rule advocated is called for. The International Law Commission could clarify this and subsequent articles by devoting a separate article or section to ‘Access to Ports’.”<sup>38</sup>

69. The Rapporteur cannot agree that an express distinction between the two topics would render the text any clearer. It is true that the régime applicable in the two cases, in some respects, different, but it is equally true that, in several other respects, the two cases are identical. The Rapporteur would prefer to retain the system proposed by the 1930 Conference, whereby the general régime applicable to vessels traversing the territorial sea is also applicable to ships entering or leaving port, subject to the reservations specified in the Commission’s draft articles (article 21, para. 2; article 22, para. 4).<sup>39</sup>

#### G. RIGHT OF PASSAGE OF FISHING VESSELS

70. Mr. Jessup regrets that the Commission has never answered the question whether fishing vessels enjoy the right of innocent passage;<sup>40</sup> this problem apparently gave rise to differences of opinion at the Conference on mutual fishing problems held in 1953 between the United States and Ecuador. In the Rapporteur’s opinion, it is clear that the right of innocent passage is also enjoyed by fishing vessels. If the Commission agrees, an express statement to that effect might be included in the comment.

<sup>35</sup> Scelle, *op. cit.*, p. 30.

<sup>36</sup> Mouton, *loc. cit.*, p. 400.

<sup>37</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, chap. II.*

<sup>38</sup> Philip C. Jessup, “The International Law Commission’s 1954 Report on the Régime of the Territorial Sea”, *The American Journal of International Law*, Vol. 49 (1955), p. 226.

<sup>39</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, chap. III.*

<sup>40</sup> Jessup, *loc. cit.*, p. 227.

## DOCUMENT A/CN.4/97/Add.1 to 3

## Summary of replies from Governments and conclusions of the Special Rapporteur

1. The Rapporteur wishes to preface this part of his report by pointing out that in most cases it is not possible to summarize the replies of Governments without detriment to their full significance. It therefore remains essential to consult the full text of these replies contained in document A/CN.4/99 and Add.1 to 9.

*Document A/CN.4/97/Add.1*

[Original text: French]

[1 May 1956]

## I. REGIME OF THE HIGH SEAS

*Article 1: Definition of the high seas**Philippines (A/CN.4/99)*

2. The Philippine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Philippines. In case of archipelagos or territories composed of many islands like the Philippines, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas.

3. The Rapporteur proposes that this question be dealt with in article 10 of the chapter on the territorial sea in connexion with "groups of islands".

*Turkey (A/CN.4/99)*

4. The Turkish Government proposes that the words "or in the internal seas" be inserted between the words "not included in the territorial sea" and the words "or internal waters of a State".

5. The Rapporteur points out that the words "internal waters" cover internal seas; he therefore sees no necessity for the proposed addition.

6. The Turkish Government might perhaps be satisfied if it was brought out in the chapter on the territorial sea that waters beyond the base lines referred to in articles 4 and 5 of that chapter are to remain internal waters.

*Israel (A/CN.4/99/Add.1)*

7. According to the Government of Israel the article lacks precision.

8. The Rapporteur hopes that the addition proposed above concerning the territorial sea will satisfy the Government of Israel.

*United Kingdom (A/CN.4/99/Add.1)*

9. The Government of the United Kingdom proposes that the words "that are not included" be substituted for "which are not included".

*United States of America (A/CN.4/99/Add.1)*

10. The United States Government is in agreement with the text proposed.

*Yugoslavia (A/CN.4/99/Add.1)*

11. The Yugoslav Government proposes the following wording:

"For the purpose of these rules the term 'high seas' means all parts of the sea which are not included in inland waters, territorial sea or contiguous zone."

12. The Rapporteur cannot accept this wording. The contiguous zone, as accepted by the Commission, forms part of the high sea. The article adopted by the Commission at its fifth session was worded as follows:

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to . . . etc."

*Conclusion*

13. The Rapporteur proposes that this article should not be amended.

*Article 2: Freedom of the high seas**Belgium (A/CN.4/99)*

14. The following text is proposed for the first sentence:

"The high seas being open to all nations, no State may subject them to its jurisdiction, sovereignty or any authority whatsoever."

15. The Rapporteur supports this proposal.

*India (A/CN.4/99)*

16. The Government of India proposes the following wording:

"These freedoms shall be enjoyed in conformity with the provisions of these articles and other rules of international law."

17. The Commission having frequently treated the rules as forming a single whole, it is not necessary to refer, in articles concerning principle, to the limitations resulting from the articles that follow.

18. Reference to "other rules of international law" has already been criticized in the Commission on several occasions.

*Israel (A/CN.4/99/Add.1)*

19. The four freedoms are not accorded equal treatment. Freedom to fly over the high seas is not dealt with in the rules that follow.

20. This is quite true; the Commission decided, however, not to go into the details of aerial law. This will have to be dealt with later.

*United Kingdom (A/CN.4/99/Add.1)*

21. The Government of the United Kingdom proposes the following wording:

"The high seas being open to all nations, no State

may purport to subject any part of them to its jurisdiction."

22. The Rapporteur accepts the proposal to insert the words "purport to".

23. The United Kingdom Government then proposes the addition of a fifth item:

"Freedom of research . . . , experiment and exploration".

24. This question is discussed by the Rapporteur in the general section of his report.

25. It then proposes the addition of a sixth item, worded as follows:

"The right to regulate the operation of foreign vessels in the coastal trade in those cases where such ships are permitted to engage in that trade."

The Rapporteur considers that this addition is outside the scope of the article; the "freedom" in question is of quite a different kind from those laid down in the four (or five) previous cases. If necessary it could be made the subject of a new article.

#### Conclusion

26. The Rapporteur proposes the following text:

"The high seas being open to all nations, no State may purport to subject them to its jurisdiction, sovereignty or any authority whatsoever. Freedom of the high seas comprises, *inter alia*:" (the 4 cases follow).

#### Article 3. Right of navigation

*United Kingdom* (A/CN.4/99/Add.1)

27. The Government of the United Kingdom proposes that the word "has" be substituted for the words "shall have". The Rapporteur accepts this drafting change.

28. Insert the word "equal" before the word "right". The Rapporteur prefers the present text. An "equal right" would not exclude limitations applying to all nations.

#### Conclusion

29. The text could be retained subject to the drafting change in the English.

#### Article 4: Status of ships

*Israel* (A/CN.4/99/Add.1)

30. The question of the flag of international organizations calls for further study by the Commission before the draft is placed before the General Assembly.

31. While recognizing the importance of this question, the Commission considered that it should be studied "in due course". The Rapporteur does not think that the Commission has occasion to study it forthwith.

*United Kingdom* (A/CN.4/99/Add.1)

32. The following text is proposed:

"Save in exceptional cases expressly provided for in international treaties or in these articles, ships shall be

subject to the exclusive jurisdiction on the high seas of the State under whose flag they sail."

33. This text should be considered in connexion with that proposed by the United Kingdom Government for article 5.

*Yugoslavia* (A/CN.4/99/Add.1)

34. The term "international treaties" is too vague. The Yugoslav Government considers that only treaties concluded under the auspices of the United Nations should be included.

35. The Rapporteur cannot accept this limitation, which he does not consider justified.

36. The Yugoslav Government considers that United Nations ships and ships sailing in the service of the United Nations should be granted the right to fly the United Nations flag. The Commission preferred to defer consideration of this question.

#### Conclusion

37. The text of article 4 could be maintained, unless the Commission decides to adopt the proposal of the United Kingdom Government.

#### Article 5: Right to a flag

*Belgium* (A/CN.4/99)

38. Paragraph 1, might be redrafted to read as follows:

"Be owned or operated by the State concerned".

39. The Rapporteur supports this proposal.

40. The Belgian Government proposes that paragraph 2 be amended to read as follows:

"... persons legally domiciled . . . or actually resident . . ."

41. The Rapporteur points out that the Commission intentionally required the combination of residence *and* domicile.

42. The Belgian Government considers that the draft of article 5 should be revised so as to specify that the distinction between the two types of bodies corporate referred to, respectively, in paragraphs (b) and (c) is the distinction between an association of persons and an association of capital.

43. It is for the Commission to consider this proposal; the Rapporteur believes that the text proposed by the Commission was based on this distinction.

44. The Belgian Government asks what is the position of a body operating in the public interest, or of a non-profit association, that wishes a ship engaged on a humanitarian or scientific mission to fly a particular flag. The Rapporteur thinks there may be a danger of going into too much detail if cases of this kind are to be expressly settled.

*Brazil* (A/CN.4/99)

45. The Government of Brazil proposes that it be stated that for purposes of recognition of its national

character, it shall suffice if the ship can prove its nationality readily, not only by means of the ship's name and port of registry clearly marked in a visible place, but also by means of the ship's papers.

46. The Rapporteur considers that this proposal merits the Commission's attention.

*Union of South Africa* (A/CN.4/99/Add.1)

47. The Union Government proposes the following addition to paragraph 2 (c):

"...provided that more than half the issued share capital of such company is registered in the names of nationals or of persons legally domiciled in the territory of the State concerned and actually resident there".

48. It seems to the Rapporteur that from the practical point of view this stipulation would meet with serious difficulties.

*Israel* (A/CN.4/99/Add.1)

49. The Government of Israel suggests that sub-paragraphs (b) and (c) of paragraph 2 might be combined in one sub-paragraph applicable to all juridical persons.

*Netherlands* (A/CN.4/99/Add.1)

50. The Netherlands Government proposes that article 5 be replaced by two other articles worded as follows:

"Article 5a

"Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine connexion between the State and the ship.

"Article 5b

"States shall issue for their ships regulations in order to ensure the safety at sea *inter alia* with regard to:

"1. The adequacy of the crew and reasonable labour conditions;

"2. The construction, equipment and seaworthiness of the ship;

"3. The use of signals, the maintenance of communications and the prevention of collisions.

"In issuing such regulations the States shall observe the standards internationally accepted for the vessels forming the greater part of the tonnage of sea-going ships.

"States shall take the necessary measures in order to guarantee the observance of the said regulations. To that effect they shall provide *inter alia* for the registration of the ship in the territory of the State and for the documents showing that the pertinent regulations of national legislation have been observed."

51. The Netherlands Government also wishes to combine the matters governed by articles 5 and 9. It doubts whether it is possible to lay down detailed regulations concerning the right of States to grant permission to fly their flag. It considers that the article should merely state

the principle that there must be a genuine connexion between the ship and the State.

52. The Commission should examine the views of the Netherlands Government.

*Norway* (A/CN.4/99/Add.1)

53. The Norwegian Government proposes that the word "actually" be deleted from paragraph 2, sub-paragraphs (a) and (b), and that sub-paragraph (c) be made more restrictive in harmony with sub-paragraphs (a) and (b).

*United Kingdom* (A/CN.4/99/Add.1)

54. The United Kingdom Government proposes the following text:

"A ship has the nationality of the State whose flag it is entitled to fly. A State may not, however, allow a ship to fly its flag, nor need other States recognize the ship as entitled to do so, unless, both under its own domestic law and under international law, the flag State is in a position to exercise, and does exercise, effective jurisdiction and control over ships flying its flag, and the right to fly its flag is limited and regulated accordingly by its domestic law. A State may permit a ship that would be entitled to fly its own national flag under domestic law, to fly the flag of another State, provided the requirement of the exercise of effective jurisdiction and control on the part of that other State is fulfilled." [For the reasons for this proposal, see the United Kingdom reply.]

55. There appears to be some measure of agreement between the opinions of the United Kingdom and the Netherlands Governments. The Commission could study their proposals together.

*Yugoslavia* (A/CN.4/99/Add.1)

56. The Yugoslav Government proposes the following wording:

"Each State prescribes the conditions under which a ship can obtain its nationality and sail under its flag, unless provided otherwise in these rules. Nevertheless, for the purposes of recognition of its national character by other States, a ship must either: "

[No change in paragraphs 1 and 2.]

And an additional paragraph to be worded as follows:

"3. If the charterer is a national of the State concerned or a juridical person established under the legislation of the State concerned and has its effective seat in the territory of that State".

