

Document:-  
**A/CN.4/99 and Add.1-9**

**Comments by Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea adopted by the International Law Commission at its Seventh Session**

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

Extract from the Yearbook of the International Law Commission:-  
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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"

and "actually resident" in the territory of the State. In some States the civil law draws a distinction between "domicile" and "residence", whereas in other countries the distinction is non-existent. That being so, there would be no uniformity in the fundamental conditions.

In Belgian law, the Act of 20 September 1903 concerning certificates of registry takes the distinction into account and requires either residence or domicile (article 3 (c)).

Article 5.2 (a) and (b) might therefore be worded as follows:

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

4. It seems to have been the International Law Commission's intention to require, as the basic condition for the right to fly a flag, that the person owning the ship should be physically present in the flag State.

Belgian legislation establishes the same requirement. The Act of 1903 makes physical presence a condition not only in the case of individuals but also in that of bodies corporate, which must have their registered office in Belgium.

5. Despite its apparent intention, the Commission's draft provisions respecting bodies corporate introduce a distinction, inasmuch as a partnership is not required, by article 5, to be formed under the laws of the State concerned or to have its registered office in the country of the flag under which it wishes its ships to sail; only the individual partners with personal liability must be domiciled and reside in that country.

6. Under the provisions of a bill now before Parliament for the amendment of the Act of 20 September 1903 concerning certificates of registry (Senate document No. 153; meeting of 2 February 1954), such a certificate would henceforth no longer be regarded as an instrument conferring nationality but as *prima facie* evidence of nationality. The ship's national character will depend on the nationality of its owners, for which purpose the compulsory registration statement is to be conclusive evidence. (See the bill concerning the introduction of compulsory registration for ships and boats; Senate document No. 155; meeting of 2 February 1954).

As far as individuals are concerned, the last-mentioned bill does not introduce any changes in the rules laid down by the 1903 Act. There is, however, a change which affects bodies corporate; a ship shall be deemed to have Belgian nationality if more than half the ownership thereof is vested in: (a) a commercial company or partnership formed under Belgian law and having its principal seat of business in Belgium; or (b) a foreign commercial company or partnership formed under foreign law if it has its principal seat of business in Belgium or is represented in Belgium by not less than one director and two other responsible officers of Belgian nationality who are domiciled in Belgium.

7. Perhaps the wording of the International Law Commission's 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.

8. When the Commission discussed the suggestion by Mr. Stavropoulos, the Legal Counsel of the United Nations, that it might consider the problem of ships under the United Nations flag (A/CN.4/SR.320, paras. 68 *et seq.*) it was stated that article 5 did not exclude the registration of ships owned by "legal entities".

Article 5, however, confines itself to stating what conditions have to be fulfilled by individuals or by certain expressly specified bodies corporate, namely, partnerships and joint stock companies. What is the position of a body operating in the public interest, or of a non-profit association, that wishes a ship engaged on, say, a humanitarian or scientific mission, to fly a particular flag?

#### *Article 8. Immunity of State ships other than warships*

9. This article may, *prima facie*, apply to several categories of ships:

(1) State-owned ships used on commercial or non-commercial government service;

(2) Privately owned ships used on:

(a) Non-commercial government service;

(b) Commercial government service.

10. It is uncertain whether article 8 applies to all these categories or whether ships covered by 2 (a) are excluded. The relevant comment in the Commission's report seems to suggest the former, as it states that "there were no sufficient grounds for not granting to State ships used on commercial government service the same immunity as other State ships".

This interpretation is, however, only possible if it is agreed that article 5.1 should be construed in the manner suggested in paragraph 2 above.

11. Under The Hague Declaration of 3 June 1955, signed by Belgium, Denmark, France, the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany, which refers to the international Convention for Regulating the Police of the North Sea Fisheries, signed on 6 May 1882, police functions over the North Sea fisheries may be exercised increasingly by ships other than warships.

12. Moreover, if fishing vessels owned or operated by the State are to enjoy complete immunity from the jurisdiction of any State other than the flag State, in the same manner as warships, that fact will have to be borne in mind in devising the appropriate international machinery to ensure due compliance with the "Overfishing" convention. Some States might even escape the control machinery of the convention by operating their national fishing vessels as State ships.

#### *Piracy*

##### *Article 15. Act of piracy*

13. As this article constitutes an exception to article 14, it is hardly logical to say that "acts of piracy" are assimilated to "acts committed by a private vessel". The following wording would seem preferable:

"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."

*Article 16. Pirate ship*

14. The article defines a pirate ship as a ship which is *devoted* to the purpose of committing acts of piracy.

The comment on article 18, however, states that before the ship can be seized it must *actually have committed* acts of piracy.

Furthermore, the terms of article 15 suggest that a warship, which cannot in principle be regarded as *devoted* to acts of piracy, might nevertheless become a pirate ship.

Some amendment is surely necessary, so that the definition should read as follows:

"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."

*Article 18. Seizure of a pirate ship*

15. If the modification suggested in paragraph 14 above is introduced, article 18 will be fully consistent with the relevant comment in the Commission's report. If the change is not made, the operative provision itself should state that the vessel can only be seized if it has committed acts of piracy. If such a clause were introduced, then the subsequent reference, in article 19, to seizure on *suspicion* of piracy, would also be more logical.

## B. REGIME OF THE HIGH SEAS. FISHING

*Article 29. Measures unilaterally adopted by a State*

16. This article is somewhat vague in its reference to the "area . . . contiguous" to the coast.

The International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome from 18 April to 10 May 1955, did not express any opinion on the question of the contiguous zone.

Furthermore, a serious query arises regarding subparagraphs (a) and (b) of paragraph 2, which state that the measures adopted "shall be 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.

Again, paragraph 3 provides for the possible application of measures which are still controversial. In such cases, however, the source of the controversy will be precisely the insufficiency of the evidence produced. It may be somewhat rash, therefore, to say that the country concerned may nevertheless proceed with those measures.

Nor is it a very reassuring feature that the coastal State would have exclusive discretion in deciding what is the "reasonable" period within which its negotiations with the other States must lead to an agreement (paragraph 7). The very term "reasonable" leaves too much scope for interpretation.

If the Commission persists in the view that, notwithstanding a reference to arbitration, measures which evoke criticism should nevertheless remain in effect, then

inevitably the negotiations will be protracted. If in consequence of arbitration proceedings the measures in question are declared to be inconsistent with the rules of international law, these measures will then have to be rescinded *ex post facto*. Such a procedure is hardly likely to prevent such measures from being adopted in the first place.

Accordingly, if there is no possibility of having the whole of article 29 deleted, at least the second sentence of paragraph 3 should be deleted; this paragraph states that "the measures adopted shall remain obligatory pending the arbitral decision". It would be preferable if controversial measures remained in abeyance so long as the arbitral commission has not rendered its award.

## C. REGIME OF THE TERRITORIAL SEA

*Article 3. Breadth of the territorial sea*

17. The breadth of the territorial sea was the subject of prolonged and lively discussions, during which the Commission made praiseworthy efforts to agree on a concrete proposal. The text now reproduced in the report calls for the following comments:

18. It would be welcome if all countries could be induced to subscribe to the principle, which the Commission admits, that international law does not justify an extension of the territorial sea beyond twelve miles. Universal acceptance of that principle would at least put a halt to the ever-growing pretensions of certain countries.

19. Furthermore, the statement that international law does not require States to recognize a breadth beyond three miles (paragraph 3) 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 the former State are not to remain in uncertainty about the law, some agreement must be reached with the State which so extends its limits. Let us take, for example, the case of Iceland: it would be useless to say that the United Kingdom, Belgium and other countries have the right to dispute the new Icelandic limits if it is simultaneously conceded that Iceland has the right to fix those limits. The Commission's statement, while correct in international law (A/CN.4/SR.328, paras. 22 ff.), does not resolve the practical difficulties.

20. In view of the possibilities (of exercising fishing rights) opened up by the scope of draft 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 limit, as stated in article 3, would be acceptable to the majority of States.

21. It will 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.

*Article 5. Straight base lines*

22. This article provides that the base line, for the

purpose of measuring the breadth of the territorial sea, may be independent of the low-water mark if circumstances necessitate a special régime (deep indentations of the coast, islands in its immediate vicinity, economic interests).

Although paragraph 1 of this article was adopted by the Commission by 10 votes to 3, there seems to be little justification for the inclusion of the criterion of "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage". Nowhere does the judgement of the International Court of Justice in the Fisheries Case state that mere "economic interests" constitute sufficient grounds for the adoption of straight base lines.

#### *Article 7. Bays*

23. In this connexion, it should be noted that The Hague Convention of 6 May 1882 fixed the maximum length of the closing line across the opening of a bay at ten miles.

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

24. See paragraph 23 above.

#### *Article 15. Delimitation of the territorial sea of two adjacent States*

25. Belgium's earlier suggestion regarding this article (formerly article 16) was not adopted.

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

26. Cf. the comments in paragraphs 2 and 9 above concerning the definition of "State ship".

#### *Article 25. Warships*

27. The corresponding article in the previous draft (article 26) had laid down the principle that there existed a right of innocent passage without previous authorization or notification. Some members of the Commission wished the text to stress that such passage was in fact merely a concession, which is contingent on the consent of the coastal State. That point of view was shared by Belgium.

The majority concurred with that view and the amended wording of the present article 25 was adopted. As the text now stands, the State will have the right to refuse passage even where, in like circumstances, a merchant vessel would be entitled to pass unhampered.

### 3. Brazil

#### *Document A/CN.4/99*

TRANSMITTED BY A NOTE VERBALE DATED 19 DECEMBER 1955 FROM THE PERMANENT MISSION OF BRAZIL TO THE UNITED NATIONS

[*Original: Portuguese*]

#### *1. With regard to the régime of the high seas*

(a) It is suggested that article 5 should contain a clause providing 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.

(b) It is recommended, with reference to the question of hot pursuit (article 22), that it should be stipulated that for the purpose of the exercise of the *right of pursuit* it shall suffice if the coastal State, in the defence of its lawful interests, has good reason to believe that an offence against its laws or regulations has been or is about to be committed; a similar provision is contained in article 9 of the Convention concluded between Finland and various other countries at Helsingfors on 19 August 1925.

(c) It is recommended that the United Nations should establish, instead of a mere arbitral commission as provided by article 31, a specialized agency 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 the problems of the conservation and utilization of the living resources of the sea.

#### *II. With regard to the territorial sea*

(a) It is noted that the draft articles do not contain any provision relating to the contiguous zone although a reference to this zone occurs in article 22 [of the provisional articles concerning the régime of the high seas]. In our view it would be desirable to allow for such a zone, extending up to twelve miles from the coast, in the case of States whose territorial sea does not exceed six miles in breadth; such States to have jurisdiction in the said zone purely for certain specific purposes or, preferably, for the purposes indicated in the relevant article adopted by the Commission at its fifth session (1953); with, perhaps, the addition of exclusive fishing rights — or at least the right to regulate and control fishing — with a view to the conservation of the living resources of the zone.

(b) With regard to article 7 we would state: (i) that the definition of the term "bay" given therein seems to us unnecessary and complicated. If, however, a definition is desired we would prefer that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Conference, namely, for the purpose of determination of the base line a bay "must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width" (League of Nations, *Conference for the Codification of International Law, Bases of Discussion*, Volume II, page 163); and (ii) that we consider the limit of twenty-five miles for the closing line at the entrance of or within a bay to be frankly excessive — especially since (except of course in the case of *historical bays*) this width has not, as a rule, exceeded twelve miles in practice.

(c) With regard to roadsteads (the subject of article 9) we maintain the view which we previously communicated to the International Law Commission. We might now cite in support of our case passages from the books of the leading authorities on the public international law of the sea; for example, Gilbert Gidel says: "*Every roadstead should be subject to the régime of internal*

waters" (Gidel, *Le droit international public de la mer*, II, pages 22 ff.). To the same effect see also: C. John Colombos, *The International Law of the Sea*, third edition, 1954, page 66, paragraph 78; and J. L. de Azcárraga, *Régimen jurídico de los espacios marítimos*, page 109. Cf. Oppenheim-Lauterpacht, seventh edition, page 455, paragraph 190c.

(d) With regard to islands, drying rocks and drying shoals, with which the draft articles 10 and 11 are concerned: 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 to us unreasonable that the same should not apply to islands in precisely the same situation. In our view 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. Thus, instead of specifying that this applies to drying rocks, etc. "which are wholly or partly within the territorial sea", the provision should be made applicable, for example, to those which lie within three miles. This would obviate the exaggerated widening of a State's territorial waters at particular points.

#### 4. Cambodia

##### *Document A/CN.4/99/Add.2*

LETTER DATED 2 APRIL 1956 FROM THE MINISTER FOR FOREIGN AFFAIRS OF CAMBODIA

[Original: French]

Referring to your letter LEG 292/9/01 LEG 292/8/01, dated 31 January 1956, in which you drew my attention to the report of the International Law Commission covering the work of its seventh session, I have the honour to transmit to you the following comments on the drafts.