57. The Rapporteur points out that this question has already been discussed by the Commission. He had expressed the opinion that such a stipulation would cause the nationality of a ship to lose the stability it should have. Moreover, the number of States which have adopted such a condition in their legislation is rather small. For readily understandable reasons it is mostly non-coastal States which favour this system. Yugoslavia is one of the few coastal States which have also adopted it.

*Ireland* (A/CN.4/99/Add.4)

58. Irish legislation makes no distinction between Irish

citizens resident in Ireland and those resident in other countries. Ownership must be entirely Irish; the Government may permit departure from these rules, however.

#### Conclusion

59. The Rapporteur reserves his conclusion concerning article 5.

#### *Article 6: Ships sailing under two flags*

*Union of South Africa* (A/CN.4/99/Add.1)

60. The comments relate to drafting only.

*Israel* (A/CN.4/99/Add.1)

61. The Government of Israel considers that the question of change of flag should be further examined. It reserves its opinion concerning the strict view adopted in article 6.

*Netherlands* (A/CN.4/99/Add.1)

62. The Netherlands Government proposes that the words "using one or other as the need arises" be inserted after the words "two or more States". The Rapporteur considers that these words, which are already in the comment, could also be included in the article itself.

*United Kingdom* (A/CN.4/99/Add.1)

63. The United Kingdom Government proposes the following wording:

"A ship that sails under the flags of two or more States may not, with respect to any other State, claim either or any of the nationalities in question, and may be assimilated to ships without a nationality."

64. This drafting amendment could be adopted.

*Yugoslavia* (A/CN.4/99/Add.1)

65. It is proposed that a new paragraph be added, to read as follows:

"Ships sailing without a flag or under a false flag may also be assimilated by other States to ships without a nationality."

66. It will be for the Commission to consider whether it is necessary to insert such a paragraph.

67. The Yugoslav Government proposes the insertion of articles concerning change of flag (see the Yugoslav Government's reply). The Commission will have to decide whether it wishes to go back on its decision not to include articles concerning change of flag.

#### Conclusion

68. The article could be retained, subject to drafting amendments.

#### *Article 7: Immunity of warships*

*Netherlands* (A/CN.4/99/Add.1)

69. The Netherlands Government proposes the following wording for paragraph 2 in order to bring it more

closely into line with the corresponding article of The Hague Convention of 1907, No. VII:

"The term 'warship' means a vessel under the direct authority, immediate control, and responsibility of the Power the flag of which it flies, bearing the external marks distinguishing warships of its nationality, the Commander of which must be in the service of the State and duly commissioned by the proper authorities, whilst his name must figure on the list of officers of the fighting fleet and the crew of which is subject to military discipline."

70. The Rapporteur supports this proposal.

*United Kingdom* (A/CN.4/99/Add.1)

71. The proposed amendment relates to drafting only.

*Yugoslavia* (A/CN.4/99/Add.1)

72. The Yugoslav Government proposes the addition of the words "bearing a visible sign of a warship" after the word "vessel" in paragraph 2.

73. The wording proposed by the Netherlands Government will probably satisfy the Government of Yugoslavia.

#### Conclusion

74. The article could be amended as proposed by the Netherlands Government.

#### *Article 8: Immunity of other State ships*

*Belgium* (A/CN.4/99)

75. The Belgian Government's objections to the wording would not apply if the Commission adopted the amendment to article 5, paragraph 1, advocated by the Rapporteur.

*Union of South Africa* (A/CN.4/99/Add.1)

76. The Union Government proposes the addition of the words "and otherwise than for commercial gain" after the words "on government service".

77. This change would be contrary to the Commission's intentions. It is clear from the comment that for purposes connected with the exercise of powers on the high seas by States other than the flag State the Commission intended ships operated by the State for commercial purposes to be assimilated to warships.

*Netherlands* (A/CN.4/99/Add.1)

78. The Netherlands Government proposes reverting to the text of the Brussels Treaty, the words "on government service" being replaced by the words "on governmental and non-commercial service". The Rapporteur makes the same comment as on the South African proposal: the Commission decided to the contrary.

*United Kingdom* (A/CN.4/99/Add.1)

79. The United Kingdom Government proposes that the words "shall be assimilated to" be replaced by the words "shall have the same immunity as". The Rapporteur supports this proposal.

*Conclusion*

80. The article could be amended as proposed by the United Kingdom Government.

*Article 9: Signals and rules for the prevention of collisions*

*Netherlands* (A/CN.4/99/Add.1)

81. This article can be deleted if the Netherlands proposal concerning article 5 is adopted.

*Yugoslavia* (A/CN.4/99/Add.1)

82. The Yugoslav Government proposes that the words "accepted for the vessels forming the greater part of the tonnage of sea-going ships" be replaced by the words "accepted by the majority of Members of the United Nations".

83. The present wording was adopted by the Commission after a full discussion; the comment shows why the Commission preferred the text of the article as it stands to that proposed by the Yugoslav Government.

*Conclusion*

84. There is no need to amend the article.

*Article 10: Penal jurisdiction in matters of collision*

*China* (A/CN.4/99)

85. The Chinese Government is in favour of the principle affirmed in the judgement of the Permanent Court of International Justice in the "Lotus" case.

*Turkey* (A/CN.4/99)

86. The Turkish Government is of the same opinion. However, if national jurisdiction is still to be recognized, the following rules should be adopted:

"(a) In the event of a collision on the high seas between ships from different ports of registry, judicial and administrative competence shall be recognised to the State whose authority extends over that port of registry from among those of the ships concerned which is the nearest to the scene of the collision.

"(b) In the event of an incident of navigation on the high seas (such as damage to a submarine telegraph or telephone cable or pipeline), judicial and administrative competence shall be recognised to the State whose authority extends over the port of registry of the vessel involved or to the State whose authority extends over the country to which the damaged property belongs depending on which one of these two lies the nearest to the scene of the incident."

*Union of South Africa* (A/CN.4/99/Add.1)

87. It is urged that the article be amended to make it clear that there is nothing to preclude a State from waiving its jurisdiction, either generally or in a particular case, over its own nationals who may be involved in penal or disciplinary responsibility for collision on the high seas.

88. The Commission will have to decide whether it considers this addition necessary.

*Israel* (A/CN.4/99/Add.1)

89. A second paragraph should be added, to read as follows:

"However, the State of which such persons are nationals shall be entitled to take disciplinary measures with a view to withdrawing the certificate issued to them."

90. As shown by the comment, the words "or of the State of which such persons are nationals" already make it possible for that State to take penal or disciplinary measures against its own nationals. The addition appears to be superfluous.

*Netherlands* (A/CN.4/99/Add.1)

91. The Netherlands Government proposes that the text should be brought more closely into line with the Brussels Convention of 10 May 1952. It would be worded as follows:

"In the event of a collision or any other incident of navigation concerning a ship on the high seas and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship was flying the flag, or of the State of which such persons are nationals."

92. The Rapporteur supports this proposal.

*Yugoslavia* (A/CN.4/99/Add.1)

93. The Yugoslav Government proposes certain drafting amendments and the insertion of a new paragraph containing the provision of article 3 of the Brussels Convention of 1952, worded as follows:

"Nothing contained in this Convention shall prevent any State from permitting its own authorities, in cases of collision or other incidents of navigation, to take any action in respect of certificates of competence or licences issued by that State or to prosecute its own nationals for offences committed while on board a ship flying the flag of another State."

*Conclusion*

94. The Rapporteur proposes that the text be amended as suggested by the Netherlands Government in order to bring it into conformity with that of the 1952 Convention. The addition of article 3 of that Convention does not seem necessary.

*Article 11: Duty to render assistance*

*Netherlands* (A/CN.4/99/Add.1)

95. *The Netherlands Government proposes the following wording for the first sentence:*

"The master of a vessel is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to any person

found at sea in danger of being lost and to proceed with all speed to the assistance of persons in distress, if he is informed of their need for assistance, in so far as such action may reasonably be expected of him.”

This proposal could be adopted.

*Norway* (A/CN.4/99/Add.1)

96. The Norwegian Government asks why this article, contrary to other articles (9, 12, 23, 35, 38), fails to enjoin States to enact the necessary legislation.

97. The Rapporteur considers that the text could be amended as proposed by the Norwegian Government.

*Yugoslavia* (A/CN.4/99/Add.1)

98. The Yugoslav Government proposes that the words “or any other incident of navigation” be inserted after the word “collision”.

99. The Rapporteur sees no need for this addition.

100. The Yugoslav Government also proposes the addition of the following paragraph:

“He is also bound, within his possibilities, to give the other vessel the name of his vessel, her port of registration and the nearest port in which she will call.”

101. The Commission could adopt the Yugoslav Government’s proposal on this point.

#### *Conclusion*

102. The Rapporteur proposes that the article be amended to read as follows:

“Every States must require the masters of vessels sailing under its flag, in so far as they can do so without serious damage to their vessels, crew or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all speed to the assistance of persons in distress if informed of their need for assistance, in so far as such action may reasonably be expected of them.

“Masters are also bound, where possible, to inform other vessels of the name of their vessel, her port of registry and the nearest port at which she will call.”

#### *Article 12: Slave trade*

*Israel* (A/CN.4/99/Add.1)

103. The Government of Israel proposes that articles 12 to 21, which relate to the policing of the high seas, should be combined in a single chapter.

104. The Rapporteur doubts whether this change would increase the clarity of the document.

105. With regard to article 12, the Government of Israel suggests that State ships other than warships should also be mentioned in the second sentence. This wish could be met by substituting the words “State ship” for the word “warship”.

*Netherlands* (A/CN.4/99/Add.1)

106. The Netherlands Government proposes that the words “and to prevent the unlawful use of its flag for that purpose” be replaced by the words “and to prevent

foreign vessels from unlawfully using its flag for that purpose”.

107. The Commission will decide whether it prefers this wording.

*United Kingdom* (A/CN.4/99/Add.1)

108. The United Kingdom proposes that the words “of any State” be inserted after the words “merchant vessel”.

This proposal could be adopted.

#### *Conclusion*

109. The article could be adopted in the following form:

“Every State shall adopt effective measures to prevent and punish the transport of slaves in vessels authorized to fly its colours and to prevent foreign vessels from unlawfully using its flag for that purpose. Any slave taking refuge on board a State ship or merchant vessel shall *ipso facto* be free no matter what colours it flies.”

#### *Article 13: Piracy*

*Netherlands* (A/CN.4/99/Add.1)

110. Article 13 refers to piracy “on the high seas” whereas according to article 14 piracy may also be committed in “territory outside the jurisdiction of any State”.

111. The Rapporteur considers that the words “on the high seas” should be deleted from article 13. Piracy is defined in article 14.

#### *Conclusion*

112. The article could be retained, with the amendment indicated above.

#### *Article 14*

*China* (A/CN.4/99/Add.1)

113. The article defines piracy in the restricted sense only and should be amended to include piracy in the broad sense of the term, according to which any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel, also commits piracy.

114. The Commission did not wish to adopt the broad definition of piracy advocated by the Chinese Government.

*Union of South Africa* (A/CN.4/99/Add.1)

115. On the drafting of article 14 the Union Government makes several comments to which the reader is referred. The Commission did not consider acts committed by one aircraft against another, because it wished to confine its work to maritime law. The Commission only considered warships and private vessels; it did not deal with vessels operated by the State for commercial purposes.

116. The Rapporteur is of opinion that such vessels can in fact be guilty of piracy. The article could be amplified accordingly.

*Netherlands* (A/CN.4/99/Add.1)

117. The Netherlands Government would like it to be made clear that article 14 does not refer to warships or to State-owned vessels having a non-commercial public function. The Netherlands Government points out that in paragraph 1 (a) only the term "vessel" is used whereas in (b) the words "vessels, persons or property" are employed. Furthermore, paragraph 1 refers to acts "against persons or property".

118. The Rapporteur agrees that the drafting could be improved.

*United Kingdom* (A/CN.4/99/Add.1)

119. Only drafting amendments are proposed.

#### *Conclusion*

120. The text of the article could be amended to read as follows:

"Piracy is any of the following acts:

"1. Any illegal act of violence, detention, or any act of depredation committed for private ends by the crew or passengers of a private vessel or aircraft or of a vessel or aircraft in commercial service, and directed against:

"(a) Vessels, persons or property on the high seas other than the vessel on which the act is committed;

"(b) Vessels, persons or property in territory outside the jurisdiction of any State."

[No change in paragraphs 2 and 3].

#### *Article 15*

*Belgium* (A/CN.4/99)

121. The Belgian Government proposes the following wording:

"If the acts referred to in article 14 are committed by a warship or a military aircraft whose crew has mutinied, then the acts in question are assimilated to acts of piracy."

122. The Rapporteur accepts this wording.

*Netherlands* (A/CN.4/99/Add.1)

123. The Netherlands Government also wishes warships to be assimilated to State-owned vessels having a non-commercial public function.

124. The Rapporteur supports this proposal.

*Yugoslavia* (A/CN.4/99/Add.1)

125. The Yugoslav Government proposes that the words "or any of the ships mentioned in article 8 of these rules" be inserted after the word "warship".

126. The new wording may perhaps satisfy the Yugoslav Government.

#### *Conclusion*

127. The Rapporteur proposes the following wording: "When committed by a State-owned vessel or aircraft in non-commercial service whose crew has mutinied, the acts referred to in article 14 are assimilated to acts of piracy."

#### *Article 16*

*Belgium* (A/CN.4/99)

128. The Belgian Government proposes the following wording:

"A ship or aircraft is considered a pirate ship or aircraft if it has committed, or is used or is intended to be used by the persons in dominant control for the purpose of committing, one of the acts referred to in article 14, paragraph 1."

129. The Rapporteur accepts this drafting subject to an amendment proposed by the Netherlands Government.

*Netherlands* (A/CN.4/99/Add.1)

130. The Netherlands Government considers that this article could be deleted, or that if it is retained it should refer to the whole of article 14 and not only to paragraph 1 of that article.

#### *Conclusion*

131. The article could be amended as suggested by the Belgian Government, but with the deletion of the final words "paragraph 1".

#### *Article 17*

132. No comment.

#### *Article 18*

*Belgium* (A/CN.4/99)

133. The Belgian Government will agree to this article if its proposal concerning article 16 is adopted.

*United Kingdom* (A/CN.4/99/Add.1)

134. This article contains no provision concerning the disposal of the pirate ship after seizure. The Commission may wish to consider inserting some provision on this point. The Rapporteur wonders whether a general rule on this matter would not present difficulties; in his opinion it should be left to national courts to decide.

#### *Conclusion*

135. The article can be maintained as it stands.

#### *Article 19*

*Netherlands* (A/CN.4/99/Add.1)

136. The Netherlands Government asks why the wording differs from that of article 21, paragraph 3. The Rapporteur considers that the wording of article 21, paragraph 3, could also be adopted for article 19.

*Norway* (A/CN.4/99/Add.1)

137. The Norwegian Government comments to the same effect.

*Conclusion*

138. The wording of this article should be amended to bring it into conformity with article 21, paragraph 3.

*Article 20*

*Union of South Africa* (A/CN.4/99/Add.1)

139. The Union Government asks whether it should not be stipulated that a vessel attacked by a pirate, but which repulses the attack, may seize the pirate vessel pending the arrival of a warship.

140. The Rapporteur considers that such provisional seizure is no more than legitimate self-defence and that it is not necessary to insert a stipulation to that effect.

*Conclusion*

141. The article could be maintained as it stands.

*Article 21: Right of visit*

*Union of South Africa* (A/CN.4/99/Add.1)

142. Paragraph (b) should be extended to cover the high seas generally.

143. This question was discussed at length by the Commission, which came to a conclusion contrary to that of the Union Government. The Commission wish to prevent suspicion of slave trading from being used as a pretext for searching vessels in parts of the high seas where there is no slave trading.

*Netherlands* (A/CN.4/99/Add.1)

144. It is suggested that in the first paragraph the words "at sea" be replaced by the words "on the high seas".

145. The Rapporteur accepts this suggestion.

*United Kingdom* (A/CN.4/99/Add.1)

146. Paragraph 3 should refer to "any" loss sustained.

147. The Rapporteur agrees.

*Conclusion*

148. The article could be adopted with the above amendments.

*Article 22: Right of pursuit*

*Brazil* (A/CN.4/99)

149. The Government of Brazil considers that for the exercise of the right of pursuit it is sufficient if the coastal State has good reason to believe that an offence against its laws or regulations has been or is about to be committed.

150. The Rapporteur is prepared to amend the article accordingly. It might begin as follows: "The pursuit of a foreign vessel, where the coastal State has good reason to believe that an offence has been committed against its laws or regulations, commenced etc."

*India* (A/CN.4/99)

151. The Government of India considers that the right of pursuit should also be recognized where a suspected vessel is in a contiguous zone.

152. The Rapporteur points out that this case is already covered by the text adopted by the Commission (see the last sentence of paragraph 1).

*Netherlands* (A/CN.4/99/Add.1)

153. The Netherlands Government proposes that the last sentence of paragraph 3 be amended to read as follows:

"The order to stop shall be a visual or auditive signal given at a distance which enables it to be seen or heard by the foreign vessel."

154. The Rapporteur accepts this amendment.

155. The Netherlands Government proposes the addition of the following final paragraph:

"The right of pursuit can only be exercised by warships and other vessels on governmental and non-commercial services."

156. The Rapporteur accepts this addition.

*Norway* (A/CN.4/99/Add.1)

157. The Norwegian Government proposes that it be made clear that the right of pursuit may also be exercised by State vessels other than warships, such as customs, police and fishery patrol vessels.

158. The Rapporteur thinks that the Netherlands amendment will satisfy the Norwegian Government.

159. The Norwegian Government raises the question whether the right of pursuit may be exercised by aircraft.

160. The same question is raised by the Government of Iceland (A/CN.4/99/Add.2).

161. The Rapporteur considers that in order to prevent abuses the right of pursuit should be confined to ships.

*United Kingdom* (A/CN.4/99/Add.1)

162. The United Kingdom Government proposes the deletion of the last sentence of paragraph 1, which it considers to be based on an erroneous conception of the nature of the "contiguous zone".

163. The Rapporteur has gone into this question in section 4 of the general part of his report; he does not share the United Kingdom Government's view.

*Yugoslavia* (A/CN.4/99/Add.1)

164. The Yugoslav Government considers that the text would be made clearer by adding the words "or contiguous zone" after the words "territorial sea" in paragraphs 1 and 2.

165. The Rapporteur has no objection to this addition.

*Conclusion*

166. The text could be retained with the amendments proposed by the Governments of Brazil, the Netherlands and Yugoslavia.

*Article 23: Pollution of the high seas*

*Union of South Africa (A/CN.4/99/Add.1)*

167. The Union Government proposes that the text of the article be restricted to the high seas.

168. The Rapporteur is agreeable to the replacement of the words "water pollution" by the words "pollution of the high seas". The title of the article is "Pollution of the high seas".

*Netherlands (A/CN.4/99/Add.1)*

169. It is proposed that in the English text the words "fuel oil" should be replaced by the word "oil". The same comment is made by the United Kingdom Government.

170. The Rapporteur agrees.

171. The Netherlands Government further proposes the addition of the following two articles:

*" Article 23a*

" All States shall draw up regulations to prevent water pollution by oil, resulting from the exploitation of submarine areas.

*" Article 23b*

" All States shall co-operate in drawing up regulations to prevent water pollution from the dumping of radioactive waste."

172. It will be for the Commission to take a decision on these proposals.

*Conclusion*

173. Article 23 could be adopted with the above amendments, subject to the decision on the two new articles proposed.

*Article 24: Right to fish*

*Sweden (A/CN.4/99)*

174. The Swedish Government considers it particularly desirable that an international convention should be concluded concerning fishing in the high seas.

*Israel (A/CN.4/99/Add.1)*

175. The position of the Government of Israel as regards articles 24-38 is reserved pending consideration of the proceedings of the Rome Conference.

*Norway (A/CN.4/99/Add.1)*

176. The Norwegian Government reserves the right to revert to articles 24-33 when it becomes clear to what extent their basic principles command general approval.

*Conclusion*

177. The article can be retained in its present form.

*Articles 25 to 33*

178. With regard to articles 25 to 33 concerning conservation of the living resources of the high seas, several Governments, including those of China, India and the United States of America, have made comments and proposed amendments affecting the very principles of the system adopted by the Commission.

179. The Rapporteur considers that until the Commission has taken a decision on the substance of these proposals it is useless to make a detailed examination of the amendments which would be necessary if these new rules were adopted. Moreover, it would be impossible to summarize the purport of the observations of Governments on this subject in a few words. In these circumstances, the Rapporteur cannot report on these articles in the same way as he has on the preceding ones. Until there has been a general discussion and the Commission has taken a decision on the questions of substance underlying the proposals, the texts cannot be examined in detail.

*Article 34*

*Sweden (A/CN.4/99), Norway, United Kingdom (A/CN.4/99/Add.1)*

180. These three Governments point out that with modern technical resources it is also possible to transmit electric power under the sea by high tension cables. The Rapporteur proposes that the words "high tension power cables" be added after the word "pipelines".

*Conclusion*

181. The article could be adopted with this amendment.

*Article 35*

*Netherlands (A/CN.4/99/Add.1)*

182. The words "and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communications" should be replaced by the words "in such a manner as might interrupt or obstruct telegraphic communication". It is also proposed that after the words "submarine pipeline in like circumstances" the following words be added: "which might result in loss of the material carried by the pipeline".

183. The Rapporteur agrees; if the proposed addition to article 34 is adopted, it must be taken into account in the drafting of article 35.

*Conclusion*

184. The article could be adopted with the amendments proposed.

*Article 36*

185. No comments.

*Article 37**United States of America (A/CN.4/99/Add.1)*

186. The United States Government proposes that this provision be given the character of a recommendation in general terms not referring exclusively to trawling gear.

187. The Rapporteur would prefer to retain the present wording of the article, which is taken from Resolution I of the London Conference of 1913.

*Article 38**Netherlands (A/CN.4/99/Add.1)*

188. The Netherlands Government proposes that this provision be extended to pipelines.

189. The Rapporteur agrees.

*Yugoslavia (A/CN.4/99/Add.1)*

190. Add the words: "under the condition that the owners of the ships have taken all preliminary and reasonable measures of precaution".

191. The Rapporteur agrees.

*Conclusion*

192. The article could be adopted with the amendments proposed.

*Document A/CN.4/97/Add.2*

[Original text: French]  
[4 May 1956]

## II. REGIME OF THE TERRITORIAL SEA

*Article 1: Juridical status of the territorial sea**India (A/CN.4/99)*

1. Add the following proviso at the end of paragraph 2:

"Provided that nothing in these articles shall affect the rights and obligations of States existing by reason of any special relationship or custom or arising out of the provisions of any treaty or convention".

2. The Rapporteur considers that if this clause is inserted in the rules relating to the territorial sea, it should be repeated in every other set of rules adopted by the Commission. He is not in favour of such a clause.

*Israel (A/CN.4/99/Add.1)*

3. Articles 1 and 2 could be combined with article 1 of the rules on the high seas.

4. The Rapporteur considers that this question could be examined in the context of the complete draft to be submitted to the General Assembly.

*Norway (A/CN.4/99/Add.1)*

5. It should be stated expressly that the draft articles do not apply to internal waters.

6. The Rapporteur believes that the Norwegian

Government could be satisfied by the addition of the following paragraph to article 4:

"Waters within the base line are regarded as internal waters".

*Yugoslavia (A/CN.4/99/Add.1)*

7. In paragraph 1 add the words "or to its internal waters" after the word "coast"; in paragraph 2 delete the words "and other rules of international law".

8. As regards the first proposal, the addition suggested above would probably satisfy the Yugoslav Government. As regards the second proposal, the Rapporteur wishes to avoid any wording which might give the impression that the limitations of sovereignty are fully and exhaustively stated in the rules which follow.