I. Cambodia has no legislation of its own on maritime law drafted since gaining its independence.

At present it applies the principles of French law.

The draft submitted for our consideration is, however, of great value and the fullest account will be taken of it when a Maritime Code for Cambodia is drafted later, since the principles enunciated in it are in conformity with both universal international law and Cambodian domestic law.

We have no comment to make on the chapter of the draft devoted to the régime of the high seas.

II. With regard to chapter III, concerning the "territorial sea", Cambodia has adopted the rules of French law, under which the territorial sea has a breadth of three miles, with a wider contiguous zone for the purposes of police or customs jurisdiction. The three-mile formula seems to be the one most in harmony with the principle of freedom of the seas.

The Government of Cambodia would accordingly like to see it adopted by all States; for it would be contrary to the principle of equality between States if all were not subject to the same rules on this point of international law.

Moreover, the three-mile limit is no bar to the exercise by the State of sovereign rights over the continental shelf (article 2 of the draft contained in the report of the International Law Commission covering the work of its fifth session).<sup>2</sup>

III. Cambodia would therefore be happy to support the efforts of the General Assembly of the United Nations in that field to achieve uniform maritime legislation.

#### 5. Canada

##### *Document A/CN.4/99/Add.7*

NOTE VERBALE DATED 7 MAY 1956 FROM THE DEPARTMENT OF EXTERNAL AFFAIRS OF CANADA

[Original: English]

The Secretary of State for External Affairs presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the Legal Counsel's letter Leg. 292/9/01 of August 24, 1955, inviting the comments of the Government of Canada on the International Law Commission's provisional articles concerning the régime of the high seas adopted by the Commission at its seventh session.

The Secretary of State for External Affairs would be grateful if it would still be possible to have forwarded to the International Law Commission a copy of the comments set out below on chapter II of the International Law Commission's draft articles on the régime of the high seas, entitled "Fishing".

##### *Article 26*

Since nationals of two or more States may be fishing in any area but not necessarily for the same stock of fish, or the fishing activities of one or more States may be on a very small scale, it would seem reasonable to provide that fishing must be on a substantial scale and that the measures to be prescribed relate to the stock of fish in which the States concerned are jointly interested.

##### *Article 27*

The comment made with regard to the aforementioned article also applies to paragraph 1 of this article, that is, fishing must not only be in the same area but on a substantial scale and for the same stocks of fish.

This article should be subject to the "abstention principle" as hereinafter mentioned.

##### *Article 28*

A coastal State always has an interest in the resources of the high seas contiguous to its coast by the mere fact of contiguity. This interest should be recognized without question. The "special interest" of the coastal State is recognized in the *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* held in Rome in 1955.<sup>3</sup> It is considered that

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

<sup>3</sup> United Nations publication, Sales No. 1955.II.B.2, para. 18.

the phrase "having a special interest in the maintenance of the productivity of the living resources" in paragraph 1 should be deleted.

*Article 29*

It is considered that a similar criticism applies to this article.

*Article 30*

Although there may be, in certain circumstances, some justification for a State not engaged in fishing in an area not contiguous to its coast to request a fishing State to take certain conservation measures, care should be taken that this request would not extend to measures necessarily having to be taken within the boundaries of the fishing State. This article, therefore, should be qualified to indicate that the fishing State would be under no obligation to take measures within its boundaries.

*Article 31*

In the event that there is disagreement concerning the composition of the arbitral Commission it is considered that all parties to the dispute should have the right to be represented on the arbitral Commission as finally constituted.

The Government of Canada is of the opinion that these articles should be subject to the "abstention principle", which was considered at the International Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in 1955 and which is stated in the report of the Conference as follows:

"A special case exists where countries, through research, regulation of their own fishermen and other activities, have restored or developed or maintained stocks of fish so that their productivity is being maintained and utilized at levels reasonably approximating their maximum sustainable productivity, and where the continuance of this level of productivity depends upon such sustained research and regulation. Under these conditions, the participation of additional States in the exploitation of the resource will yield no increase in food to mankind, but will threaten the success of the conservation programme. Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action.

"Existing procedures. The International North Pacific Fishery Commission provides a method for handling the special case mentioned above. It was recognized that new entrants in such fisheries threatened the continued success of the conservation programme. Under these circumstances the State or States not participating in fishing the stocks in question agreed to abstain from such fishing when the Commission determines that the stock reasonably satisfies all the following conditions:

"(a) Evidence based upon scientific research indicates that more extensive exploitation of the stock will not provide a substantial increase in yield;

"(b) The exploitation of the stock is limited or

otherwise regulated for conservation purposes by each party substantially engaging in its exploitation; and

"(c) The stock is the subject of extensive scientific study designed to discover whether it is being fully utilized, and what conditions are necessary for maintaining its maximum sustained productivity. The Convention provides that, when these conditions are satisfied, the States which have not engaged in substantial exploitation of the stock will be recommended to abstain from fishing such stock, while the States engaged in substantial exploitation will continue to carry out the necessary conservation measures. Meanwhile, the abstaining States may participate in fishing other stocks of fish in the same area."<sup>4</sup>

## 6. Chile

### *Document A/CN.4/99/Add.1*

LETTER DATED 16 MARCH 1956 FROM THE PERMANENT MISSION OF CHILE TO THE UNITED NATIONS

[*Original: Spanish*]

With reference to Your Excellency's note No. LEG 292/9/01 dated 24 August 1955, inviting my Government to comment on the provisional articles concerning the régime of the sea adopted during the seventh session of the International Law Commission, I have the honour to transmit the following reply:

The position of the Chilean Government in the matter of the provisional articles concerning the régime of the sea has been determined by domestic legislation, by the international agreements signed with Ecuador and Peru and by Chile's attitude in the international organizations concerned.

In this connexion we would draw attention to

The Presidential Declaration of Sovereignty, dated 3 June 1947;

The agreements signed at Santiago with Ecuador and Peru, in August 1952, and the supplementary agreements signed at Lima, in December 1954, with those countries;

The Chilean delegation's attitude at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1955, under the auspices of FAO;

The position taken at the third meeting of the Inter-American Council of Jurists, held in Mexico in January 1956, and in particular the resolution approved by that international body, by a large majority, concerning the subjects under discussion.

Lastly, the views which Chile intends to uphold at the specialized inter-American conference to be held in the Dominican Republic will complete the series of precedents determining the Chilean Government's position on the provisional articles drafted by the International Law Commission concerning the régime on the high seas and of the territorial sea.

<sup>4</sup> *Ibid.*, paras. 61 and 62.

As the matter is one that is developing rapidly and as we intend to support the inter-American decision on these problems, the Chilean Government feels unable to give a more explicit reply to your note until the conclusion of the relevant debates at the meeting to be held at Ciudad Trujillo.

At the same time, I have pleasure in enclosing herewith a copy of the resolution approved on this matter at the Third Meeting of the Inter-American Council of Jurists, held in Mexico in January 1956.<sup>5</sup>

## 7. China

### *Document A/CN.4/99*

TRANSMITTED BY A LETTER DATED 9 FEBRUARY 1956 FROM THE PERMANENT MISSION OF CHINA TO THE UNITED NATIONS

[Original: Chinese]

#### *Comments on the provisional articles concerning the régime of the high seas*

1. Provisional article 10 provides that in the event of a collision on the high seas, criminal proceedings against persons responsible for the incident may be instituted only before the authorities of the State to which the ship on which such persons were serving belonged or of the State of which such persons are nationals. This provision is incompatible with articles 3 and 4 of the Chinese Criminal Code.

The Chinese Government believes that although criminal jurisdiction is primarily territorial, it does not follow that a State can assume jurisdiction only over offences which are committed wholly within its territory. An offence must be deemed to have been committed within the territory of a State if the overt act constituting the offence is committed within the territory of that State or if the offence produces its effect within the territory of that State. In either case, the offence is within the penal cognizance of that State. This is a principle generally accepted in modern penal legislation and incorporated in the Chinese Criminal Code.

In a collision case, if an unlawful, injurious act involving the criminal responsibility of the crew of one vessel produces its effect upon a vessel of a different nationality, the offence is of the same nature as a crime which produces its effect in the territory of the State to which the victim vessel belongs. Under the principle stated above, it cannot be doubted that such an offence is within the criminal jurisdiction of that State.

This rule was unequivocally affirmed in the judgement rendered in 1927 by the Permanent Court of International Justice in the "Lotus" case. It should be pointed out that the provisional article in question, in its attempt to alter this rule, has run counter to the notion of the territoriality of criminal jurisdiction now adopted by most States. For

this reason, the Chinese Government is unable to agree to provisional article 10.

It is stated in the report of the International Law Commission covering the work of its seventh session that the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, signed at Brussels in 1952, modified the rule affirmed in the judgement on the "Lotus" case. Since this convention has not yet won general acceptance, its provisions can have only limited application as rules of international law.

2. Piracy has been said to "consist in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons". (See the report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, 1927, page 116.) This is piracy in the restricted sense.

In a broad sense, 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 can also be regarded as having committed piracy. This interpretation is fully in accord with the views of writers and authorities on international law and is adopted in the Chinese Criminal Code, which provides for the punishment of both types of piracy. (See article 5, paragraph 8, and article 333, paragraphs 1 and 2, of the Chinese Criminal Code.)

Since provisional article 14 contains only the definition of piracy in its narrow sense, the Chinese Government believes that it should be amended to include also piracy in its broad sense as described in the preceding paragraph.

3. Provisional articles 25 and 26 on the regulation and control of fishing activities appear to favour States whose nationals are already engaged in fishing in any given area of the high seas and fail to take into account the possible interests of the States whose nationals may in future participate in the fishing activities in such areas. The Chinese Government considers it desirable to adopt appropriate supplementary provisions in this regard in order to safeguard such interests.

#### *II. Comments on the draft articles on the régime of the territorial sea*

1. In draft article 3, the International Law Commission has, in effect, recognized the right of each State to decide on the breadth of its own territorial sea within the limits of three to twelve miles. Although this formulation may be regarded as expedient under the prevailing circumstances, the Chinese Government wishes to reserve its position on this question for the time being.

2. The Chinese Government fully agrees with the provisions of draft article 7 that waters within a bay should be considered internal waters if the line drawn across the opening does not exceed twenty-five miles and that where the entrance of a bay exceeds twenty-five miles, a closing line of such length should be drawn within the bay.

<sup>5</sup> Not included in this document. The resolution is reproduced as annex I to document A/CN.4/102.

## ANNEX

TEXTS OF ARTICLES 3, 4, 5 and 333 OF THE  
CHINESE CRIMINAL CODE<sup>6</sup>

## 8. Denmark

*Document A/CN.4/99/Add.9**Article 3*

This Code shall apply to any offence committed within the territorial limits of the Republic of China. Offences committed on any Chinese vessel or aircraft beyond the territorial limits of the Republic of China shall be deemed to have been committed within the territorial limits of the Republic of China.

*Article 4*

An offence shall be deemed to have been committed within the territory of the Republic of China if the overt act constituting the offence is committed within the territory of the Republic of China, or if the offence produces its effect in the territory of the Republic of China.

*Article 5*

This Code shall apply to any one of the following offences committed beyond the territorial limits of the Republic of China:

1. Offences against the internal security of the State;
2. Offences against the external security of the State;
3. Offences relating to counterfeit currency;
4. Offences relating to counterfeiting of valuable securities, as specified in articles 201 and 202;
5. Offences relating to false documents and seals, as specified in articles 211, 214, 216 and 218;
6. Offences relating to opium,<sup>7</sup>
7. Offences against personal liberty, as specified in article 296;
8. Offences of piracy, as specified in articles 333 and 334.

*Article 333*

Whoever navigates any vessel not being commissioned by a belligerent State or not being part of the naval forces of any State, with intent to commit violence or employ threats against any other vessel or against any person or thing on board such other vessel, is said to commit piracy, and shall be punished with death, or imprisonment for life, or for not less than 7 years.

Whoever being a ship's officer<sup>8</sup> or a passenger on board a ship, with intent to plunder or rob, commits violence or employs threats against any other officer<sup>8</sup> or passenger and navigates or takes command of the ship shall be deemed to have committed piracy.

Where death results from the commission of piracy, the offender shall be punished with death; or if grievous bodily harm results, the offender shall be punished with death or imprisonment for life.

<sup>6</sup> The texts of the various articles, with the exception of article 4, are based on the translations made by the Legal Department of the Shanghai Municipal Council (The Commercial Press, Shanghai, China, 1935), pp. 2-3 and 119. Texts of articles 3, 4 and 5, taken from the same source, already appear in *Laws and Regulations on the Régime of the High Seas* (United Nations Legislative Series, Vol. II (1952), p. 24). A new translation of article 4, the key article on which the Chinese Government bases its comments on the question of collision, has been made because the existing text does not fully express the meaning of the original.

<sup>7</sup> An additional item which appears in the Chinese text submitted by the Chinese Government. Article 5 was amended on 7 November 1948.

<sup>8</sup> "A member of the crew" and "another member of the crew" would be closer to the meaning of the original expressions.

TRANSMITTED BY A LETTER DATED 2 JULY 1956 FROM THE  
PERMANENT MISSION OF DENMARK TO THE EUROPEAN  
OFFICE OF THE UNITED NATIONS

[Original: English]

The Danish Government wish to make the following comments on the provisional articles concerning the régime of the high seas and the régime of the territorial sea (chapters II and III of the Commission's report) as adopted by the International Law Commission as its seventh session.

I. *The régime of the high seas**Article 33*

According to this article, the decisions of the arbitral commission shall be binding. On the other hand, the article leaves the question open as to who is to supervise the observance of the provisions and as to what coercive measures may be applied against countries failing to abide by the decisions and against the fishermen of such countries. It is the opinion of the Danish Government that the efficacy of the whole arbitration scheme will depend on a satisfactory solution of these questions.

The particular interest which, from a Danish point of view, attaches to the preservation of the fauna of the arctic regions, makes it desirable in the opinion of the Danish Government that, in accordance with the underlying purpose of protecting and developing the living resources of the sea, the proposed convention should apply also to marine mammals, particularly seals, and that this be expressed in the draft articles.

II. *The provisions concerning the régime of the territorial sea**Article 1*

According to this article, the sovereignty of a State extends to a belt of sea adjacent to its coast and described as the territorial sea.

This axiom can be accepted provided it does not preclude that the breadth of this belt is fixed differently for the different relations in which a State exercises sovereignty over the parts of the sea nearest to its coast. According to Danish legislation and practice, the limit of the territorial sea is normally four nautical miles from the coast as regards the maintenance of customs control, whereas in other respects the limit of the territorial sea is three nautical miles from the coast. In other words, territorial sea as a term of international law should not necessarily be construed as a standard term, but should be variable according to the different functions it serves.

### Article 3

In the opinion of the Danish Government it would be desirable if, as recommended by the International Chamber of Shipping in their statement of 27 April 1955, agreement was reached between the Government on a definite, not too wide, limitation of the territorial sea. However, the Danish Government are in agreement with the statement of the Commission to the effect that, as conditions are to-day, no uniform international practice can be demonstrated as regards the breadth of the territorial sea.

In these circumstances and in the light of existing practice the Danish Government take the following view:

The prevailing régime is not tantamount to complete freedom for each State to decide the breadth of its territorial sea. This point of view has also been upheld by the International Court of Justice in its decision of the British-Norwegian fisheries dispute. Thus, a State cannot, by altering the rules which have so far been applied for delimitation of the territorial sea, incorporate any large areas which have hitherto been high seas into its own territorial waters to the detriment of the interests of other States. On the other hand, it would not be equitable for those States which have so far maintained a territorial sea of, say, three nautical miles to be bound to that limit indefinitely, irrespective of other States maintaining a considerably broader territorial sea. Thus, it cannot be considered unreasonable if a State effects a certain limited extension of its territorial sea, when weighty national considerations warrant such a policy and when such extension can be effected without violating the established interests of other States in the waters in question. Such an extension should not, however, exceed the limits generally observed in the waters in question, and it should not be exorbitant as compared with the rules practised by other States, notably those whose coasts are adjacent to the waters involved.

As a State has not only certain rights but also obligations in its territorial sea, the Danish Government would recommend that it be indicated in this article that a State shall not limit its territorial sea to less than a breadth of three nautical miles.

As regards the problem of solving disputes between States on the questions falling under this heading, the Danish Government are of the opinion that, as conditions are to-day, it may be doubtful whether a diplomatic conference as proposed by the Commission would be a suitable means to that end. It would seem preferable, as a minimum and provisional solution, to establish an impartial and independent arbitral body, as previously considered, which could deal with cases where a State claims that its interests require an extension of the territorial sea maintained so far, while another State or other States oppose such a measure as being incompatible with their established interests.

### Articles 5 and 7

A special bay rule based on geometrical computations, laying down general conditions for the cases when a basis line may be drawn across the mouth of an indentation, will hardly provide a satisfactory solution which will be

applicable to all the widely different geographical conditions. It will also be necessary to take economic and defence factors into consideration in the computation of bay-chords. It might be worthwhile considering whether the rule of article 5 would not be sufficient, possibly deleting the word "deeply" before "indented" in the second line of paragraph 1.

The last period but one of paragraph 1 of article 5 appears to imply that the sea areas within the base lines will always be "internal waters". This does not appear to be a necessary consequence of using the base line as a starting point for the fixing of the outer limit of the territorial sea. Hence, there should be nothing to prevent the drawing of base lines between islands and the mainland at the mouth of straits without thereby implying that the part of the strait lying within such base line is to be regarded as internal waters. Even if delimitation between the internal and outer territorial sea should normally follow the base lines used at the fixing of the outer limits of the territorial sea, it may be expedient to make deviations from this rule in certain cases. A State should not be precluded from fixing only the outer limits of its territorial sea without indicating any delimitation between the internal waters and the territorial sea.

In compliance with the wish expressed in the Commission's comments on article 7 for information concerning bays bounded by two different States, it may be stated that in the case of Denmark the question has been solved *vis-à-vis* Sweden by a declaration concluded between the two countries on 30 January 1932, and *vis-à-vis* Germany by the fixation of the frontier made by an international commission acting in accordance with article III of the Versailles Treaty. In both cases, the frontiers are based on the median line and exceptions from this principle have only been made when shipping- and fishery-interests of the States justified a different arrangement.

### Article 10

In its comments on article 10 the International Law Commission mentions the question of formulating a special rule for groups of islands. In the opinion of the Danish Government it should not be necessary to formulate such a rule because the principle underlying article 5 implies that straight base lines may be drawn between the islands of a group. Perhaps article 5 should be amended so as to preclude any doubt. It would not appear reasonable to make a distinction between islands off a coast and islands forming an independent group. Incidentally, any such distinction would be difficult to maintain from a geographic point of view as an island may be so large that in the application of the said principle it should rank equally with a mainland.

### Article 12

With regard to straits whose coasts belong to the same State, it must be permissible, under the general principle of article 5, to draw straight base lines between points on either side of the strait near its mouths. In accordance with the comments on articles 5 and 7, the drawing of such base lines should not affect the normal right of free passage through the strait.

*Articles 18 and 25*

Paragraph 4 of article 18 and paragraph 2 of article 25 refer to the right of innocent passage through international straits, partly for vessels in general and partly for warships. The Danish Government would find it very desirable that the provisions in question indicate, in exact terms, that the right of passage through an international strait does not imply permission for any navigation other than passage, and only in the normal sailing route. This could be achieved, for example, by formulating the relevant passages "through that part of the straits normally used for ...".

The Danish Government agree with the principle of international law that warships in time of peace have right of innocent passage through international straits. It is the view of the Danish Government, however, that this principle does not debar the State in question from taking, in certain areas, reasonable measures for the protection of its security, provided that these measures do not amount to a prohibition or to a suspension of the right of innocent passage, *vide* paragraph 4 of article 18 of the draft articles. The requirement of previous notification, for example, would be within the scope of such reasonable measures, and the Danish Government therefore believe that in their comments to paragraph 2 of article 25 the Commission have gone too far by suggesting that

"in straits normally used for international navigation between two parts of the high seas, the right of passage must not be made subject to previous authorization or notification".

The Danish Government are 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.<sup>9</sup>

In addition to these comments on the individual provisions of the draft, the Danish Government take the opportunity of pointing out that the report of the International Law Commission contains no reference to a problem which is of particular interest to Denmark, namely, the problem of the extent of the jurisdiction to which a coastal state is entitled as a result of its responsibility for the measures to be taken for the safety of navigation.

As the waters round the Danish coasts are comparatively shallow at a great distance from the nearest coast and contain many shoals and reefs constituting a danger to navigation, the Danish Government have undertaken the responsibility for marking the fairways by means of light-vessels, buoys and the like far beyond the Danish territorial sea. This particular responsibility rests partly on an old-established practice and partly on the express provision in article 2 of the Treaty of 14 March 1857 on the abolition of the Sound dues, under which the Danish Government were obliged to preserve and maintain "...the buoys, and beacons now existing which serve to facilitate navigation on the Kattegat, the Sound and the Belts" and

moreover "in future, as heretofore, in the general interest of navigation to take up for serious consideration whether it might be useful and convenient to alter the location and form of these . . . buoys and beacons or to increase their number, everything without any charge to foreign shipping". By agreements between the Danish Lighthouse Authority and the corresponding authorities of the neighbouring countries, a delimitation has been established of the area of responsibility of each country in the waters outside the territorial sea.

In order to accomplish this task efficiently and safely, it must be possible to enforce the regulations issued by the Danish authorities with that end in view, with binding effect on everyone navigating the said waters. As examples of such regulations may be mentioned:

(a) Prohibition of jettison of rubbish, cargo, ballast, ashes or the like in places where it may cause a reduction of the depth of the fairway to such a degree that free navigation is endangered.

(b) Rules on the placing of pound net stakes, including prohibition of placing such stakes in fairways where they may endanger navigation.

(c) Prohibition of establishing, without permission, sea-marks and the like in the fairways which may obstruct navigation.

(d) Prohibition of destruction or damage of established sea-marks and of using sea-marks for mooring or for securing fishing tackle, etc.

(e) Rules on the removal of wrecks and rendering them harmless, including the right of making the salvage of wrecks abandoned by the owner conditional on special permission by the Danish authorities. (Only such rules will provide the necessary assurance that the salvage contractor carries out the salvage with due regard to the safety of navigation and, particularly, provides the necessary depth of water over any wreckage left).

From the aspect of international law there is nothing to prevent such regulations from being enforced against Danish nationals outside the territorial sea. It is, however, obvious that the efficacy of the rules would be materially weakened if the argument should be raised that they are not enforceable against foreign nationals. Experience has proved, especially since 1945, the need for regulations for the salvage of wrecks by foreign contractors in those parts of the high seas where Denmark is responsible for the buoying of the fairways.

The Danish Government would therefore welcome a succinct formulation of a rule of international law to the effect that a State which, according to custom or international agreement, has assumed responsibility for the buoyage and similar measures for the safety of navigation in fairways outside the territorial sea, shall be entitled to issue, also with effect for foreign nationals who navigate in such waters, any regulation which may be required to prevent dangers to navigation, and entitled to exercise such jurisdiction over foreign nationals as may be required for the effective enforcement of these regulations.

In conclusion, the Danish Government wish to state that they may revert, in greater detail, to the problems dealt with in this document. Certain questions relating to ar-

<sup>9</sup> The observations of the Danish Government on paragraph 2 of article 25 were transmitted earlier by a letter of 13 January 1956.

title 22 of the provisional articles concerning the régime of the high seas are at the moment being studied by the Danish authorities.

## 9. Dominican Republic

### *Document A/CN.4/99*

TRANSMITTED BY A LETTER DATED 5 MARCH 1956 FROM THE PERMANENT MISSION OF THE DOMINICAN REPUBLIC TO THE UNITED NATIONS

[*Original: Spanish*]

1. The provisions of municipal law concerning the régime of the high seas, the régime of the territorial sea and the submarine or continental shelf are contained in article 5 of the Constitution of the Dominican Republic, in Act No. 3342 of 13 July 1952 concerning the extent of the territorial waters of the Republic, and in the Harbour and Coastal Police Act (No. 3003) of 12 July 1951.

2. So far as the extent of the territorial sea and the continental shelf are concerned, article 5 of the Constitution of the Republic provides that "the adjacent territorial sea and continental shelf are likewise part of the national territory", and adds that "the extent of the territorial sea and of the continental shelf shall be defined by statute". Article 1 of Act No. 3342 provides:

"a zone of three nautical miles along the coasts, the said zone extending seaward from the mean low-water mark, is hereby established as the extent of the territorial or jurisdictional waters".

Article 4 establishes:

"an additional zone adjacent to the territorial sea, to be known as the 'contiguous zone', which shall consist of a belt extending outward from the outer limit of the territorial sea to a distance of twelve nautical miles into the high seas".

Previous delimitations are subject to a transitional provision of the Act which states:

"The dimensions of the territorial sea and of the contiguous zone which are specified in this Act constitute the minimum limit of the aspirations of the Dominican Republic and, accordingly, do not represent an immutable position with respect to any progressive development of positive international law that may hereafter affect the régime of the sea."

3. The Bays of Samaná, Ocoa and Neiba, within the boundaries formed by lines drawn transversally between their respective capes and points, are declared historical waters or bays. These lines demarcate the boundaries of the internal waters and the base line of the territorial waters in the bays in question.

4. With regard to maritime resources, article 5 provides:

"The Dominican State reserves the right of ownership in and utilization of the natural resources and wealth which occur or may be discovered in the sea bed or subsoil of the sea in an area, adjacent to Dominican territory, the extent of which shall be determined by

the National Administration according to the requirements inherent in the taking possession and exploitation of the said natural resources and wealth and, where appropriate, through international treaties. The Dominican State shall have power to set up or to authorize the setting up of structures or installations necessary for the exploitation of the said resources and to exercise all and any policing measures necessary for their conservation."