*Conclusion*

9. The article could be adopted in its present form.

*Article 2: Juridical status of the air space over the territorial sea and of its bed and subsoil**Turkey (A/CN.4/99)*

10. Add the following paragraph:

"The provisions of the following articles regarding passage by sea are not applicable to air navigation of any kind."

11. Since all the rules relate exclusively to maritime law, the addition appears unnecessary. A provision to this effect could be included in the comment, however.

*Conclusion*

12. The article could be adopted in its present form.

*Article 3: Breadth of the territorial sea*

13. Several Governments have stated their opinion on the proposed text. The various views are summarized below.

*Belgium (A/CN.4/99)*

14. It would be welcome if all countries could be induced to subscribe to the principle that international law does not justify extension of the territorial sea beyond twelve miles. The statement that international law does not require States to recognize a breadth beyond three miles implicitly confirms that it is necessary to conclude an international agreement concerning the limits of the territorial sea. Belgium has always maintained precisely that position. The Commission reaffirms the right of a State to refuse to recognize any extension of another State's limits beyond twelve miles. If, however, the nationals of these States are not to remain in uncertainty about the law, some agreement must be reached with the State which so extends its limits. The Commission's statement, while correct in international law, does not resolve the practical difficulties. In view of the possibilities of exercising fishing rights afforded by the scope of articles 24 to 33 concerning the régime of the high seas, and especially in view of the terms of article 29, it is very probable

that the principle of the twelve-mile maximum would be acceptable to the majority of States. It would then be possible, by means of international agreements, to arrive at the solution of fixing a limit other than the three-mile limit, provided that it is less than twelve miles.

*China* (A/CN.4/99)

15. The Chinese Government reserves its position.

*Dominican Republic* (A/CN.4/99)

16. The Constitution fixes the breadth of the territorial sea at three miles and establishes a contiguous zone of twelve miles.

*India* (A/CN.4/99)

17. Paragraph 3 conflicts with paragraph 2 and renders its provisions meaningless. The Government of India suggests that paragraph 3 be deleted and paragraph 2 be redrafted to read as follows:

“The maximum breadth of the territorial sea may be fixed at twelve miles and within that limit each country, whatever the geographical configuration of its coastline, should have freedom to fix a practical limit”.

*Philippines* (A/CN.4/99)

18. The Philippine Government considers that the breadth of the territorial sea may extend beyond twelve miles. Provisions should be included which take account of the special characteristics of countries like the Philippines which consist of archipelagos.

*Sweden* (A/CN.4/99)

19. The Swedish Government supports the Commission's view that the limitation to three miles is not based on uniform international practice. The Commission states in its comment that the extension of the territorial sea to twelve miles does not constitute a violation of international law; but this can only mean one thing: that such an extension is justified under international law. If that were so, however, these limits would clearly have to be respected by other States. The Commission says in its comment that the claim to a territorial sea up to twelve miles in breadth may be supported *erga omnes* by any State which can show a historical right in the matter. This rule is so important that it might well have been embodied in the actual text of the rules. Six miles is the maximum breadth claimed by a large number of States. The solution proposed by the Commission might be termed a compromise, in that it would meet the conflicting views at present held. However it would be no real solution, for it would tend to perpetuate rather than to reconcile existing divergencies.

20. In the Swedish Government's view it would be advisable to fix the maximum breadth of the territorial sea at six miles, perhaps recognizing as an exception the right of States which can show historical reasons to claim a greater breadth.

*Turkey* (A/CN.4/99)

21. Paragraphs 2 and 3 are contradictory. The Turkish Government wishes paragraph 3 to be deleted.

*Union of South Africa* (A/CN.4/99)

22. The divergent views between three and twelve miles should be harmonized by a diplomatic conference. Pending the adoption by international agreement of a common standard, the Union Government considers that the rules enunciated in draft article 3 embody as good an interim solution as can be expected at the present stage.

*Israel* (A/CN.4/99/Add.1)

23. The addition of paragraph 3 completely destroys the whole balance of the article and opens the way both to an aggravation of existing disputes and to the creation of new disputes. Either the law does or does not present an absolute maximum for the breadth of territorial sea. If it does, then the Commission must say so and indicate how it proposes to deal with the existing situation in which a great number of States are likely to be found to have a different limit. If the rule of international law does not contain an absolute maximum figure (as this Government believes to be the case) then it would appear to be incumbent upon the Commission to search out the controlling principles of international law which will enable the law to perform its proper regulatory function in international affairs. It may be open to question whether it is possible, in draft articles intended to have universal application, to go into such detail as the number of miles of territorial sea that may be permitted. A regional approach might offer more chances of success than a universal approach.

24. By a Government decision of 11 September 1955 the breadth of the territorial sea was fixed at six miles.

*Norway* (A/CN.4/99/Add.1)

25. The Norwegian Government wishes to support efforts to prevent unreasonable extension of the breadth of the territorial sea. The Norwegian Government would find it impossible to accept a breadth of less than four miles for its own coasts.

*United Kingdom* (A/CN.4/99/Add.1)

26. The United Kingdom Government welcomes the statement in paragraph 3 that States are not required to recognize claims to a breadth of territorial sea of more than three miles. It urges the Commission to restate this view more strongly in the revised text. The Commission states that it considered that extensions of the territorial sea beyond a twelve-mile limit infringe the principle of freedom of the seas. Since the principle of the freedom of the seas is incompatible with claims to exercise exclusive jurisdiction over large areas of the sea, the United Kingdom Government suggests that the recognition of the principle must entail the limitation of territorial waters to the belt of three miles which experience has shown to be both necessary and at the same time sufficient to serve the legitimate needs of coastal States. The United Kingdom Government considers that certain recent developments (conservation of the living resources of the sea, contiguous zones and the continental shelf) make it easier to maintain the three-mile limit to the territorial sea.

*United States of America* (A/CN.4/99/Add.1)

27. The Government of the United States agrees with paragraph 1 of this article as a statement of fact. However, it does not agree with it as a proposition of law, except in so far as it recognizes that the traditional limitation of territorial waters in three miles. The Government of the United States considers that there is no valid legal basis for claims to territorial waters in excess of three miles. Since it considers that claims in excess of three miles are not justified under international law, *a fortiori* it agrees with the statement of law in the second paragraph, that international law does not justify an extension of the territorial sea beyond twelve miles. Consistently with these views, the United States Government is also in agreement with the statement of law in the third paragraph. The United States practice has been uniformly consistent with this position, as witness its formal protest against Governments to territorial waters in excess of three miles, except when such claims could be justified on a historical basis.

*Yugoslavia* (A/CN.4/99/Add.1)

28. The Yugoslav Government does not consider the provision of this article as the introduction of a rule, but merely as a statement to the effect that a different practice is applied by various States. The Yugoslav Government is of the opinion that the breadth of three miles, which is of a later date than the breadth of four to six miles and is not recognized by three-quarters of the members of the United Nations, cannot be recognized as a rule of international law.

*Iceland* (A/CN.4/99/Add.2)

29. The views expressed in article 3 seem to present a very curious mixture and really to be irreconcilable. The Government of Iceland has been unable to find a sound basis in these postulates. The practice of States seems to be incompatible with the acceptance of a general rule fixing the extent of the territorial sea with precision. A uniform system would be possible only if very extensive limits were adopted. The only practicable solution would be to accept the principle of regional or local systems.

30. The question of the breadth of the territorial sea is of course closely linked with that of the contiguous zones. If a contiguous zone is recognized for fisheries, the necessity for a broad territorial sea, so far as Iceland is concerned, would appear in a quite different light.

*Cambodia* (A/CN.4/99/Add.2)

31. The three-mile limit is acceptable.

*Lebanon* (A/CN.4/99/Add.2)

32. Although it is impossible, in the present state of the law, to reach agreement on this point, it is nevertheless desirable that upper and lower limits should be formally fixed for the breadth of the territorial sea.

*Conclusion*

33. The text of article 3, which was merely provi-

sional,<sup>1</sup> has not been properly understood by certain Governments. They have expressed the opinion that the third paragraph is incompatible with the first, which is by no means the case. Other Governments regret that the Commission has been unable to achieve a more practical result. ("The Commission's statement, while correct in international law, does not resolve practical difficulties", says the Belgian Government). The Commission does not dispute this: it is perfectly well aware that it has not been able to settle the differences, but in view of such divergent and irreconcilable opinions, it sees no way of overcoming the practical difficulties. The Swedish Government rightly observes that the solution proposed by the Commission "might be termed a compromise, in that it would meet the conflicting views at present held". The Swedish Government regrets, however, that it is "no real solution, for it would tend to perpetuate rather than to reconcile the existing divergencies". The Commission nevertheless believes that the mere fact of having stated the present legal position clearly can contribute to a subsequent solution of the problem. The Rapporteur therefore considers that the Commission could maintain the view adopted at its seventh session. It must, however, be put in the same form as the other articles and drafted in such a way as to prevent any misunderstanding of its true purport.

*Article 4: Normal baseline**Sweden* (A/CN.4/99)

34. The article is unduly complicated. Stretches of waters which are geographically linked to the land domain must obviously be treated juridically as part of the land domain. It follows that the lines constituting the outer limits of internal waters must also serve as the baselines for measuring the territorial sea. If that be so, however, it is difficult to see how the other conditions laid down by the Commission for the drawing of straight baselines can be of any value. Hence it would be sufficient for article 4 to state that the breadth of the territorial sea is measured from the low-water line along the coast or from the straight lines constituting the outer limits of internal waters. Article 5 would then be redundant and the same applies, in principle, to the provisions concerning bays, ports and the mouths of rivers.

35. The Rapporteur points out that in the Swedish Government's view the concept of "internal waters" is in itself sufficient to distinguish clearly between such waters and territorial waters. He is not quite clear how the Swedish Government envisages the practical application of this idea. The Swedish Government's comments have not convinced the Rapporteur that article 4 is too complicated.

*Union of South Africa* (A/CN.4/99)

36. The Union Government adheres to the view previously expressed, that in certain cases the seaward edge of the surf should be taken as the point of departure in measuring the breadth of the territorial sea.

<sup>1</sup> See Report of the International Law Commission covering the work of its seventh session, *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, n. 14.

37. The Commission did not think it should adopt this idea which, in its opinion, could not be given practical effect.

*Conclusion*

38. The article could be maintained in its present form. The paragraph suggested in the comments on article 1 (see under Norway) could be added.

*Article 5: Straight baselines*

*Belgium, Sweden (A/CN.4/99) and the United Kingdom (A/CN.4/99/Add.1)*

39. These three Governments consider that the inclusion of the criterion "economic interests" is not justified. In the judgement of the International Court of Justice in the Fisheries Case, economic interests alone were not accepted as sufficient justification for the adoption of straight baselines.

*India (A/CN.4/99)*

40. In paragraph 1, replace the word "region" by the word "area".

*Norway (A/CN.4/99/Add.1)*

41. Delete the provision concerning drying rocks and drying shoals, which does not appear in the judgement of the Court.

*United Kingdom (A/CN.4/99/Add.1)*

42. It is essential that some greater precision be introduced into the type and length of baseline permissible. The United Kingdom Government regrets the omission of the previous second paragraph of this article, as set out in the 1954 report.

43. The United Kingdom Government suggests further that the Commission might consider stating explicitly in the articles the principle that baselines cannot be drawn across frontiers between States, by agreement between States, in a bay or along a coastline, in such a way as to be valid against other States.

44. The United Kingdom Government again draws the Commission's attention to the problems relating to the status of waters enclosed by baselines, in particular the matter of the right of innocent passage through newly enclosed waters. (The Rapporteur points out that Sir Gerald Fitzmaurice will submit a proposal on this subject.)

*United States of America (A/CN.4/99/Add.1)*

45. The Government of the United States was in agreement with the draft of this article previously adopted by the Commission. The article as now drafted is too broad and lacks the safeguards which were present in the former draft.

*Yugoslavia (A/CN.4/99/Add.1)*

46. The Yugoslav Government proposes the addition of the following two paragraphs after paragraph 1:

"2. If a group of islands (archipelago) is situated

along the coast the method of straight baselines joining appropriate points on the islands facing the high sea will be applied. The parts of the sea closed in by these lines, islands and coast of the mainland will be considered as internal waters.