5. In pursuance of Act No. 3003 (see para. 1), if any crime or offence is committed on board a Dominican or foreign merchant vessel, whether in a port or in the territorial waters of the Republic, the harbour-masters (*Comandantes de Puerto*) are empowered to act; they report the circumstances to the ordinary courts, but this action does not prejudice whatever action may be taken by other officials of the Judicial Police. If a crime or offence is committed on board a warship, the harbour-master concerned may not go on board but instead prepares a report setting forth the facts which have come to his notice.

6. The provisions relating to entry into port in distress or through *force majeure* and to the nationality of ships are contained, respectively, in article 46 and in articles 96 and 97 of Act No. 3003:

"A vessel shall be deemed to have entered a Dominican port in distress or owing to *force majeure* if its entry is occasioned by:

"(a) Lack of general provisions for the needs of the voyage;

"(b) Legitimate fear of being captured by enemies or pirates;

"(c) Accidents which render the vessel unseaworthy;

"(d) A storm which cannot be weathered on the high seas;

"(e) An unexpected illness or serious injury suffered by a passenger or crew member and requiring urgent attention; or

"(f) A mutiny on board, threats or serious disagreements between the crew.

"In all other cases entry into port shall be deemed to be voluntary.

"The following vessels possess Dominican nationality:

"(a) Vessels registered as such with the Port Authorities;

"(b) Vessels seized from the enemy in time of war or condemned as prize;

"A vessel cannot acquire Dominican nationality until its foreign registration has been cancelled."

7. The enclosed copies of article 5 of the Constitution and of Act No. 3342 contain provisions concerning the extent of the territorial waters of islands or islets; canals and other waters considered as territorial; the regulations governing the territorial sea and the contiguous zone in the areas bordering on the territory of the Republic of Haiti; and the powers of jurisdiction or control in the contiguous zone and in internal waters declared to be national territory.

## 10. Iceland

*Document A/CN.4/99/Add.2*

NOTE VERBALE DATED 6 APRIL 1956 FROM THE MINISTRY  
FOR FOREIGN AFFAIRS OF ICELAND

[*Original: English*]

The Ministry for Foreign Affairs of Iceland presents its compliments to His Excellency, the Secretary-General of the United Nations, and has the honour to refer to the Legal Department's note of 24 August 1955 (LEG 292/9/01) inviting the comments of the Government of Iceland upon the report of the International Law Commission covering the work of its seventh session. The Government of Iceland has the honour to submit the following comments.

I. *Preliminary remarks*

The Government of Iceland has studied the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea which were submitted in the report of the International Law Commission. Since the two régimes are closely related the following comments will whenever necessary refer to both sets of articles.

The fundamental provisions will be dealt with first (II), whereupon certain other provisions will be commented on (III).

II. *Provisions of fundamental importance*

*A. Baselines:* In the opinion of the Icelandic Government the International Law Commission has done very valuable work in redrafting articles 4 and 5 of the territorial sea draft. These articles constitute a marked improvement over earlier drafts. The Icelandic Government, however, finds it necessary to propose that the last sentence of paragraph 1 of article 5 should be deleted. It is there provided that the baselines should not be to and from drying rocks and drying shoals. In the Anglo-Norwegian Fisheries Case the International Court of Justice confirmed the legality of using drying rocks as basepoints and in present Icelandic legislation such basepoints are used in many instances.

*B. Bays:* Article 7 of the territorial sea draft also constitutes a marked improvement over earlier drafts. Also in this case useful work has been performed by the Commission for which it deserves credit. This applies particularly to paragraph 5 of article 7, without which the draft would have been unacceptable. It is submitted, however, that paragraph 5 should apply to all the preceding paragraphs.

*C. Breadth of the territorial sea:* The Commission wishes to have the comments of Governments before drafting the final text of article 3 of the territorial sea draft. However, the Commission has in a preliminary manner drafted certain basic postulates.

In paragraph 1 of article 3 the Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles. It does not seem appropriate to refer to the so-called

three-mile rule "as the traditional limitation". As the Commission itself recognizes, practice is not uniform in this field. It seems that it would have been quite sufficient for the Commission to state that fact.

In paragraph 2 of article 3 it is stated that the Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles. The Government of Iceland, as will be further explained later, does not share this view.

In paragraph 3 of article 3 it is said that the Commission considers that international law does not require States to recognize a breadth beyond three miles.

The views expressed in article 3 seem to present a very curious mixture and really to be irreconcilable. On the one hand the so-called three-mile limit is apparently given basic importance which in the opinion of the Icelandic Government is quite unwarranted. On the other hand a wider limit than twelve miles would apparently be considered illegal even if recognized by other states or justified in view of local considerations. The Government of Iceland has been unable to find a sound basis in these postulates.

The traditional régime of the sea is characterized by a sort of compromise between the jurisdiction of the coastal State in waters adjacent to its coast and the freedom of the seas beyond that area. The former is juridically on the same level as the latter. It would be a mistake to consider it as an exception to a principle. The difficulty has always been and still remains to decide where the line of separation should be drawn.

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 group of States would favour a general convention based on the system of the three-mile limit. The conclusion of such a convention would imply that the many States which are opposed to that limit would give up their opposition. That, of course, is thoroughly unrealistic.

In its judgement in the Fisheries Case the Court stated the following in connexion with the United Kingdom Government's assertion that the so-called ten-mile rule in bays should be regarded as a rule of international law:

"In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."<sup>10</sup>

It seems clear that the same reasoning applies with equal force to the assertion that the three-mile limit for the extent of the territorial sea should be regarded as a rule of international law.

As indicated by the rapporteur of the International Law Commission, the practice of States varies greatly, and in the different reports of the rapporteur different limits are

<sup>10</sup> *I.C.J. Reports 1951*, p. 131.

proposed varying from three miles to twelve miles. In the report of the International Law Commission it is stated that on this question divergent suggestions were made during the debates of the Commission.<sup>11</sup>

A uniform system would be possible only if very extensive limits were to be adopted. It would not mean that all States would agree to the three-mile limit. On the contrary, the States who are in favour of that limit would have to be prepared to accept a much more extensive one. In the absence of that attitude it seems that the only practicable solution would be to accept the principle of regional or local systems which is in conformity with the facts of the present practice. The Government of Iceland is prepared to examine any reasonable proposition of that nature.

The question of the breadth of the territorial sea is, of course, closely linked with that of the contiguous zones and cannot be dealt with in an isolated manner. The basis for coastal jurisdiction is that certain interests of States in their coastal areas are recognized. One of these interests would be exclusive jurisdiction over fisheries in the coastal area. If a contiguous zone is used for that purpose the necessity, for example, as far as Iceland is concerned, for a wide territorial sea would appear in quite a different light from the situation where no such contiguous zone was provided. The reasons for this attitude are found in an earlier statement by the Icelandic Government as follows:

"... 2. The views of the Icelandic Government with regard to fisheries jurisdiction can be described on the basis of its own experience, as follows:

"Investigations in Iceland have quite clearly shown that the country rests on a platform or continental shelf whose outlines follow those of the coast itself (see provisional map, p. 54) whereupon the depths of the real high seas follow. On this platform invaluable fishing banks and spawning grounds are found upon whose preservation the survival of the Icelandic people depends. The country itself is barren and almost all necessities have to be imported and financed through the export of fisheries products. It can truly be said that the coastal fishing grounds are the *conditio sine qua non* of the Icelandic people for they make the country habitable. The Icelandic Government considers itself entitled and indeed bound to take all necessary steps on a unilateral basis to preserve these resources and is doing so as shown by the attached documents. It considers that it is unrealistic that foreigners can be prevented from pumping oil from the continental shelf but that they cannot in the same manner be prevented from destroying other resources which are based on the same sea-bed.

"3. The Government of Iceland does not maintain that the same rule should necessarily apply in all countries. It feels rather that each case should be studied separately and that the coastal State could, within a reasonable distance from its coasts, determine the necessary measures for the protection of its coastal fisheries

in view of economic, geographic, biological and other relevant considerations."<sup>12</sup>

These views remain unchanged.

The Icelandic Government recently has had occasion to present its views on this subject to the Council of Europe in a memorandum of September 1954 as well as in an additional memorandum of October 1955. In the former memorandum it is shown that in the period between 1662 and 1859 the fishery limits around Iceland were 16 miles, all bays being also closed to foreign fishing. In the latter part of the nineteenth century the enforcement of the prevailing limits by the Danish Government became inefficient and in 1901 they concluded an Agreement with the United Kingdom which specified the ten-mile "rule" for bays and three-mile fishery limits around Iceland. These limits were applicable until the Agreement was terminated in 1951, due notice in accordance with its own provisions having been given by the Icelandic Government to that effect. For many years it had then been quite clear that the fishstocks were rapidly decreasing due to overfishing, so that unless positive steps were taken the country's economic foundation would be faced with ruin.

In the last few years steps have been taken by the Icelandic Government towards enforcing its jurisdiction over the continental shelf fisheries in conformity with the provisions of the 1948 Law concerning the Scientific Conservation of the Continental Shelf Fisheries. The steps taken so far, although they only partially meet the requirements of the situation, have already been of immense value and constitute significant proof of the tremendous importance of exclusive fisheries jurisdiction as the basis of the country's economy. It should not be overlooked in this connexion that foreign fishing, far from being adversely affected, has benefited from the measures taken. The result of the measures has been that the fishstocks have increased and led to greater output of the fisheries in the Icelandic area. This matter is further discussed in the memorandum to the Council of Europe referred to above.

In the articles drafted so far by the Commission no contiguous zone is provided for exclusive fisheries jurisdiction. In the absence of such provisions the interests involved would have to be covered by a very wide territorial sea. If, on the other hand, a contiguous zone is provided, the text of article 2 of the high seas draft would have to be changed.

In chapter II of the high seas draft (articles 24-33) conservation of the living resources of the high seas is dealt with. Although these articles recognize the special interests of the coastal States, it is quite clear that they would not grant exclusive fisheries jurisdiction to the coastal States. According to them the necessary measures for conservation are to be worked out if possible through international agreements. If that is not possible the coastal state could adopt the necessary measures, but *inter alia* such measures must not discriminate against foreign fishermen. This system is reasonable if applied to the area beyond the limits of exclusive coastal jurisdiction over fisheries, provided the interests of the coastal State in

<sup>11</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9, para. 68.*

<sup>12</sup> *Ibid., Eighth Session, Supplement No. 9, annex II, section 8.*

such jurisdiction are reasonably protected. Within the limits of exclusive coastal jurisdiction, foreign fishing can of course be prohibited by the coastal State. This is an incontrovertible fact. But to say that such limits are fixed at, for example, three miles has no realistic foundation. What is called for is an appreciation by the coastal State of its own needs up to a reasonable distance. That distance might vary considerably in the different countries in view of economic, geographic, biological and other relevant considerations. To take an example, a country having no special interest in its coastal fisheries might consider relatively narrow limits sufficient for its purposes, whereas a country, like Iceland, basing its economic existence upon coastal fisheries, would consider the same limits quite unacceptable. Also, countries bordering upon a narrow sea, like the North Sea, would be in a different position from a country situated far from other countries. *The coastal State is in the best position to analyse and assess its requirements in this field and should do so (up to a reasonable distance which would not necessarily be limited to twelve miles).*

*Although conservation through international agreements, where foreign fishermen would have the same rights as the local fishermen, is reasonable and necessary beyond the limit of exclusive coastal fisheries jurisdiction, the former is not an acceptable substitute for the latter. This is the crux of the matter and that problem has to be faced in a realistic manner.* Consequently the Icelandic Government would not consider that the conservation articles adopted by the Commission would reduce the importance of exclusive coastal fisheries jurisdiction. In other words the conservation articles would supplement the coastal jurisdiction. They could not in any way substitute such jurisdiction.

### III. Other provisions

*Article 2* of the high seas articles provides for freedom of fishing in the high seas. As already pointed out this text would have to be changed if a contiguous zone for exclusive fisheries jurisdiction is provided.

*Article 22* of the same draft deals with the right of pursuit. It is submitted that the text of paragraph 3 should be amended so as to cover identification and pursuit by aeroplanes as well as identification from the coast.

*Article 24:* Same observations as on article 2 above.

## 11. India

### *Document A/CN.4/99*

A. TRANSMITTED BY A NOTE VERBALE DATED 10 FEBRUARY 1956 FROM THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS

[Original: English]

#### *Régime of the high seas*

*Article 2:* The Government of India are of the view that it is desirable to clarify that the freedoms enumerated in this article are to be enjoyed in conformity with the rules of international law. The position as it exists today is that the freedom of the high seas is subject to certain

recognized exceptions in international law including the right of a coastal State to adopt measures necessary for self defence. Most of these exceptions find place in the subsequent articles, and it does not appear to be the intention of the International Law Commission to introduce any basic changes in the existing position. To put the matter beyond controversy, the Government of India would suggest the insertion of the following clause at the end of the article:

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

It would appear that a similar provision has been made in article 1 (2) on the régime of the territorial sea.

*Article 5:* The Government of India have undertaken a revision of their laws relating to merchant shipping and for the present they would like to reserve their comments on this draft article.

*Article 22:* The Government of India are of the view that this article should be suitably amended so as to allow the right of pursuit of a foreign vessel also in cases where the pursuit has commenced within the contiguous zone though outside the territorial sea. The Government of India feel that unless such a right is recognized the utility of contiguous zones would be much diminished and the purpose of establishing such zones may be somewhat frustrated.

*Articles 24 to 30:* The Government of India have no comments on article 24. They are, however, of the view that the basis of the draft articles 25 to 30 are unacceptable. They do not protect the legitimate interests of coastal States and, in particular, are unfair to under-developed areas which have expanding populations increasingly dependent for food on the living resources of the seas surrounding the coasts, and which for political reasons were unable hitherto to assert their rights to develop their fishing fleets. The Government of India feel that a coastal State should have the exclusive and pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the high seas contiguous to its coast. Unless such a right of the coastal State is recognized, States with well developed fishing fleets may indulge in indiscriminate exploitation of the living resources of the sea contiguous to the coast of another State much to the detriment of that State and its people. The Government of India consider that it would be undesirable to confer a right on a State to adopt conservation measures or establish conservation zones in areas contiguous to the coast of another merely because its nationals have engaged in the past in fishing in such areas. The primary right and duty of conservation of living resources should be that of the coastal State in respect of areas contiguous to its coast. The Government of India do not deny the right of other States to fish in the high seas contiguous to the coast of another, but where conservation measures have been adopted by the coastal State, other States may approach the latter for suitable agreements in this regard. The Government of India feel that the exercise of such a right by the coastal State will be in the general interest of the international community and will not in any way interfere

with the freedom of *bona fide* fishing in the high seas enjoyed by all the States. The Government of India attach great importance to these articles and desire that these be reconsidered in the light of the above comments.

The Government of India would suggest the following amendments to these articles:

*Article 25:* Insert the words "contiguous to its coast" between the words "high seas" and "where" in line 2.

*Article 26:* Insert the words "beyond the belt of 100 miles from the coast of a State" after the words "high seas" in line 2.

*Article 28:* This becomes unnecessary if amendments to article 25 are accepted.

*Article 29:* The proviso to paragraph 1 should be omitted and the following proviso be substituted:

"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: clause (a), omit the word "scientific"; clause (b), in place of the existing clause substitute the following: "That the measures adopted are reasonable"; clause (c), at the end of the clause insert the words "as such".

*Article 30:* May be deleted.

*Articles 31 to 33:* The Government of India would prefer to reserve their comments on these articles until a final decision is reached on the subject of arbitral procedure.

*Annexures to articles on the régime of the high seas:* The Government of India wish to offer the same comments as under articles 24 to 33.

#### *Régime of the territorial sea*

*Article 1:* The Government of India would suggest insertion of 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".

*Article 3:* The Government of India are unable to accept paragraph 3 of this article as this will be in conflict with the provisions of paragraph 2 and would render the said provisions meaningless. The Government of India would suggest that paragraph 3 should be omitted and paragraph 2 be redrafted 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 coast line, should have freedom to fix a practical limit".

*Article 5:* The Government of India would suggest the substitution of the word "area" for the word "region" in paragraph 1.

*Article 7:* Comments to be telegraphed later.

*Articles 8, 9, 13:* Comments to be telegraphed later.

*Article 16:* The Government of India would suggest insertion of the following clause at the end of paragraph 1:

"Except in times of war or emergency declared by the coastal State".

*Article 19:* The Government of India would suggest that the following be inserted as sub-clause (a) and that the existing sub-clauses be renumbered as (b), (c), (d), (e) and (f) respectively.

"(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".

#### *Document A/CN.4/99/Add.3*

B. NOTE VERBALE DATED 17 APRIL 1956 FROM THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS

[Original text: English]

The Permanent Representative of India to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to refer to the comments of the Government of India forwarded with his note No. 325, dated the 10th February 1956, on the draft articles on the régime of the territorial sea provisionally adopted by the International Law Commission.

Article 13 of the régime of the territorial sea is acceptable to the Government of India subject to the following proviso:

"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."

The Government of India have no comments to offer on articles 8 and 9. Comments as regards article 7 will be communicated shortly.<sup>13</sup>

#### 12. Ireland

#### *Document A/CN.4/99/Add.4*

LETTER DATED 20 APRIL 1956 FROM THE DEPARTMENT OF EXTERNAL AFFAIRS OF IRELAND

[Original: English]

I am directed by the Minister for External Affairs to refer to your letter of 31st January 1956, concerning the report of the International Law Commission covering the work of its seventh session (LEG 292/9,01; LEG 292/8,01), and to say that the Government of Ireland have read with interest and appreciation 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. However the Government of Ireland consider that the time available

<sup>13</sup> By a *note verbale* of 23 August 1956, the Permanent Representative of India to the United Nations notified the Secretary-General that the Government of India had no comments to offer on article 7.

for the study and furnishing of comments on this important subject by those States admitted to membership of the United Nations at the tenth session of the General Assembly in inadequate and accordingly wish, at this stage, to reserve generally their attitude as regards the articles, particularly as regards chapter II of the draft articles on the régime of the territorial seas.

Nevertheless, without prejudice to the general reservation of their attitude, the Government of Ireland take this opportunity of indicating the following in relation to article 5 of the provisional articles concerning the régime of the high seas:

Article 5 provides that for purposes of recognition of a ship's national character by other States, that ship must be Government-owned or more than half-owned by:

(1) Persons actually resident in the territory of the flag State who are either nationals of that State or legally domiciled there; or

(2) A partnership in which the majority of the partners are such persons; or

(3) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.

Under the Mercantile Marine Act, 1955, the Government or a Minister of State, an Irish citizen or an Irish body corporate are alone unconditionally entitled to own an Irish ship or a share therein. No distinction is drawn between Irish citizens actually resident in Ireland and those actually resident in other countries.

Moreover, provision exists in that Act for the granting, by order of the Government, of registry and ownership rights in Ireland to citizens of and bodies corporate registered in another State which permits Irish citizens and bodies corporate to own a ship of its flag or a share therein. One such order has been made to date.

### 13. Israel

#### *Document A/CN.4/99/Add.1*

TRANSMITTED BY A NOTE VERBALE DATED 21 MARCH 1956  
FROM THE PERMANENT MISSION OF ISRAEL TO THE UNITED  
NATIONS

[*Original: English*]

#### I

The present observations are submitted in accordance with provisions contained in the Statute of the International Law Commission and in response to the invitation of the Secretary-General of the United Nations. By way of preliminary observation the Israel Government wishes to place on record its appreciation of the work which has been achieved in the field of the codification and progressive development of the international law regarding the high seas and the régime of the territorial sea by the International Law Commission, by its Special Rapporteur, Professor J. P. A. François, and by the Development and Codification of International Law Division of the Secretariat of the United Nations. Whatever may be the ultimate outcome in these important spheres, there is no room for doubt concerning the high scientific value of the

documents which have been prepared in connexion with these topics, and which serve, and will assuredly continue to serve, as important signposts in connexion the clarification of the legal aspects of the problem. At the same time the Government deems it necessary to place on record its view that, regarded as a whole, the complex of problems involved in these two topics is not solely or even predominantly of a legal character. The non-legal elements will, in due course and in the proper organs, have to be accorded a like degree of careful and penetrating study such as the International Law Commission has succeeded in giving to their legal aspects.

A word of comment is ventured on the form of the Commission's reports in the hope that at its eighth session the Commission and its general Rapporteur, as well as the Secretariat, will be able to give consideration to the somewhat technical problem about to be mentioned. The different kinds of administrative difficulties which stand in the way of the preparation of the Commission's reports and the rapid circulation of the official summary records of the Commission's deliberations are appreciated. But at the same time it is felt that the summary records of the Commission's deliberations must be regarded as an integral part of its reports. Indeed, it is impossible to acquire complete understanding of the different formulations put forward by the Commission, whether in its draft articles or in its comments, without careful perusal of the Commission's deliberations preceding the final adoption of the article or comment in question. Furthermore, the system of incorporation of portions of comment by reference to previous reports of the Commission has led to some unnecessary confusion, and it is requested that this system be abandoned. The Government of Israel considers that it would be useful, both in connexion with the discussion on the Commission's final draft which is due to be placed on the provisional agenda of the eleventh session of the General Assembly, and for any other discussions which might subsequently take place, were the Commission's report, or an accompanying document prepared by the Secretariat, to set forth with great particularity and detail the full history of each article and comment, including a chronological survey of the different drafts and attendant proposals put forward during the various deliberations of the Commission, both those adopted by the Commission and included in its various sessional reports and those which were not adopted by the Commission. Furthermore, such synoptic survey should also contain the most ample references to the summary records and documentations of the Commission's eighth and all previous sessions at which the particular item was discussed. In this connexion it is also considered that additional scientific and political value will attach to such a report could it be found possible to include in it comparable references to the proceedings of The Hague Codification Conference of 1930. Owing to the relative unavailability of much of the earlier documentation it is felt that it is incumbent upon the various organs to provide some adequate substitute.

#### II

In its note of 24 January 1950 (see A/CN.4/19), this Ministry gave a preliminary survey of the laws in force in Israel and relating to the topics of territorial waters

and the régime of the high seas. In response to a subsequent invitation of the Secretary-General, in connexion with the preparation of further volumes of the United Nations Legislative Series (a publication of which this Government is highly appreciative), further factual information of similar character was transmitted to the Secretary-General in this Ministry's note dated 13 December 1955. In connexion with these documents the following observation is required: As is apparent from the dates of most of the legislation to which reference is made in those communications, by far the greater part of that legislation originated with the mandatory authorities prior to the independence of Israel. Essentially in order to avoid the creation of a legal vacuum and for reasons of obvious convenience, the legislative organ decided at the very beginning of the State's independent existence to reintroduce into force the whole corpus of mandatory legislation previously in force. Subsequent legislative action has been in the main, though not entirely, concerned with introducing various amendments to the earlier legislation thus maintained in force. The various statements of the existing law transmitted on previous occasions in order to assist in the work of the International Law Commission must be taken therefore as what they are, namely, as descriptions of law which for the greater part does not yet reflect, or does not necessarily reflect, the general policy of the country as regards the matters with which they are concerned. This policy is still in early stages of its development and is likely to remain so for some time. This facet may be illustrated by one example — a cardinal one. In a number of domestic laws, the breadth of the country's territorial sea has been defined by reference to the three-miles rule, and other legislation of relevance to that topic faithfully reflects the policies of the United Kingdom, as mandatory power, upon them. The views of the United Kingdom on all matters connected with the law of the sea are based upon a number of considerations of policy and of interest particularly to the United Kingdom. As will be seen in the course of these observations, in this matter the Government of Israel has reached conclusions which are different from those of the United Kingdom. In so far as international action is concerned the Government has taken the necessary steps to give formal public notification of what those views are. It has not yet found it possible to complete the necessary legislative steps to bring all the domestic legislation into line, or fully into line, with its international position. For this reason alone the relevant domestic legislation of Israel, nearly all of it a "heritage" of the previous rulers of the country, can under no circumstances or for any purpose be regarded as indicating the view of the Government and legislature thereon, or as evidence of the State practice of Israel.

The two most important international actions undertaken by the Government of Israel in connexion with the topics under discussion relate to the continental shelf (submarine areas), and the breadth of the territorial sea. In a *note verbale* dated 17 March 1952 (A/2456, p. 58) from the Permanent Delegation of Israel to the United Nations, a number of the Government's general views in connexion with an earlier formulation by the International Law Commission of draft rules on the continental shelf

were set forth. Since then, by a Proclamation dated 3 August 1952, the Government decided to extend all its competences over the submarine areas (continental shelf) contiguous to the shores of Israel.

The following is a translation of the formal proclamation embodying this policy published in *Yalkut Hapirsumim* No. 244 of 11 August 1952, page 989.

#### "PROCLAMATION

"Whereas recent scientific investigations indicate the presence of mineral wealth and other natural resources in the submarine areas contiguous to the coasts of Israel;

"And whereas it is desirable to take steps to preserve these resources and to assure their availability for the purpose of future research, utilization and development;

"And whereas several other States have taken steps to exercise jurisdiction over the submarine areas contiguous to their coasts;

"Therefore the Government of Israel hereby proclaims and publicly announces as follows:

"(1) The territory of the State of Israel shall include the seabed and the subsoil of the submarine areas contiguous to the coasts of Israel and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas.

"(2) Nothing contained in paragraph 1 shall affect the character as high seas of the waters as are above the said submarine areas and outside the territorial waters of Israel.

"12 Av 5712 (3 August 1952)

"By order of the Government

"Hannah EVEN-TOV

"Deputy Secretary to the Government"

Shortly afterwards the Knesset passed legislation by which this policy was transformed into a rule of domestic law. Following is a translation of the law in question.<sup>14</sup>

#### No. 21; SUBMARINE AREAS LAW, 5713 — 1953

1. (a) The territory of the State of Israel shall include the sea floor and under-ground of the submarine areas adjacent to the shores of Israel but outside Israel territorial waters, to the extent that the depth of the superjacent water permits the exploitation of the natural resources situate in such areas.