"3. If the provision of paragraph 2 of this article cannot be applied to the group of islands (archipelago) due to a great distance from the mainland, the method of baselines will be applied which join appropriate points of the coast towards the high seas. Parts of the sea enclosed by these lines and islands will be considered as internal waters of the archipelago."

Paragraph 2 then becomes paragraph 4.

*Conclusion*

47. The Rapporteur considers that the Commission should review the article in the light of the comments.

*Article 6: Outer limit of the territorial sea*

48. No comments.

*Article 7: Bays*

*Belgium (A/CN.4/99)*

49. It should be noted that The Hague Convention of 6 May 1882 fixed the maximum width of the opening of a bay at ten miles.

*Brazil (A/CN.4/99)*

50. The definition of a bay seems unnecessary and complicated. If, however, a definition is desired it would be preferable to adopt that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Codification Conference, namely, that for the purpose of determination of the baseline a bay "must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width".

51. The limit of twenty-five miles for the closing line is excessive.

52. As regards the first comment of the Brazilian Government, the Rapporteur wishes to point out that the definition of bays was taken from the report of the group of experts reproduced in an addendum to the Special Rapporteur's second report on the régime of the territorial sea (A/CN.4/61/Add.1). The group of experts formulated that definition because its members were unanimous in considering the definition proposed by the United Kingdom delegation to the 1930 Conference to be inadequate. The 1930 definition was also criticized by the International Court of Justice in its judgement in the Fisheries Case. Hence the Rapporteur cannot support the proposal to revert to that definition.

*China (A/CN.4/99)*

53. The Chinese Government fully approves of this article.

*Turkey (A/CN.4/99)*

54. Change the title of the article to "Bays and internal seas" and add the following paragraph:

"For the purpose of these regulations an internal sea is a well marked sea area which may be connected to the high seas by one or more entrances narrower than twelve nautical miles and the coasts of which belong to a single State. The waters within an internal sea shall be considered internal waters."

55. The Rapporteur points out that if this proposal were adopted many inlets which hitherto have generally been regarded as bays would henceforth be internal seas. The Rapporteur regrets that he cannot understand the purpose of this proposal.

*Union of South Africa (A/CN.4/99)*

56. Article 7 would be acceptable to the Union Government only if it were amended in such a way as to leave no doubt that the so-called "historical" bays were to be treated as *sui generis* and excluded not only from the operation of the rule contained in paragraph 4, but also from the application of the criteria laid down in the rest of the article.

57. The Rapporteur believes that the Union Government could be satisfied by replacing the words "the provision laid down in paragraph 4 shall not apply" (paragraph 5) by the words "the foregoing provisions shall not apply", which already appear in the comment.

*Israel (A/CN.4/99/Add.1)*

58. A width of twenty-five miles is excessive. A maximum of ten or twelve miles would be more acceptable. The draft would be deficient if the Commission did not consider the problem of bays, the coasts of which belong to more than one State.

59. The Government of Israel asks what is the practical value of the provisions of article 7 considered as distinct from those of article 5. In the opinion of the Rapporteur, the answer to this question supplied by the Government of Israel itself is correct; nevertheless, he cannot regard the new wording proposed by the Government of Israel as an improvement on the present text.

*Norway (A/CN.4/99/Add.1)*

60. The article is not clear. None of the paragraphs reflects principles of international law and it is doubtful whether the article would constitute an improvement. The exception made in paragraph 5 for the straight baseline system would, at any rate, have to be made applicable to the article as a whole.

61. As regards the latter point, the Rapporteur notes that the amendment proposed above (see under Union of South Africa) might satisfy the Government of Norway.

*United Kingdom (A/CN.4/99/Add.1)*

62. The United Kingdom Government does not consider that the interest of the coastal State affords any justification for a width of twenty-five miles for the closing line.

63. Paragraph 2 should be clarified by the addition of a clause to the effect that islands fronting a bay cannot be considered as "closing" the bay if the usual route of international traffic passes shoreward of them.

64. For other comments by the United Kingdom Government the reader is referred to the full text of its reply.

*United States of America (A/CN.4/99/Add.1)*

65. The United States Government wishes the width for the closing line to remain at ten miles.

*Conclusion*

66. The Rapporteur notes that the width of twenty-five miles proposed for the closing line on a provisional basis as explained in the comment, has met with little support. The Commission will have to decide whether it still wishes to maintain its proposal. The other provisions of the article could be retained subject to various changes of detail and to the addition proposed by the United Kingdom Government.

*Article 8: Ports**United Kingdom (A/CN.4/99/Add.1)*

67. The United Kingdom Government refers to its previous comments concerning piers extending several miles into the sea.<sup>2</sup>

68. The Rapporteur wishes to point out that the Commission decided that it would not be necessary to legislate for such exceptional cases.

*Conclusion*

69. The article need not be amended.

*Article 9: Roadsteads**Brazil (A/CN.4/99)*

70. The Brazilian Government maintains its view that the waters of a roadstead should be considered as internal waters.

71. The Rapporteur points out that the Commission considered the question on two occasions but was unable to adopt this opinion.

*Conclusion*

72. The article could be maintained in its present form.

*Article 10: Islands**Article 11: Drying rocks and drying shoals**Brazil (A/CN.4/99)*

73. If mere drying rocks and drying shoals may be taken as points of departure for extending the territorial sea, with the result that the waters between them and the coast become internal waters, it seems unreasonable that

<sup>2</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, p. 44.*

the same should not apply to islands in precisely the same situation. It would be desirable to set a limit on the use of such drying rocks or drying shoals — as well as islands in the same situation — as points of departure for extending the territorial sea. Instead of specifying that drying rocks, etc., may serve as such points of departure where they are “wholly or partly within the territorial sea” the provision might be made applicable, for example, to those which lie within three miles of the coast. This would obviate excessive broadening of a State’s territorial waters at particular points.

74. In this connexion the Rapporteur makes the following comments: It appears that the Government of Brazil has not properly understood the purport of this article. It is not true to say that mere drying rocks and drying shoals may serve as points of departure for extending the territorial sea, whereas an island in precisely the same situation does not enjoy this treatment. On the contrary, an island is in a privileged position. If islands were included in article 11, their position would be worsened. For according to article 11, drying rocks may only be taken as points of departure for extending the territorial sea where they are wholly or partly within the territorial sea as measured from the mainland or from an island; every island has a territorial sea of its own, and even an island lying beyond the outer limit of the territorial sea extending from the coast may be taken as a point of departure for extending that territorial sea if the territorial sea of the island and that of the mainland or of another island touch or overlap. It is precisely in order to avoid excessive extension of the territorial sea that a further distinction has been made between islands and drying rocks, to the detriment of the latter. In fixing the outer limit of the territorial sea it is permissible to jump from island to island, but not from rock to rock; only rocks lying within the territorial sea extending seawards from the mainland or from an island come into consideration.

#### *Union of South Africa (A/CN.4/99)*

75. In the same connexion, the Union Government maintains its view concerning the surf-line to seaward of drying rocks or shoals.

#### *Conclusion*

76. Articles 10 and 11 could be retained in their present form. The Rapporteur points out that the Commission decided to omit the draft article on groups of islands (archipelagos). In its reply, the Philippine Government stresses the special conditions obtaining in countries whose territory consists of islands, whereas the United Kingdom Government approves the omission of this article.

#### *Article 12: Delimitation of the territorial sea in straits*

#### *Article 14: Delimitation of the territorial sea of two States, the coasts of which are opposite each other*

#### *Israel (A/CN.4/99/Add.1)*

77. The Government of Israel considers it unsatis-

factory that the provisions concerning straits should be dispersed over several articles (12, 14 and 18).

#### *Netherlands (A/CN.4/99/Add.1)*

78. The Netherlands Government wonder whether article 14 has any *raison d'être* alongside the article concerning straits.

79. The Rapporteur agrees that the draft is not satisfactory in this respect: articles 12 and 14 could be combined. However, it is necessary to maintain the distinction between the articles dealing with delimitation of the frontier in straits (12 and 14) and the article dealing with passage (18). On this basis, article 12 could be deleted and article 14 could be amplified as suggested below.

#### *Turkey (A/CN.4/99)*

80. In paragraph 4, add the words “except where the connexion passes through an internal sea” after the words “straits which join two parts of the high seas”.

81. The Rapporteur cannot support this addition, the exact purport of which escapes him.

#### *Norway (A/CN.4/99/Add.1)*

82. While supporting the principle of the median line, the Norwegian Government draws attention to the fact that the articles provide no solution for the case of two States which have territorial seas of different breadth.

83. The Rapporteur agrees; the Commission has been unable to solve this problem.

#### *United Kingdom (A/CN.4/99/Add.1)*

84. Replace paragraph 1 of article 14 by the following text:

“The boundary of the territorial sea between two States, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, is usually determined, unless another boundary line is justified by special circumstances, by the application of the principle of the median line, every point of which is equidistant from the nearest points on the base line from which the width of the territorial sea of each country is measured.”

85. The Rapporteur agrees, subject to drafting amendments.

#### *Yugoslavia (A/CN.4/99/Add.1)*

86. In article 14, paragraph 1, delete the following words “in the absence of agreement between those States or unless another boundary line is justified by special circumstances”.

87. The United Kingdom proposal would partially satisfy the Yugoslav Government.

#### *Conclusion*

88. The Rapporteur proposes that article 12 be deleted and article 14 redrafted to read as follows:

“1. The boundary of the territorial sea between two States the coasts of which are opposite each other

at a distance less than the extent of the belts of territorial sea adjacent to the two coasts is, unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the nearest points on the base line from which the width of the territorial sea of each country is measured.

"2. If the distance between the two States exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

"3. The first sentence of paragraph 2 of this article shall be applicable to cases where both coasts belong to one and the same coastal State. If, as a consequence of this delimitation, an area of sea not more than two miles across is entirely enclosed in the territorial sea, such area may be declared by the coastal State to form part of its territorial sea.

"4. The line of demarcation shall be marked on the largest scale charts available which are officially recognized."

*Article 13: Delimitation of the territorial sea at the mouth of a river*

*India (A/CN.4/99/Add.3)*

89. Article 13 is acceptable subject to the following addition:

"Provided that if there is a port situated at or near the mouth of a river or on the estuary into which a river flows, the territorial sea shall be measured from such outermost limits as may be notified by the Government or the port authority having jurisdiction over the port, in the interest of pilotage and safe navigation to and from the port."

90. The Commission will have to decide whether it wishes to grant such discretionary powers to the coastal State.

*Article 15: Delimitation of the territorial sea of two adjacent States*

*Norway (A/CN.4/99/Add.1)*

91. The Norwegian Government asks whether articles 14 and 15 could not be combined.

92. The Rapporteur does not think so, as they deal with two quite different cases which are governed by different criteria.

*United Kingdom (A/CN.4/99/Add.1)*

93. The United Kingdom Government agrees to the text.

*Yugoslavia (A/CN.4/99/Add.1)*

94. The same proposal as in regard to article 14.

*Conclusion*

95. The article could be adopted without amendment.

*Article 16: Meaning of the right of innocent passage*

*India (A/CN.4/99)*

96. Add the words: "except in times of war or emergency declared by the coastal State".

97. The Rapporteur points out that all the rules concerning passage will be applicable only in time of peace. This could be expressly stated in the comment. Another question on which the Commission will have to take a decision is whether an exception can be made for a state of emergency unilaterally declared by the State in question.

*Israel (A/CN.4/99/Add.1)*

98. Paragraph 3 makes the effect of paragraph 1 completely nugatory. (For the numerous other objections of the Government of Israel, see the full text of its reply.)

*Netherlands (A/CN.4/99/Add.1)*

99. The Netherlands Government is in agreement with articles 16 to 18. Relatively vague definitions such as that in paragraph 1 are unavoidable.

*Norway (A/CN.4/99/Add.1)*

100. It should be added that the rules apply only in time of peace.

*United Kingdom (A/CN.4/99/Add.1)*

101. In paragraph 3, after the words "coastal State" add the words "or for the purpose of avoiding import or export controls or customs duties of the coastal State".