(b) Nothing in subsection (a) shall affect the character of the water superjacent on the said submarine areas, and outside Israel territorial waters, as waters of the high seas.

With regard to the breadth of the territorial sea, the Government decided, after careful review of all factors

<sup>14</sup> Passed by the Knesset on the 25th Shevat, 5713 (10th February, 1953) and published in *Sefer ha-Kukkim* No. 120 of the 5th Adar, (20th February, 1953), p. 53; the Bill and an explanatory note were published in *Hatza'ot Hok* No. 133 of the 20th Av, 5712 (11th August, 1952), p. 332. English translation from *Laws of the State of Israel*, Vol. 7, 5713—1952/3, authorized translation from the Hebrew, p. 41.

involved, upon a reasonable increase in the limits of the territorial sea beyond the so-called traditional rule of three miles. In the circumstances the reasonable extended limit was placed at six nautical miles from the line of low-tide. The formal embodiment of this policy is found in a Notice published in *Yalkut Hapersumim* No. 442 dated 22 September 1955, page 1, of which the following is the tenor:

“GOVERNMENT’S DECISION OF 24 Elul 5715  
(11 September 1955)

“*Notice on the maritime frontier of the State of Israel*

“The maritime frontier of the State of Israel is placed at a distance of six nautical miles from the coast measured from the low-water line, and the areas of the sea between the low-water line as aforesaid and the maritime frontier, together with the air space above them, constitute the maritime areas of Israel.”

In this case this Ministry found it desirable to send a formal notification of the terms of the Government’s Proclamation (while not considering that in strict law it was under any obligation to do so, the document in question having been published in the corpus of Israel official documents regularly published in *Yalkut Hapir-sumim* — the Official Gazette — and thus being available for the examination of other Governments whenever they should desire) to all countries with which diplomatic relations are maintained, as well as for information to the Secretary-General of the United Nations and of other specialized agencies which might be interested.

### III

No comment is made at present on the arrangement of the articles by the Commission with one exception (relating to straits). However, before proceeding to the detailed observations on them, a few words of comment are necessary on some general problems which are of transcendental importance.

The first of these problems relates to the breadth of the territorial sea at present discussed in article 3 of the Draft articles on the régime of the territorial sea. In some respects this is the pivot upon which the whole of the Commission’s proposals depend — both those on the high seas and those on the territorial sea — but it is believed that this problem is in fact far wider than a mere technical legal problem. It is a matter of common knowledge that there exist a number of international tensions which have their origin in important conflicts of interests and in which the very concept of the territorial sea plays an important role. The proceedings of the International Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in April 1955, in the opinion of the Israel Government, afford little ground for confidence that it is possible to find on a technical and scientific basis a set of principles of universal validity upon which a satisfactory legal régime can be constructed. Re-reading in the twentieth century the classic literature on the topic in the light of the able researches of Mr. Wyndham Walker in *The British Year Book of International Law*, Vol. 22 (1945), p. 210, and of Mr. H. S. K. Kent in the *American Journal*

*of International Law*, Vol. 48 (1954), p. 537, it appears that what is sometimes called the traditional three-miles rule and the rigidity of its application have their origin in a combination of a number of fortuitous circumstances, the present importance of which is negligible. The validity today of the transference of the traditional rule and its rigid application to other parts of the world, in conditions entirely different from those prevalent when it emerged as the solution to a classic controversy of the formative period of modern international law, cannot be taken for granted. Leaving aside any considerations due to particular requirements of particular States, it is an impressive fact that the two publicists previously quoted have drawn attention to the circumstance that in the Mediterranean area for example, the three-miles rule is not traditional. Indeed, how untraditional the three-miles rule is can be seen from even a cursory perusal of the reports submitted to the Commission by the Special Rapporteur. In his first report on the régime of the territorial sea (A/CN.4/53) the following Mediterranean countries were listed as maintaining more than three nautical miles for the breadth of their territorial sea: Egypt, Italy, Portugal, Spain, Turkey, Yugoslavia. In the second report on the same subject (A/CN.4/61) the following Mediterranean countries were listed as maintaining more than three nautical miles for the breadth of their territorial sea: Egypt, Greece, Italy, Lebanon (apparently), Portugal, Spain, Syria (apparently), Turkey, Yugoslavia. Of the countries possessing a Mediterranean seaboard, two only were indicated as maintaining the system of three nautical miles: France, including Algeria and Tunisia, and Israel (a reference only to mandatory practice). Similarly, perusal of the practice of other States of the Asian continent does not disclose any overriding enthusiasm for the three-miles rule. What is called the Commonwealth system based on three nautical miles is maintained by the members of the Commonwealth, Ceylon, India and Pakistan. Other Asian countries listed as maintaining the three-miles rule or less are: China (but it is not stated which China), Indo-China, Indonesia and Japan. Of the remainder Iran and Saudi Arabia maintain the six-mile belt.

In its report covering the work of its seventh session the International Law Commission proposed to consider that international law does not require States to recognize a breadth beyond three miles, but it particularly asked for comments of Governments on this proposal.<sup>15</sup> Having regard to the serious political tensions previously mentioned and to the fragile basis upon which the so-called traditional rule rests, it is considered that the approach of the International Law Commission, as manifested in article 3 of its draft articles on the régime of the territorial sea, is open to serious criticism. Furthermore, an inherent contradiction seems to exist between paragraph 2 and paragraph 3 of the said article. The Commission states that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles, regarding this as a statement of an incontrovertible fact. The implication of this observation by the Commission

<sup>15</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, p. 16.

depends ultimately upon what is meant by "fact". Sufficient evidence exists to show that this is not a fact of which the law must draw the consequences, but rather the reverse, that it is itself the consequence of another fact — namely, that universal international law does not lay down that three miles, and only three miles, is the recognizable limit of the territorial sea. This indeed is recognized, although with hesitation, in paragraph 2 of article 3, and if article 3 limited itself (subject to certain drafting changes) only to paragraphs 1 and 2, then it might be found to constitute a satisfactory basis for a universal rule. But 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 the law does not, present an absolute maximum for the breadth of the 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. By proposing, in paragraph 2, a maximum of twelve miles while at the same time considering that States are not required to recognize a breadth beyond three miles, the Commission fails to answer the crucial question, namely: What is the position of a State which exercises its right recognized by the Commission to extend its territorial sea to a limit of twelve miles *vis-à-vis* a State which exercises another right which emerges from the Commission's formulation, not to recognize a breadth of more than three miles? What is the legal régime of the *mare nullius* the breadth of which may be up to nine nautical miles, the shoreward line of which would itself be at least three nautical miles from the coast, and how are disputes on that point to be resolved? It is essential for an answer to be found to this problem if the Commission is to proceed along the lines of its report on its seventh session.

The Government is loth to believe that universal international law is so deficient in controlling principles as to be unable to suggest a solution to the conflict of interests between those of the littoral State and those of the international community, embodied in the concept of freedom of navigation. In fact the situations of tension rarely concern the bare notion of freedom of navigation. They appear to rest upon more concrete antagonisms of an essentially economic and sociological character arising out of the exercise of the right of freedom of navigation. The judgement of the International Court in the *Anglo-Norwegian Fisheries* case is interpreted as laying down that the law must take those factors into consideration. That case showed that the law will apply a general criterion of reasonableness, and the Court implied that what is reasonable in a given case depends upon all the circumstances, each of which has to be treated on its own merits, such circumstances including also the relevant elements of geography and environment. It is therefore recognized that each individual State may have individual reasons

for wishing to increase the limit of its territorial sea beyond three miles and even beyond some other arbitrary figure which may be laid down. An approach on this basis would appear to offer greater prospects for the codification and the progressive development of international law than any mechanical one, and it leads to the conclusion that the draft must also deal carefully with the settlement of disputes. Possibly this will be given an answer in the so-called "final clauses" of the draft, if it is put in the form of a convention.

Finally, it may be open to question, in the opinion of this Ministry, whether there exists any possibility, 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. It would be going too far to state categorically that on this matter there exist a number of regional customs operative in clearly defined geographic regions. However, persual both of the illuminating reports submitted by Professor François and of the proceedings of the International Technical Conference above referred to does seem to indicate that a regional approach might offer more chances of success than a universalist approach. More careful analysis of all the State practice adopted by independent States in the principal maritime regions, and of the general circumstances which led to the adoption of those practices, may be found to supply an underlying unifying factor which is at present lacking. If that be so, then it would appear to be the proper function of the Commission to attempt to establish what are the controlling rules for preventing or regulating conflicts between the States of one region and those of another.

#### IV

Of no less importance, in the opinion of the Israel Government, is the question of straits. The political tensions to which problems of navigation through straits give rise is a well-known feature of diplomatic history, and the fact that several, though by no means all, of the major straits of international concern are regulated by international conventions attests to the practical importance of the question.

It is not considered that the treatment by the Commission of the law of straits is satisfactory. These provisions are scattered over a number of articles. For example, article 12, which partly incorporates article 14, deals with the delimitation of the territorial sea in straits. Paragraph 4 of article 18 lays down — as the Commission was bound to do in the light of the judgement of the International Court in the *Corfu Channel* case — a rule that there must be no suspension of the innocent passage of foreign vessels through straits used for international navigation between two parts of the high seas. Paragraph 2 of article 25 deals with the passage of warships through straits. This arrangement of the provisions regarding straits within their context of the draft articles on the régime of the territorial sea is liable to bring about some distortion of the law.

Generally speaking, as regards the material law, the propositions advanced by the Commission covering straits are in themselves seen to be adequate (subject to a few drafting changes), but only so long as they are considered

independently from their context. For under the present arrangement of the texts, the formulation of the principle of freedom of navigation through straits might be interpreted as if it were a derogation from the rights to exercise sovereignty possessed by the littoral State or States. However, the correct manner of looking at the question is to regard the principle of freedom of navigation as predominant, and the exercise of any rights of sovereignty, including those classified by the Commission as rights of protection, as an exception from the predominant right and interest of the international community. What this means is that where access to a given port — whether an existing one or one which at some future date a State may wish to establish — is only possible by traversing a strait (in the geographical sense), then it is quite immaterial whether that strait is or is not within the waters classed as the territorial sea of one or more of the littoral States, or what is the legal nature (gulf, bay, high seas) of the waters on which the harbour is situated. In such circumstances the right of passage for the ships of all nations, and quite regardless of their cargo, is and must remain absolutely unqualified, and the littoral State or States have no right whatsoever, so long as the matter is not regulated by Convention, to hinder, hamper, impede or suspend the free passage of those ships. The same rule is also true as regards warships. This principle is clearly recognized in paragraph 4 of article 18 of the Commission's draft.

For these reasons it is considered necessary that all the provisions regarding straits should be formulated as a separate chapter which probably ought to be included not in the draft articles on the régime of the territorial sea but in those dealing with the high seas. The interests of the international community must here have absolute predominance over those of the littoral States whose territorial waters have to be traversed in making for a given harbour. In this respect the passage through straits of this character is assimilated to the high seas themselves. Such a rearrangement of the text would also remove doubts as to existence of the right of free aerial navigation over all waters assimilated with high seas.

## V

The following comments are made on the *Provisional articles concerning the régime of the high seas*:

### Article 1

The necessity for including definitions in any codification is recognized. However, lack of precision in the definitions is liable to harm the work of codification. It is therefore indispensable to avoid recourse to definition except where absolutely necessary. Article 1, by attempting to define the term "high seas" by reference to other elements — "territorial sea" and "internal waters" — themselves undefined, lacks the necessary precision. The reference to "internal waters" is particularly disturbing, because of the physical impossibility, under the Commission's approach, for high seas ever to come within physical contact with internal waters, the territorial sea always being interposed. The immediate purpose of article 1 of the draft articles on the régime of the territorial sea is to establish the juridical status of the territorial sea,

but without defining the territorial sea. In these circumstances it may be asked what is the merit of mentioning internal waters in an article which purports to deal with the definition of the high seas? If the purpose of article 1 is to define those areas of salt water to which the articles concerning the régime of the high seas apply, and not to prescribe the extent of those areas, it would appear preferable to reduce the elements necessary for a definition of the high seas to one instead of two, with the general object of eliminating as far as possible the uncertainties inherent in ambiguous terms. The same result could also be achieved by suppressing article 1 altogether, and by adding a new introductory paragraph to article 2 to the effect that for the purpose of the present articles all parts of the sea not included in the territorial sea are comprehended within the term "high seas"; the high seas being open, etc. (as in article 2). See further, comment on article 1 of the draft on the régime of the territorial sea.

### Article 2

The four freedoms which together constitute the freedom of the high seas are not accorded equal treatment in the provisional articles. Whereas freedom of navigation, freedom of fishing, and freedom to lay submarine cables and pipelines are elaborated elsewhere in the draft, no further mention is made of the freedom to fly over the high seas, a matter which the Commission seems to regard as one concerning the formulation of rules of air navigation.