102. The Rapporteur has no objections.

*Yugoslavia (A/CN.4/99/Add.1)*

103. Amend paragraph 3 to read as follows:

"Passage is innocent so long as the vessel does not use the territorial sea for preparing, attempting or committing any act prejudicial to the security or public order of the coastal State, or so long as it does not violate its customs and sanitary regulations or other interests, or does not endanger the safety of navigation."

104. The Rapporteur prefers the present text.

*Conclusion*

105. Subject to amendment of paragraph 3 and to settlement of the question raised by the Government of India, the article could be adopted.

*Article 17: Duties of the coastal State*

*Yugoslavia (A/CN.4/99/Add.1)*

106. The Yugoslav Government considers that the interests of the coastal State (article 19) should precede those of navigation (article 17). The words "principle of the freedom of communication" should be replaced by the words "innocent passage".

107. The Rapporteur has no objection to the latter proposal. He would prefer, however, to keep the articles in the order adopted by the Commission.

*Article 18: Rights of protection of the coastal State**Turkey (A/CN.4/99)*

108. The Turkish Government doubts that any useful purpose is served by attempting to formulate articles on passage through straits. In its opinion, it is impossible to work out general rules applicable to all straits. There is no case where freedom of passage could not be interpreted as permitting a disregard of the duties of the coastal State towards its nationals, in particular, as regards security, public order and health.

109. The Rapporteur considers that the draft sufficiently protects the rights of the coastal State in this connexion.

110. The Turkish Government proposes that paragraph 4 should begin with the words "In peace time", and that a clause should be inserted expressly reserving the rights of the coastal State in time of war, or when it considers itself under the menace of war, or when it is acting in conformity with its rights and obligations as a Member of the United Nations.

111. The Commission will have to take a decision on this proposal.

*Israel (A/CN.4/99/Add.1)*

112. Regardless of their position as territorial sea, straits in the geographical sense which constitute the only access to a harbour belonging to another State, can under no circumstances fall under the régime of the territorial sea.

113. The Rapporteur considers that the Commission should examine this proposal.

*Norway (A/CN.4/99/Add.1)*

114. The words "under the present rules" in paragraph 1 are not sufficient; there should also be a reference to other rules of international law.

115. The Rapporteur agrees to this proposal.

*United Kingdom (A/CN.4/99/Add.1)*

116. Paragraph 1 of this article duplicates paragraph 3 of article 16.

117. The Rapporteur prefers to retain both paragraphs, which relate to different situations.

*Yugoslavia (A/CN.4/99/Add.1)*

118. The following text is proposed for paragraph 1:

"1. A coastal State may take necessary steps in its territorial sea to protect itself against any endangering of its security and public order, security of navigation, customs, sanitary and other interests."

119. The Rapporteur prefers the present text.

*Conclusion*

120. The article could be adopted with the amendment proposed by the Norwegian Government, and subject to the addition proposed by the Government of Israel and, if necessary, the amendment proposed by the Government of Turkey.

*Article 19: Duties of foreign vessels during their passage**India (A/CN.4/99)*

121. Add the following as sub-paragraph (a):

"The traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment."

122. If this relates to safety of traffic, the case is covered by the existing sub-paragraph (a). If, however, it concerns intervention by a coastal State in the transport of material for the military forces of another country, it is a restriction on the right of passage to which the Commission must give careful consideration.

*Turkey (A/CN.4/99)*

123. Add the words "submarines shall navigate on the surface".

124. The Rapporteur points out that a similar stipulation has already been inserted in article 23, for warships. It hardly seems necessary to legislate for commercial submarines, but the Rapporteur has no objections.

*Union of South Africa (A/CN.4/99)*

125. In sub-paragraph (c) add the words "mineral or other resources of the territorial sea".

126. The Rapporteur has no objections.

*Yugoslavia (A/CN.4/99/Add.1)*

127. Amend the article to read as follows:

"Foreign vessels that use the right of innocent passage through the territorial sea must comply with the laws and regulations of the coastal State unless otherwise provided by these rules, concerning especially:

"(a) Flying the national flag;

"(b) Following the fixed international navigation route;

"(c) Complying with the regulations on public order and security as well as customs and sanitary regulations."

[The former sub-paragraphs (a)-(e) become (d)-(h)]

128. The Rapporteur has no objections.

*Lebanon (A/CN.4/99/Add.2)*

129. The coastal State should be permitted to suspend the application of this article in time of war or in the event of exceptional circumstances officially proclaimed.

*Conclusion*

130. The article could be adopted with the amendment proposed by the Governments of Turkey, the Union of South Africa and Yugoslavia, and subject to the addition proposed by the Government of India.

*Article 20: Charges to be levied upon foreign vessels**Turkey (A/CN.4/99)*

131. Delete the words "rendered to the vessel" and add the following paragraph:

"The right of the coastal State to demand and obtain

information on the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the perception of charges is reserved".

132. The Rapporteur has no objections.

*United Kingdom* (A/CN.4/99/Add.1)

133. Paragraph 1 of the 1954 comment could be restored.

134. The Rapporteur agrees. He takes the liberty of pointing out that elsewhere, too, it would be advisable to insert in the text to be submitted to the Assembly, comments included in the 1954 report which, for the sake of simplicity, have not been reproduced in full in the report for 1955.

#### *Conclusion*

135. The article could be adopted with the amendment proposed by the Turkish Government.

#### *Article 21: Arrest on board a foreign vessel*

*Union of South Africa* (A/CN.4/99)

136. Delete the word "merchant" in paragraph 1.

137. The word is in fact superfluous and may be omitted. The whole section refers only to merchant vessels.

*Israel* (A/CN.4/99/Add.1)

138. No mention is made of the right of the coastal State to take steps to suppress illicit traffic in narcotic drugs.

139. The Rapporteur wonders whether this case is not covered by sub-paragraph (a); it is for the Commission to decide.

*Norway* (A/CN.4/99/Add.1)

140. The jurisdiction of the coastal State should perhaps be limited to those cases where the consequences of the crime extend to its land or sea territory. At any rate, the coastal State should not be entitled to assume jurisdiction in cases where the consequences of the crime extend merely to the territory of the State, the nationality of which is possessed by the ship.

141. The Rapporteur asks the Commission to take a decision on this point.

#### *Article 22: Arrest of vessels for the purpose of exercising civil jurisdiction*

*Israel* (A/CN.4/99/Add.1)

142. The Government of Israel would prefer the article to set forth the cases in which arrest is justified rather than merely to refer to the Brussels Convention. Moreover, no mention is made of the place in which the arrest may be effected.

143. The Rapporteur points out that the Commission preferred this wording in order to avoid divergencies between present rules and those of the Brussels Convention. As regards the place where the arrests under paragraph 2 may be effected, the Rapporteur thinks it is

clear that such arrests are made while the ship is passing through the territorial sea.

*Norway* (A/CN.4/99/Add.1)

144. The Norwegian Government cannot accept this article, as it sanctions the arrest of a vessel other than that to which the claim relates.

145. The Rapporteur can only point out that it was decided to follow the system of the Brussels Convention.

*United Kingdom* (A/CN.4/99/Add.1)

146. It would be better to omit paragraphs 2 and 3.

*Yugoslavia* (A/CN.4/99/Add.1)

147. The Yugoslav Government cannot accept paragraphs 2 and 3.

#### *Conclusion*

148. The Commission is requested to consider whether it would be better to delete paragraphs 2 and 3, for the reasons indicated, in particular, in the reply of the United Kingdom Government.

#### *Article 23: Government vessels operated for commercial purposes*

*Turkey* (A/CN.4/99)

149. After the words "shall also apply to" add the word "unarmed".

150. The Rapporteur cannot accept this proposal. The rules laid down apply to government vessels operated for commercial purposes, whether armed or unarmed; they do not of course apply to warships, which are dealt with separately in section D.

#### *Article 24: Government vessels operated for non-commercial purposes*

151. No comments.

#### *Article 25: Passage [of warships]*

*Belgium* (A/CN.4/99)

152. In the Belgian Government's view the right of passage is merely a concession contingent on the consent of the coastal State.

*Denmark* (A/CN.4/99)

153. The requirement of previous notification may be considered a reasonable measure. The Danish Government is of the opinion that innocent passage is not interfered with when for special reasons, for instance security reasons, passage is made subject, not to any authorization, but merely to previous notification through diplomatic channels.

*Turkey* (A/CN.4/99)

154. For the reasons indicated in its reply the Turkish Government considers that paragraph 2 should be completely redrafted in order to reflect rules of positive

international law. Furthermore, the following article should be added:

“Nothing in the preceding article shall be construed as affecting the rights and obligations of States resulting from the provisions of the Charter of the United Nations.”

*United Kingdom* (A/CN.4/99/Add.1)

155. The following text is proposed for paragraph 1:

“Subject to the provisions of the present rules, the coastal State may not normally forbid the innocent passage of warships through the territorial sea nor require a previous authorization or notification.”

*Netherlands* (A/CN.4/99/Add.1)

156. The Netherlands Government wishes the 1954 text to be restored; it cannot agree to previous authorization.

*Conclusion*

157. The Commission is requested to reconsider the text in the light of the comments made.

*Article 26: Non-observance of the regulations*

158. No comments.

### *Document A/CN.4/97/Add.3*

[Original text: French]  
[9 May 1956]

#### III. CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

##### *Article 25*

*India* (A/CN.4/99)

1. Insert the words “contiguous to its coast” between the words “high seas” and “where” in the second line. (For reasons, see full text of the reply). The Rapporteur points out that the Indian Government does not propose defining the expression “contiguous to its coast”, as it does in the case of article 26 (100 miles). Thus it is not clear whether the contiguous zone in article 25 also extends for 100 miles.

2. According to the explanation given by the Indian Government, the intention is to prevent any State from having the right to adopt conservation measures in areas contiguous to the coast of another State. The Rapporteur considers that the drafting of the amendment goes beyond its purpose, as it also excludes conservation measures in parts of the high seas where only the nationals of a single State are engaged in fishing, and which are not contiguous to the coasts of another State.

3. The Rapporteur wonders whether the Indian Government’s purpose would not be better served by leaving article 25 as it stands, but adding the words “unless the area in question is contiguous to the coasts of another State”. But even with this addition the article would be open to criticism, for so long as the coastal State

remains inactive, any regulation of conservation in an area extending from its coast is impossible, even when the ships of another State are engaged in fishing there. In his remarks at the 337th meeting of the Commission (A/CN.4/SR.337, paras. 2-3) Mr. Pal pointed out that the case contemplated was that in which the nationals of the coastal State were engaged in fishing in the area whereas the nationals of other States were not. There is nothing in the Indian Government’s amendment which makes it possible to limit the proposal to this special case. According to the text adopted by the Commission, a non-coastal State whose ships are engaged in fishing in an area contiguous to the coasts of another State where other nations do not fish, may take regulatory measures; but under article 29 the coastal State may unilaterally adopt other rules which must be observed as long as they are not changed by arbitration. The Rapporteur considers that the various interests involved are well protected in this way.

*United States of America* (A/CN.4/99/Add.1)

4. The United States desires to call to the attention of the International Law Commission the absence from the draft articles of two propositions which the United States feels are essential to their completeness. The first of these concerns a definition of the term “conservation” as applied to the living resources of the sea. Since the principal purpose of these articles is to codify a set of rules to guide States in their relations with one another in regard to the conservation of such resources, and it is proposed that States accept certain responsibilities and commitments in order to assure adequate conservation régimes, it would be essential to define specifically the key term “conservation” in the context of the articles. The International Technical Conference on the Conservation of the Living Resources of the Sea considered this matter and concluded that the “principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products”, and that “when formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas near to its coast”.<sup>3</sup> It will be noted that the “special interest” aspect of this conclusion has been worked into and given expression by the proposed articles themselves, thus obviating any necessity for defining or clarifying that particular term. The following draft article would cover the balance of the definition of conservation for the purpose of the International Law Commission articles on high seas fisheries:

“For the purpose of these articles, conservation of the living resources of the sea is defined as making possible the optimum sustainable yield from these resources so as to secure a maximum supply of food and other marine products.”

5. The Rapporteur agrees [see article 25 proposed by

<sup>3</sup> Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April to 10 May 1955 (United Nations publication, Sales No.: 1955.II. B.2), para. 18.

Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

*United Kingdom* (A/CN.4/99/Add.5)

6. The United Kingdom Government proposes the addition of a second paragraph to article 24, in the following terms:

“For the purposes of this and succeeding articles the conservation of the living resources of the sea is to be understood as the conduct of fishing activities so as, immediately, to increase or at least to maintain the average sustainable yield of products in desirable form and, ultimately, to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products.”

7. This text, also taken from the Rome Conference, differs slightly from that proposed by the United States Government [see also the article proposed by Mr. Edmonds] at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3). The Drafting Committee could compare the texts and consider whether this provision could be inserted either in article 24 or in article 25.

*Yugoslavia* (A/CN.4/99/Add.1)

8. The Yugoslav Government proposes the addition of the following two paragraphs:

“2. The measures adopted will be based on appropriate scientific findings or other expert findings and should not discriminate against foreign fishermen.

“3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 29 of these rules.”

9. As regards paragraph 2, the drafts proposed by Mr. Edmonds and the United Kingdom will probably satisfy the Yugoslav Government. Paragraph 3 appears unnecessary, since the coastal State can proceed under article 29, while for other States article 30 is applicable.

10. The Yugoslav Government also proposes that the Commission should solve the question of the right of coastal States to regulate the protection of the living resources in that part of the sea which is adjacent to their territorial sea together with the solution of the question of the breadth of the territorial sea, the contiguous zone and the continental shelf.

11. In case the Commission does not accept the above-mentioned suggestion, the Yugoslav Government suggests that articles 28 and 29 should form one single article, to be article 31, and read as follows:

“1. A coastal State may in any part of the high sea, which is adjacent to its territorial sea, adopt unilaterally any measures for regulating and controlling the exploitation of living resources in that part of the sea up to a distance of twelve nautical miles, counting from the base line of its territorial sea. If a part of the high sea, adjacent to the territorial seas of two or more States whose coasts are opposite one another, is less than twenty-four nautical miles, the border of the part of the high sea, up to which a State may unilaterally adopt measures for regulating and controlling the ex-

ploitation of living resources of the sea, is, in the absence of an agreement between these States, the geometrical line every point of which is at an equal distance from the outside line of the territorial sea of every State concerned.

“2. Any disputes which might occur between the coastal States concerning the application of this paragraph, will be submitted to arbitration at the request of any of the coastal States if no settlement has been reached by diplomatic means.”

12. The proposal limiting the zone contiguous to the coast to twelve miles will probably find little support, as a much wider zone is contemplated.

13. The Executive Secretary of the International Commission for the Northwest Atlantic Fisheries points out that the word “conservation” might be an obstacle to the adoption of regulations for the development of fisheries (A/CN.4/100).

14. The Rapporteur considers that a remark on this subject could be included in the comment.

#### *Conclusion*

15. The article could be adopted with an addition on the lines suggested by the United States (see proposal by Mr. Edmonds) and the United Kingdom, the text of which would be studied by the Drafting Committee, the word “conservation” being explained in the comment.

#### *Article 26*

*India* (A/CN.4/99)

16. After the words “high seas” in line 2, insert the words “beyond the belt of 100 miles from the coast of a State”.

17. The Indian Government’s amendment can only be interpreted as meaning that in an area less than 100 miles from the coast, the coastal State will have the exclusive right to make conservation rules unilaterally, even if other States are engaged in fishing there. The coastal State has not even the duty to enter into negotiations on the matter with the other States: this duty is confined to cases where the fishing area is beyond the 100-mile belt.

18. In the opinion of the Rapporteur, it is not to be expected that those States which, under the existing rules of international law, freely engage in fishing at distances between three and 100 miles from the coast of another State will accept this restriction in the absence of any guarantee that the coastal State will not use the powers so conferred on it, for the purpose of unjustifiably furthering its own interests. The Rapporteur considers that this proposal has no chance of being adopted and put into effect. Moreover, the Commission’s draft affords coastal States effective protection of their interests. For this reason the Rapporteur cannot support the Indian Government’s proposal.

*Iceland* (A/CN.4/99/Add.2)

19. Although these articles recognize the special interests of coastal States it is quite clear that they do not

grant them exclusive fisheries jurisdiction. Within the limits of exclusive coastal jurisdiction, foreign fishing can, of course, be prohibited by the coastal State. This is an incontrovertible fact. What is called for is an appreciation by the coastal State of its own needs up to a reasonable distance. That distance may vary considerably in the different countries in view of economic, geographic, biological and other relevant considerations. The Government of Iceland does not consider that the conservation articles adopted by the Commission would reduce the importance of exclusive coastal fisheries jurisdiction.

20. The Rapporteur points out that as long as "exclusive fisheries jurisdiction" is claimed in areas extending 100 miles from the coast, no agreement seems possible.

*United States of America (A/CN.4/99/Add.1)*

21. The first paragraph of this article would enable a State operating only occasionally in a fishery to insist that a State with a substantial operation in the same fishery enter into negotiations with it for a conservation programme; failing such negotiations an arbitral procedure would be invoked. In order to remove the possibility of abuse, the United States suggests the insertion of the word "substantial" before "fishing" in paragraph 1.

22. Also under this paragraph, a State could request another State to enter into negotiations even though their nationals were not engaged in fishing the same stock of fish. In the view of the United States, the right of a State to request such negotiations, and consequently to initiate the arbitral procedure contemplated in the next paragraph, should be limited to instances where their nationals are engaged in fishing the same stock of fish. It is suggested, therefore, that the words "fishing in any area of the high seas" be replaced by the words "substantial fishing of the same stock or stocks of fish in any area or areas of the high seas", and that the words "conservation of the living resources of the high seas" be replaced by the words "conservation of such stock or stocks of fish".

23. Under paragraph 2 the scope of the authority of the arbitral body in making determinations under article 26 is not clear. For example, the role of the arbitral body with regard to conservation proposals that may have been made by one or more of the disagreeing States is not indicated. Nor is it indicated whether the arbitral body would be authorized to originate proposals for conservation measures. The United States is of the opinion that, so far as proposals are concerned, the authority of the arbitral body should be limited to consideration of conservation proposals of the parties to the dispute; and that the arbitral body should not be empowered to initiate conservation proposals or to enlarge upon any that originate with the parties. Moreover, it would seem advisable and appropriate to specify criteria for the guidance of the arbitral body in making determinations under this article.

24. In the view of the United States, the arbitral procedure contemplated by the second paragraph of

article 26 should be based on criteria specifically set forth in this article. These criteria should be:

"If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of conservation measures proposed by any of them, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations, depending upon the nature of the disagreement:

"(a) Whether conservation measures are necessary to make possible the maximum sustainable productivity of the concerned stock or stocks of fish;

"(b) Whether the specific measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly;

"(i) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

"(ii) The cost of their application and enforcement; and

"(iii) Their relative effectiveness and practicability;

"(c) Whether the specific measure or measures discriminate against the fishermen of any participating State as such.

"Measures considered by the arbitral commission under paragraph 2 (b) of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State as such."

25. The Rapporteur is not convinced of the need to insert the word "substantial"; he has no serious objections to this proposal, however.

26. The Rapporteur agrees to the other amendments [see text of article 26 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

*Union of South Africa (A/CN.4/99/Add.1)*

27. Add the words "in such area" at the end of paragraph 1.

28. The Rapporteur agrees.

*Yugoslavia (A/CN.4/99/Add.1)*

29. The Yugoslav Government proposes the addition of the following sentence at the end of paragraph 1:

"The measures adopted shall not be contrary to the provision of article 25, paragraph 2, of these rules".

30. If the Commission decides not to adopt the Yugoslav proposal for article 25, paragraph 2, the question of this addition will not arise.

*Conclusion*

31. The article could be adopted with the amendments proposed by the United States and the Union of South Africa.

*Article 27**United States of America (A/CN.4/99/Add.1)*

32. The comment of the United States on paragraph 1 of article 26, in so far as it relates to identifying the fishing with stocks of fish as against areas, applies also to paragraph 1 of article 27. Likewise, the comment on paragraph 2 of article 26, that the scope of the authority of the arbitral body should be limited and that specific criteria should be set forth, applies to paragraph 2 of article 27. The criteria suggested for article 26 should be incorporated in article 27.

33. Furthermore, the United States believes that the operation of article 27 should be subject to an important qualification, the principle of abstention. The proposition of the United States Government relates to situations where States have, through the expenditure of time, effort and money on research and management, and through restraints on their fishermen, increased and maintained the productivity of stocks of fish, which without such action would not exist or would exist at far below their most productive level. Under such conditions and when the stocks are being fully utilized, that is, under such exploitation that an increase in the amount of fishing would not be expected to result in any substantial increase in the sustainable yield, then States not participating, or which have not in recent years participated in exploitation of such stocks of fish, excepting the coastal State adjacent to the waters in which the stocks occur, should be required to abstain from participation.

34. This proposed rule takes into account the fact that under the stated conditions the continuing and increasing productivity of the stocks of fish is the result of and dependent on past and current action of the participating States and that the participation of additional States would result in no increase in the amount of useful products. Rather than increasing production the advent of additional States is almost sure to stimulate the abandonment of such conservation activities through removing the incentive for maintaining expensive and restrictive conservation programmes. In fact, such advent very probably would encourage the idea that if the resource declined to a less productive level, it would offer less inducement to distant States. In recognition of a "special interest" on the part of a coastal State, the adjacent coastal State could be excepted from the operation of the rule. Strict and precise criteria should be laid down in the qualifications of a fishery for the rule, and questions arising as to qualifications made arbitrative. These criteria should include (a) whether the stock is subject to reasonably adequate scientific investigation with the object of establishing and taking the measures required to make possible the maximum sustainable yield; (b) whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and (c) whether the stock is under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

35. The Rapporteur agrees; this is a question which

was discussed at the Rome Conference and for which a solution was proposed on the lines indicated by the United States Government [see the proposal submitted by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

*Article 28**India (A/CN.4/99)*

36. The Government of India proposes that the article be deleted.

37. The Rapporteur points out that this deletion is subject to acceptance of the Indian proposal concerning the previous articles.

*Netherlands (A/CN.4/99/Add.1)*

38. The Netherlands Government is uncertain of the relationship between articles 28 and 29: is it possible to proceed under article 29 if the negotiations referred to in article 28 have been unsuccessful?

39. In the opinion of the Rapporteur the answer is that the coastal State may proceed either under article 28 (arbitration) or under article 29 (unilateral regulation). It will take the latter course if the urgency of the measures in question precludes the delay entailed in proceeding under article 28.

*United States of America (A/CN.4/99/Add.1)*

40. The United States understands the special interests of the non-fishing contiguous coastal State to be of two principal types.

41. First, the coastal State is interested in seeing that the living resources in high seas near to its coast are maintained in a productive condition, since its nationals might at some future time desire to participate in these resources. Such an interest would be protected by assurance that an adequate conservation programme is being carried forward.

42. Second, the coastal State has an interest in conservation measures applied to high seas contiguous to its territorial waters in so far as these specific measures affect, directly or indirectly, resources lying inside territorial waters. Furthermore, in most instances, a fishery resource occurring in contiguous high seas will extend into the territorial waters. For these reasons the non-participating coastal State may have an interest in the specific conservation programme referred to above. The interests described in this paragraph can be safeguarded by giving the coastal State, upon satisfactory showing of a special interest, a right to participate fully in the conservation programme.

[The text of article 28 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3) is the same as that adopted by the Commission].

*Yugoslavia (A/CN.4/99/Add.1)*

[See under article 25, paragraph 11 above].

*United Kingdom (A/CN.4/99/Add.5)*

43. The United Kingdom Government proposes the following text for paragraph 1.

"A coastal State whose nationals are not actively engaged in a high seas fishery but which is able to demonstrate a latent or potential interest in the maintenance of the productivity of that fishery is entitled to take part on an equal footing in any plan of research or system of regulation in regard to that fishery."