Difficulties which have led the Commission to refrain from discussing in detail rules on air navigation in a document relating to the law of the sea are appreciated. But since the Commission considers that freedom to fly over the high seas follows directly from the principle of the freedom of the sea, it would at least seem logical for it to have included a reference to the matter, for example in article 3. Probably a distinction has to be made between the rules of air navigation which are to a great extent regulated by the Convention on Civil Aviation signed at Chicago on 7 December 1944 (and its various appurtenant documents), and the general international law governing the right to air navigation over the high seas. Clearly, the first aspect is better dealt with by the International Civil Aviation Organization, but that does not preclude the Commission from laying down what are the general rules of international law concerning such rights of navigation, since it is of opinion that, in so far as concerns the high seas, freedom to fly over the high seas follows directly from the principle of the freedom of the sea.

The omission of any further mention of this aspect may have an additional consequence in that it might open the way to the argument that this right is different in kind from other rights and freedoms. But such an interpretation would be completely false and it should be made clear that the right to aerial navigation exists wherever there is freedom of navigation on the sea without any exception.

It is observed that whereas article 2 refers to "freedom", and other articles, including 3 and 24, refer to "right", neither word appears in the heading to chapter III of the provisional articles, nor is any explanation given for this different terminology.

*Article 4*

Regarding the decision of the Commission, that the question whether the United Nations and possibly other international organizations should also be granted the right to sail vessels exclusively under their own flags calls for further study, and that such study will be undertaken in due course, this is considered to be a matter of sufficient importance to warrant more definite conclusions on the part of the Commission before its final draft is placed before the General Assembly. Such study should, it is considered, also cover the partly related question of the right of the United Nations and possibly other international organizations to fly aircraft exclusively under their own colours — an aspect which has arisen more than once in connexion with the activities of various United Nations agencies operating in the Near East.

The general problem might be simplified were a distinction made between the legal consequences implicit in the conception of the nationality of a ship, including in particular the total application of the law of the flag — both civil and criminal — to that ship and to all persons on board and events occurring on board (subject only to the exceptions in the way of concurrent jurisdiction recognized by general or particular international law), and the use for international purposes of recognized signs and insignia in order to secure certain measures of protection or certain other privileges which, but for those signs and insignia, the vessel would not be entitled to enjoy. This seems to be the conception underlying the system of identifying hospital ships and other vessels protected under the Geneva Conventions for the Protection of War Victims of 1949, and a similar approach to the problem under discussion might point the way to a satisfactory solution. The degree of protection thus accorded to vessels wearing the United Nations colours would then depend the vessel continuing to abide by the conditions under which the right to wear those colours was recognized. As a general illustration, reference may be made to paragraph 38 of this Ministry's note of 24 January 1950 (see A/CN.4/19).

*Article 5*

Care should be used in employing terms such as "partnership" or "joint stock company" since these may have too technical a connotation in the various systems of municipal law. As far as Israel is concerned, co-operative societies are to be assimilated to the other juridical persons mentioned in this article. It is suggested that sub-paragraphs (b) and (c) of paragraph 2 might be combined into one sub-paragraph applicable to all juridical persons.

*Article 6*

The difficulty of appreciating the import of this article is due to the unwillingness of the Commission to consider the problem of the rights and obligations of States concerning change of flag. While appreciating the reasons which have led the Commission to the view that this topic would raise a number of complicated problems, it is nevertheless considered that further examination of them must be undertaken. The assimilation of ships sailing under two flags to ships without a nationality seems to

be an extremely far-reaching conclusion, and reserve is expressed pending further consideration.

*Article 10*

Israel has not yet been able to ratify the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation signed in Brussels on 10 May 1952. Pending consideration by the competent domestic organs, comment on article 10 of the Commission's draft is reserved. But doubt is felt whether the solution adopted by the Commission in this respect is in absolute conformity with that adopted by the Brussels Convention. By article 1 of that Convention, criminal or disciplinary proceedings may be instituted against persons involved in a collision or other incident of navigation only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation. On the other hand, article 10 of the draft confers also on the State of which such persons were nationals the right to institute penal or disciplinary measures. If, as the Commission states in its comment, this addition is made in order to enable States to take disciplinary measures against their nationals with a view to withdrawing the certificates issued to them, then, in such cases, the national State should base its disciplinary (but not penal) action on the conviction pronounced by the courts of the State of the flag, and they alone should be competent in the criminal matter. If paragraph 1 were formulated in that sense, a second paragraph might be added as follows:

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

*Articles 12-20*

It is suggested that these articles, all of which relate to the policing of the high seas, should be combined to form one chapter of the document. Article 21 should also be included in that chapter because article 21 relates essentially to the suppression of the slave trade and the suppression of piracy.

With regard to article 12, it is observed that the last sentence refers specifically to a warship and a merchant vessel. However, article 8 mentions another category of "State ships". The Commission already having quite properly extended the purport of article XXVIII of the General Act of Brussels of 2 July 1890 to merchant ships, it would be equally proper for the Commission to mention other State ships.

*Articles 24-38*

The position of the Government of Israel on all the articles concerning fishing, other than article 2, is reserved pending fuller consideration of the proceedings of the International Technical Conference held at Rome in April 1955.

At the same time it is believed that article 7 of the annex, relating to arbitration, needs very careful reconsideration. The system of arbitration proposed by the

Commission appears to constitute an abdication of the role of international law in the settlement of this kind of dispute. It is therefore extremely prejudicial to the prospects of satisfactory settlement of such disputes, because it opens the way to the introduction of too great a political element in the constitution and probably in the functioning of the arbitral commission.

In this Government's understanding, the essential function of arbitration is to provide a machinery for the quasi-judicial settlement of international disputes, especially, but not exclusively, where a high degree of expert and technical knowledge is required on the part of the members of the tribunal. Thus conceived, an arbitral tribunal (subject to the will of the parties) is distinguished from a judicial tribunal proper in that it is recognized that the decision may be reached taking into account the non-legal factors equally with the legal elements of the dispute, whereas in a judicial tribunal the dispute may only be decided by application of international law. As the Commission has been requested by the General Assembly to reconsider its draft on arbitral procedure, it is suggested that the difficulties which the Commission encountered when drafting articles 7 to 9 of the annex to the provisional articles concerning the régime of the high seas should be taken into consideration, and that the formulation of articles 7 to 9 should be postponed until thereafter.

## VI

The following comments are made on the *Draft articles on the régime of the territorial sea*:

### Articles 1 and 2

In view of the comments made on article 1 of the provisional articles on the régime of the high seas, the question arises whether articles 1 and 2 of the draft articles on the régime of the territorial sea might not well be combined with article 1 of the articles concerning the régime of the high seas so as to form a comprehensive introductory chapter to the two sets of articles which, although dealing with matters which are juridically distinct if interrelated, nevertheless have a single unifying element — the sea. From this point of view, the articles on the high seas deal with that part of the sea — the greater part — over which sovereignty cannot be exercised while those on the régime of the territorial sea deal exclusively with that part of the sea which is subject to the sovereignty of the littoral State.

Obviously international law, and only international law, defines the conditions according to which sovereignty may be exercised over that part of the sea itself subject to sovereignty. Paragraph 2 of article 1 should not be drafted in such manner as to suggest that these articles themselves are something distinct from any other rules of international law.

The importance of this question arises principally from article 2, especially in the light of the discussion in the 295th meeting of the Commission. It is necessary to make clear what is the distinction between sovereignty, and the exercise of sovereignty, each treated separately in the two paragraphs of article 1, as well as the implications of the

extension of the concept of sovereignty, or its exercise, to the air space above the territorial sea. There is probably a contradiction between article 2 of the draft articles on the régime of the territorial sea and the recognition in article 2 of the provisional articles concerning the régime of the high seas, that the freedom to fly over the high seas follows directly from the principle of the freedom of the sea. As has previously been mentioned, the right to aerial navigation (in the Commission's conception) derives from the principle of the freedom of navigation, and as the Commission recognizes in several articles of its draft, the freedom of navigation or the right to free navigation does not only depend upon whether the waters in question are high seas but is also fully exercisable through other waters which might physically be territorial sea.

It further appears, from careful perusal of the whole of the two sets of draft articles, that the concept embodied in articles 1 and 2 of the draft articles on the régime of the territorial sea is not the postulate from which all other rules can be deduced so much as the residuum after all the other rules have been formulated. More detailed formulation of the question of competence and jurisdiction in the territorial sea, including straits, may render the dispositions of articles 1 and 2 superfluous in the context of articles on the régime of the territorial sea without prejudicing their general character as part of an introductory chapter to both sets of articles.

### Article 3

For reasons already given the draft article is not regarded as acceptable.

### Article 7

It is considered that the draft articles would be deficient on a crucial issue were the Commission not to consider the problem of bays, the coasts of which belong to more than one State.

With regard to article 7 itself the following questions arise:

1. Is it considered that the definition of paragraph 1 applies also to gulfs?

2. Having regard to paragraph 3 and to the Commission's comment on the article, is it considered that the definition of article 7 applies only to bays having a single coastal State, and, if so, is it considered that the existence of a single coastal State is an essential element of the definition of a bay? What then is the position of bays in which this element is absent?

3. If the general purpose of article 7 is to lay down a method of determining the distinction between territorial sea and internal waters as regards bays, what is the practical purpose of the introductory words of paragraph 7: "For the purpose of these regulations?" The draft articles do not discuss the régime of internal waters. If the judgement of the International Court in the *Fisheries* case is correctly understood<sup>16</sup> the possibility exists that internal waters may nevertheless constitute a navigational route, and while the existence of such navigational route within internal waters would not prejudice their

<sup>16</sup> *I.C.J. Reports 1951*, p. 132.

character as internal waters, the question nevertheless arises whether international law has anything to say on the topic.

4. What is the difference from the juridical (and not geographical) point of view between the straight base lines discussed in article 5 and the closing line of a bay mentioned in article 7?

These questions have been raised because of difficulty that has been experienced in appreciating the practical value of the provisions of article 7 considered as something distinct from those of article 5. However, if the practical value resides in the fact that, contrary to article 5, article 7 contains restrictions, firstly as regards the extent of water enclosed within an indentation by reference to its mouth (an area as large as or larger than that of the semi-circle drawn on the entrance of that indentation), and secondly as regards the fixed distance of the entrance, the objective might be obtained by a formula which would specify that the internal waters of a State include the waters enclosed within a well-marked indentation occurring on its own coast if the area of that indentation is as large as or larger than that of a semi-circle having for its diameter a line not exceeding miles from low tide mark and traced between the points of entrance of the indenture. Paragraphs 2, 4 and 5 would then remain as they are, but paragraph 3 could be eliminated.

It is considered that the diameter of twenty-five miles, which is the figure mentioned by the Commission in paragraph 3, is excessive and would constitute too severe a restriction of the area of sea not capable of coming under sovereignty of a State. A figure of some ten to twelve miles at the maximum would appear more reasonable.

#### Article 12

For reasons already given, it is considered that, 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 within the régime of territorial sea.

#### Articles 16-19

It is possible that the title of article 16, "Meaning of the right of innocent passage", is not entirely an accurate heading. The article as a whole does not place emphasis upon freedom of transit and freedom of communications such as was clearly enunciated in the Barcelona Convention of 20 April 1921. Paragraph 3 of article 16, read together with article 18, is couched in terms so wide as to render completely nugatory the recognition of the right contained in paragraph 1. It is necessary to give absolute precision to what is meant by the expression "acts prejudicial to the security of the coastal State" in formulating what is a serious derogation from the right of innocent passage. Above all, it has to be made clear that this derogation from the general right is not operative when the passage in question constitutes the only access to a given port.

None of the dispositions of chapter III appear to place any emphasis on the fact that it is the behaviour of the vessel herself, and not extraneous circumstances, which

determines the innocent character of a particular passage.

It is not clear why in paragraph 4 of article 18 the Commission found it necessary to depart from the very clear language of the International Court in its judgement in the *Corfu Channel* case and, by the addition of the word "normally", to distort almost beyond recognition the very clear statement of the law made by the Court. Furthermore, the word "suspension" is far too broad an indication of what is permitted to the littoral State, especially as paragraph 3 emphasizes the temporary character of any such action. It is noted that article 17 uses the word "hamper" and article 25 the word "interfere". Probably all three words should be used in all three places, it also being made clear that nothing permanent or discriminatory is involved.

As to article 19 (c), which refers to the conservation of the living resources of the sea, it is considered that the duty of foreign vessels to conform with such laws and regulations depends upon those laws and regulations being themselves conformable not merely to general international law but to particular international law in force between the flag State and the littoral State. Subject to any rules of particular law in force between them, it has to be made clear that the obligations deriving from article 19 (other than those referred to in article 19 (d)) on the part of a foreign vessel also depend upon the absolutely non-discriminatory character of the laws and regulations which should apply equally to vessels of the littoral State and to all foreign vessels.