44. The Rapporteur agrees to this text.

#### *Conclusion*

45. The article could be adopted with the amendment to paragraph 1 proposed by the United Kingdom Government.

#### *Article 29*

##### *Belgium (A/CN.4/99)*

46. Serious doubts arise concerning paragraph 2, sub-paragraphs (a) and (b) under which the measures are valid only if certain requirements are fulfilled. No State will ever be able to produce scientific evidence showing that there is an imperative and urgent need for measures of conservation or to prove that the measures are based on appropriate scientific findings.

47. If there is no possibility of having the whole of article 29 deleted, it would at least be better to omit the second sentence of paragraph 3 which provides that "the measures adopted shall remain obligatory pending the arbitral decision".

##### *India (A/CN.4/99)*

48. In paragraph 1, delete the comma after the words "this interest exists" and substitute a semi-colon; delete the remainder of the paragraph and substitute the following text:

"provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures".

In paragraph 2, sub-paragraph (a), omit the word "scientific"; in sub-paragraph (b) replace the existing clause by the following words: "That the measures adopted are reasonable"; in sub-paragraph (c) add the words "as such" at the end of the sentence.

49. The Rapporteur observes that, as already pointed out by Mr. Padilla Nervo at the 338th meeting of the Commission A/CN.4/SR.338, para. 15), the addition to paragraph 1 proposed by the Indian Government seems unnecessary. Every Government will always have the right to request another State to enter into negotiations. It is only necessary to mention such a right where, in case of refusal, the dispute may be submitted to arbitration. But on this point the Indian Government has reserved its position.

##### *Sweden (A/CN.4/99)*

50. Article 29 calls for most serious reservations. How will it be possible to prove that there are fully appropriate scientific findings to show that certain measures are necessary or advisable? The provision in article 29 should be deleted.

##### *Norway (A/CN.4/99/Add.1)*

51. Measures of conservation cannot be adopted on the basis of scientific evidence alone. Account must also be taken of the technical and economic conditions of the fishing industries of the countries concerned. The Norwegian Government is not convinced that it will be possible to establish satisfactory general criteria. It must reserve its position on the proposal. In the opinion of the Norwegian Government, it is not clear whether the arbitration procedure also applies when the parties to an existing convention for the regulation of fisheries fail to agree. Application of a general convention to whaling and seal-catching would give rise to particular problems.

##### *United Kingdom (A/CN.4/99/Add.5)*

[See comments in paragraphs 5-15].

##### *United States of America (A/CN.4/99/Add.1)*

52. No comments [the text proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3) is the same as that adopted by the Commission].

#### *Conclusion*

53. While recognizing the justice of several of the comments made on this article, the Rapporteur considers that it should be retained in its present form. It is the outcome of long discussions at the seventh session and forms an essential part of the set of rules proposed by the Commission on this subject; it may perhaps to some extent reconcile the different interests involved. Its omission would destroy the structure of the system adopted. The Drafting Committee could examine various drafting amendments proposed by the United Kingdom Government. The question of existing treaties, raised by the Government of Norway, merits the Commission's attention; the Rapporteur thinks it could be agreed that existing treaties shall not be affected by the new rules but should be brought into harmony with them as soon as possible.

#### *Article 30*

##### *India (A/CN.4/99)*

54. The Government of India proposes that this article be deleted.

##### *United States of America (A/CN.4/99/Add.1)*

55. The United States understands that this article is intended to safeguard the interests of the non-fishing States whose nationals may depend on the products of the fishery or who might some day desire to participate in fishing the resource. Specifically, the interest is in the continued productivity of the resource and should be exercisable through assurance that such States have an opportunity to challenge the fishing States as to the adequacy of the over-all conservation programme for the resource, as distinguished from a voice in the specific conservation measures. In this connexion, specific criteria should be established for the guidance of the arbitral body, as well as language which would clearly except

from challenge the programmes of States within their own boundaries, for example, the erection of dams which might affect the runs of anadromous fish.

56. The United States suggests that the words "If no agreement is reached within a reasonable period, such State" in the second paragraph of article 30, be replaced by the words "If satisfactory action is not taken upon such request within a reasonable period, such requesting State...". The United States also suggests that the following criteria be incorporated in this article:

"The arbitral commission shall, in procedures initiated under this article, reach its decision and make its recommendations on the basis of the following criteria:

"(a) Whether scientific evidence shows that there is a need for measures of conservation to make possible the maximum sustainable productivity of the concerned stock or stocks of fish; and

"(b) Whether the conservation programme of the States fishing the resource is adequate for conservation requirements.

"Nothing in this article shall be construed as a limitation upon the action a State may take within its own boundaries."

57. As regards paragraph 2, the Rapporteur prefers the Commission's text; he agrees to the first paragraph of the proposed addition, but finds the second unnecessary. [See article 30 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

### Article 31

#### Brazil (A/CN.4/99)

58. The Government of Brazil recommends that instead of a mere arbitral Commission, a specialized agency should be set up in the form of a permanent international maritime body competent not only to settle differences of the type contemplated in articles 26 to 30, but also to carry out technical studies concerning problems of conservation and utilization of the living resources of the sea.

59. The Rapporteur considers that the proposal to set up a commission to study problems relating to the conservation of the resources of the sea should be carefully examined. But he does not think that such a commission should also be responsible for settling differences that arise between States. In view of the diversity of the interests which may be the subject of these differences, he thinks it preferable to set up *ad hoc* commissions.

#### Union of South Africa (A/CN.4/99/Add.1)

60. The Union Government asks what is to be done if the Secretary-General of the United Nations and the Director-General of the Food and Agriculture Organization do not agree on the choice of arbitrators. It proposes that the words "in consultation" be amended to read "after consultation".

61. The Rapporteur believes that this proposal is in fact in accordance with the Commission's intention.

#### Netherlands (A/CN.4/99/Add.1)

62. Since the arbitral commissions referred to in these

articles imply a kind of legislative arbitration, it would be preferable for the International Law Commission to bring out more clearly in its report that these commissions are free to make any regulations they think justified and effective, even though they depart from the existing regulations. Consequently, it would probably be better to drop the terms "parties" and "differences to be settled".

63. The Rapporteur does not think that the task of the arbitral commissions can be regarded as "legislative arbitration" in all cases. He would prefer to leave the text as it stands.

#### United Kingdom (A/CN.4/99/Add.5)

64. The United Kingdom Government is not in favour of the provision for extending the period within which the arbitral commission must give its decision. The United Kingdom Government fears that the period of three months might easily become three years. It is particularly dangerous where measures remain in force pending the decision of the arbitral commission.

65. The Rapporteur does not share these fears. A commission in which the two parties place sufficient trust to allow it to settle the substance of their dispute should also be able to extend the prescribed period if it considers this to be in the interests of its work.

#### United States of America (A/CN.4/99/Add.1)

66. With respect to the appointment of an arbitral commission when the parties have not agreed upon a method of settlement, the United States would suggest the following modifications: (a) the commission should be composed, in any combination, of seven members well qualified in the legal, administrative or scientific fields of fisheries, depending upon the nature of the dispute; (b) three of these members should be from countries neutral to the dispute and might be appointed, at the request of any State party to the dispute, either by the Secretary-General of the United Nations or as follows: one, who shall act as chairman, by the Secretary-General of the United Nations; one by the President of the International Court of Justice; and one by the Director-General of the Food and Agriculture Organization. If the dispute involves only two States, each should appoint two members of the arbitral commission. If there is more than one State on either side of the dispute, each side, irrespective of the number of States on that side, should appoint a total of two members of the arbitral commission. If either side fails to appoint its members within three months of the date of the original request for settlement, these appointments should be made by the Secretary-General of the United Nations.

67. Under this proposal, a situation could conceivably arise, for example, under article 26, where the dispute would involve a divergence of views of three or more States thereby creating an issue not clearly divisible into two sides. The opportunity to initiate an arbitral procedure should not be defeated by this fact. In the view of the United States, it is essential that any State should be enabled to challenge, bilaterally, in turn if necessary, any of the other States in disagreement.

68. The Rapporteur is not in favour of the changes

proposed. The Commission has endeavoured to suit the composition of the arbitral commission to the diversity of interests that will come in conflict before it. Frequently, it will not be a matter of deciding between two definitely opposed points of view, but of solving a variety of problems; hence the Commission has provided for a membership in which the different interests involved can be given the broadest possible representation. The United States proposal appears to narrow this possibility [see article 30 as proposed by Mr. Edmonds (A/CN.4/SR.338, para. 3) which does not seem to conform entirely to the proposal of the United States Government, but which the Rapporteur finds equally unacceptable.]

*India* (A/CN.4/99)

69. The Government of India reserves its opinion on articles 31, 32 and 33.

### Conclusion

70. The Rapporteur is in favour of retaining the article subject to drafting amendments.

#### Article 32

71. No comments.

[In the draft proposed by Mr. Edmonds (A/CN.4/SR.338, para. 3) article 32 is omitted. The first paragraph can in fact be regarded as unnecessary in view of the directives contained in Mr. Edmond's draft articles 25, 26, 27, 29 and 30. The second paragraph of article 32 forms the second paragraph of Mr. Edmonds' draft article 33.]

#### Article 33

72. No comments.

[This article forms the last paragraph of Mr. Edmonds' draft article 33 (A/CN.4/SR.338, para. 3).]

## DOCUMENT A/CN.4/99 and Add.1 to 9

### Comments by Governments on the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea adopted by the International Law Commission at its seventh session in 1955<sup>1</sup>

#### 1. Austria

##### *Document A/CN.4/99/Add.1*

LETTER DATED 14 MARCH 1956 FROM THE AUSTRIAN MISSION TO THE UNITED NATIONS

[*Original: English*]

With reference to your letter LEG 292/9/01 of 31 January 1956, concerning chapter II of the report of the seventh session of the International Law Commission and "provisional articles concerning the régime of the high seas", and chapter III "Draft articles on the régime of the territorial sea", I have the honour to inform you upon instruction of my Government that Austria has no objection concerning the two drafts referred to.

#### 2. Belgium

##### *Document A/CN.4/99*

TRANSMITTED BY A NOTE VERBALE DATED 9 JANUARY 1956 FROM THE PERMANENT MISSION OF BELGIUM TO THE UNITED NATIONS

[*Original: French*]

#### A. REGIME OF THE HIGH SEAS

##### *Article 2. Freedom of the high seas*

1. On several occasions, the exact scope of the term

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, chaps. II and III.* The Governments of Italy and the United Kingdom of Great Britain and Northern Ireland transmitted comments also on the draft articles relating to the continental shelf and the contiguous zone, adopted by the International Law Commission at its fifth session and reproduced in *Official Records of the General Assembly, Eighth Session, Supplement No. 9, chap. III.*

"jurisdiction" was the subject of discussion in the Commission. The present report states that the term is used in article 2 in a broad sense, including not merely the judicial function but any kind of sovereignty or authority.

Perhaps it would be advisable to define the scope of the term in the body of article 2, especially as in chapter III of the report (Régime of the territorial sea) article 1 speaks of the "sovereignty" of a State over the territorial sea.

Consequently, the first sentence of article 2 might read as follows:

"The high seas being open to all nations, no State may subject them to its jurisdiction, sovereignty or any authority whatsoever. Freedom..."

##### *Article 5. Right to a flag*

2. This article lays down certain conditions for purposes of recognition of the national character of a ship.

One of these conditions is that the ship must be the "property" (in French: *appartenant*) of the State concerned. It is not clear whether this term should be interpreted in the strict sense of "absolute ownership", or whether it is implied that a ship chartered by a State (e.g., for a special mission) is also State "property". Whichever of these interpretations is correct, it seems that the text should be clarified.

It is pertinent to compare this text with that of article 8, which confers immunity on ships "owned or operated by a State and used only on government service".

Article 5. 1 might be redrafted to read:

"Be owned or operated by the State concerned."

3. As regards the condition to be satisfied in the case of private ownership, it would probably be difficult to insist, in every instance, that a particular person must fulfil the twin conditions of being "legally domiciled"