#### Article 21

Without questioning the general tenor of this article, it is believed that it might be open to misinterpretation in so far as no mention is made of the right of the authority of the coastal State to take steps to suppress illicit transit traffic in stupefying drugs, a matter which of course is regulated by a considerable number of international conventions.

#### Article 22

It is considered preferable to set forth seriatim the types of civil maritime claims which would justify arrest of a vessel rather than merely to refer to the Brussels Convention relating to the Arrest of Sea-going Ships. It is noticed that paragraph 2 of article 22 refers only to civil maritime claims justifying the arrest of vessels, but does not mention the place in which the arrest may be effected. A similar problem is regulated in paragraph 1 of article 21 by the proposal regarding the arrest of any person, etc., on a vessel *passing through the territorial sea*. It is not clear whether arrest under paragraph 2 of article 22 may be exercised in the same manner.

It is further observed that paragraph 3 of this article is the only one to contain reference to the individual (a claimant). Careful reconsideration of this formula would appear desirable. Furthermore, to the extent that the law in force in Israel does not permit the arrest of another vessel owned by the person who at the relevant time was owner of the arrested vessel, as is proposed by the Commission, the Israel Government's position in that aspect is reserved.

Finally, the competent organs of the State not having yet pronounced themselves as regards ratification by Israel

of that Convention, reserve is expressed at the provisions of paragraph 4. The law in force in Israel at present (the U.K. Merchant Shipping Act, 1894, section 688) envisages a somewhat broader power to levy execution against or to arrest a foreign vessel for the purpose of any civil proceedings than is mentioned in the said paragraph 4.

## VII

Observing the fact that by virtue of previous decisions of the General Assembly, including in particular its resolution 899 (IX) of 14 December 1954, the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea will be placed on the provisional agenda of the eleventh session of the General Assembly, it is considered that it would be generally advantageous were the Commission, in accordance with article 16 (j) and article 22 of its statute, to indicate in the recommendations which it is entitled to make to the General Assembly, what further procedure it considers would be useful to carry the work so ably performed by the Commission up to the present to a successful conclusion. In the *note verbale* of 17 March 1952, paragraph 3, the view was expressed that ultimately the whole work of the Commission on the two topics of the high seas and territorial sea would have to be discussed together as a single phase, either in the General Assembly itself or in a specially convened diplomatic conference. From its study of the developments that have occurred since 1952, the Government of Israel remains in favour of that type of procedure. Nevertheless, it considers that much further preparatory work is required before such a full discussion could profitably be undertaken. The views of the Commission would certainly be of the greatest assistance in considering these further aspects.

### 14. Italy

#### *Document A/CN.4/99/Add.8*

COMMENTS TRANSMITTED IN A LETTER DATED 14 JUNE 1956  
FROM THE MINISTRY OF FOREIGN AFFAIRS OF ITALY

[*Original: French*]

I. COMMENTS ON THE DRAFT ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS APPROVED BY THE INTERNATIONAL  
LAW COMMISSION AT ITS FIFTH SESSION (1953)

#### 1. *Continental shelf*

##### *Article 2*

We are of the opinion that the sovereign rights of the coastal State over the continental shelf should be limited to mineral resources only. The term "natural resources" used in this article appears to be of too wide a scope, seeing that an exception is created to the principle of freedom of the high seas, and also that the rule as worded in the proposed text conflicts with the principle of freedom of fishing clearly laid down in article 2, paragraph 2, of

the 1955 draft articles concerning the régime of the high seas.

It must also be remembered that the new concept of the continental shelf owes its origin to the questions which arose concerning the right to explore and exploit mineral resources.

Hence, having regard to the present requirements of most States, it does not seem possible to extend the scope of this concept to include all natural resources.

This remark, of course, applies also to all the other articles containing the term "natural resources".

#### 2. *Contiguous zone*

The rule concerning the contiguous zone is not acceptable in its present form, chiefly because it does not meet anti-smuggling requirements.

It may be pointed out that Italy has a territorial sea six miles wide, but its customs control belt extends up to twelve miles from the coast. In this latter belt full jurisdiction in the matter of customs laws is now exercised.

In view of Italy's geographical position and the configuration of its coasts, diminution as provided for in the draft of the powers granted to the coastal State in the contiguous zone would make the measures to prevent and punish smuggling ineffectual.

The draft article concerning the contiguous zone could be accepted by Italy if the words "within its territory or territorial sea" were deleted from the text, which would then read as follows:

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the baseline from which the width of the territorial sea is measured."

II. COMMENTS ON THE DRAFT ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS AND THE REGIME OF THE  
TERRITORIAL SEA APPROVED BY THE INTERNATIONAL LAW  
COMMISSION AT ITS SEVENTH SESSION (1955)

#### A. *Régime of the high seas*

##### 1. Right to a flag

##### *Article 5*

To avoid any doubt over the interpretation of this article, it would be well to insert the words "or of public corporations" after the words "property of the State concerned".

It would also seem desirable to specify that the conditions required for recognition of a ship's national character by other States also exist when the ship is owned (in the proportion laid down in article 5, paragraph 2) by the State or by a corporate body.

##### 2. Immunity of other State ships

##### *Article 8*

It is apparent from the text of article 8 and the com-

<sup>17</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, chap. III.*

ment thereon that the Commission decided to assimilate ships used on commercial government service to warships for purposes connected with the exercise of powers on the high seas by States other than the flag State.

We consider that such assimilation is not sufficiently justified, for in the case in question the activities carried on by those using the ship might be of an essentially private nature.

Hence the category of State ships should be kept within the limits laid down by the Brussels Convention of 10 April 1926 concerning the immunity of State-owned vessels.

### 3. Piracy

#### Article 14

Article 14 of the draft states that illegal acts (of violence, etc.) committed by the crew or the passengers of a private ship or a private aircraft against a ship on the high seas or in territory outside the jurisdiction of any State are acts of piracy. But it does not provide for the converse: namely, that the illegal acts in question directed by a private ship against an aircraft are also to be considered piracy.

We think it advisable to draw the Commission's attention to this point because the comment on the article shows that this particular case has not yet been studied.

#### Article 16

To prevent the definition of pirate ships given in article 16 covering only ships permanently engaged in acts of piracy, it would be advisable to replace the principle of intended use by that of actual use, which lends itself better to the inclusion also of the case of occasional use for piracy.

#### Article 20

We propose that the power of seizure be extended also to ships performing official duties, such as customs control and policing.

### 4. Right of pursuit

#### Article 22

We propose that the right of pursuit be also granted to aircraft.

### 5. Right to fish

#### Article 25

It would seem desirable that in the case covered by this article regulation of fishing on the high seas should be permitted solely on the basis of scientific findings.

#### Article 26

Similarly, in the case covered by this article, we think it necessary to provide that the request for negotiations to regulate fishing be supported by the results of research and studies actually carried out.

#### Article 29

We think it necessary that the right given to the coastal State of adopting protective measures in the high seas contiguous to its territorial waters should be limited in all cases to a distance not exceeding twelve miles measured

from the baseline referred to in articles 4 and 5 of the draft concerning the territorial sea.

#### Article 30

We propose the deletion of this article, in view of the disputes which might arise from the application of this standard.

#### Article 31

We think it would be more practical and fairer for the Commission provided for in this article to consist, not of four or six biologists and one expert in international law, but of two or four biologists, two fisheries experts particularly well acquainted with the areas involved in the dispute, and one expert in international law.

#### Article 32

We think it would be better if the measures adopted unilaterally or otherwise by coastal States, particularly on the high seas, were, in the event of appeal to the Commission provided for in article 31, suspended *de jure* unless the Commission decides otherwise.

### 6. Submarine cables and pipelines

#### Article 34

In view of technical advances, it would be advisable to provide not merely for the laying of telegraph or telephone cables and oil pipelines, but rather, by a more general wording, for the laying of any kind of submarine cable or pipeline.

### B. Régime of the territorial sea

#### 1. Extension of the territorial sea

##### Article 3

As regards the extension of the territorial sea, in view of the difficulties of reaching agreement on a uniform limit, we propose that the problem be solved by allowing different limits to be laid down for specific geographical sectors.

In the case of Mediterranean waters — where the three-mile limit is not traditional — we propose a maximum limit of six nautical miles, without prejudice, of course, to the powers which the coastal State may exercise in the contiguous zone, as mentioned in the comments already made concerning the article on that zone.

#### 2. Rights of protection of the coastal State

##### Article 18 and article 25

As regards article 18, paragraph 4, and article 25, paragraph 2, it would be well to state that the passage of ships, without distinction as to nationality, through straits covered by these rules may be suspended for short periods in exceptional circumstances, subject to due publicity being given.

### 15. Lebanon

#### Document A/CN.4/99/Add.2

NOTE VERBALE DATED 4 APRIL 1956 FROM THE MINISTRY OF FOREIGN AFFAIRS OF LEBANON

[Original: French]

The Ministry of Foreign Affairs presents its compli-

ments to the Secretary-General of the United Nations and has the honour to refer to the letter LEG 292/9/01; LEG 292/8/01, dated 24 August 1955, from the Legal Counsel of the United Nations concerning the draft provisional articles relating to the régime of the high seas and the territorial sea, contained in the report of the International Law Commission covering the work of its seventh session.

The Lebanese Government considers that the two drafts represent, on the whole, a clear and valuable codification of the principles of public international law relating to the régime of the sea.

The draft articles applicable to the régime of the territorial sea call, however, for the following comments:

*Article 3. Breadth of the territorial sea*

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.

*Article 18. Rights of protection of the coastal State*

The present text might be amended so as to enable the coastal State to suspend its application in time of war or in the event of exceptional circumstances being officially proclaimed.

## 16. Nepal

### *Document A/CN.4/99/Add.6*

LETTER DATED 6 MARCH 1956 FROM THE MINISTRY OF  
FOREIGN AFFAIRS, NEPAL

[*Original: English*]

I am directed to acknowledge with thanks the receipt of your letter No. LEG 292/9/01 dated 31 January 1956, transmitting the report of the International Law Commission containing in chapter II and annex "Provisional articles concerning the régime of the high seas" and in chapter III "Draft articles on the régime of the territorial seas".

In view of her geographical situation as a landlocked country, Nepal has very little direct concern with the above articles. However, I have the pleasure to inform you that the two drafts referred to above are acceptable in principle to the Government of Nepal, and they have very much appreciated the attempts made by the Commission.

## 17. Netherlands

### *Document A/CN.4/99/Add.1*

TRANSMITTED BY A LETTER DATED 16 MARCH 1956 FROM  
THE PERMANENT MISSION OF THE NETHERLANDS TO THE  
UNITED NATIONS

[*Original: English*]

COMMENTS ON THE PROVISIONAL ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS

The comments and suggestions are not to prejudice the

position of the Governments of Surinam and the Netherlands Antilles, which Governments are at present studying the matter.

### *General*

It is known to the Netherlands Government that the International Council of Scientific Unions has, in a letter to the Director-General of UNESCO, expressed its concern about the consequences which the draft of the International Law Commission concerning the continental shelf might entail for fundamental research in the fields of geophysics, submarine geology and marine biology of the seabed and the subsoil of the continental shelf. The Netherlands Government are of the opinion that it is advisable to draw the Commission's attention to this fact and to recommend that it include, either in its draft or in its comments, a provision to the effect that the coastal State shall be obliged to permit examination of the seabed of the shelf for purely scientific purposes.

The provisional articles concerning the régime of the high seas further give rise to the general comment that the draft is only concerned with the *high seas*. As the draft also deals with some problems having wider implications, as for instance the slave trade referred to in article 12, the Netherlands Government would like to emphasize that the fact that the draft applies only to a limited area should never be pleaded in favour of an argument that outside that area — i.e., on the mainland or on the territorial sea — those illegal acts should be legal.

### *Articles 1-4*

These articles require no comment.

### *Article 5*

The Netherlands Government welcome the efforts of the International Law Commission to lay down certain safeguards against the possible abuse of the right of a sovereign State to fix the conditions for the registration of ships in its territory and the right to fly its flag.

There exists, of course, a certain analogy between the "nationality of ships" and the nationality of individuals. In this connexion the Netherlands Government would like to recall that at the Codification Conference which was held at The Hague in 1930, the principle was recognized according to which, though each State is free to determine under its national law who are its nationals, such law must be recognized by other States only "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality". The same principle, in regard to protection due to foreign nationals, underlies the judgement of the International Court of Justice in the *Nottebohm Case* of 6 April 1955).

Though the Netherlands Government wholeheartedly subscribe to the said principle — also with respect to the "nationality of ships" — they do not, however, approve of the way in which the International Law Commission has developed it. They doubt whether it is possible to lay down detailed regulations which the State granting the right to fly its flag is bound to observe.

Regulations of such a kind will necessarily give rise to many questions and uncertainties. So, for instance, difficulties will undoubtedly arise with regard to the conditions relating to vessels owned by joint stock companies as referred to in article 5, paragraph 2 (c). It is a well-known fact that the recognition of foreign companies and their nationality form the subject of many controversies.

Furthermore, the Netherlands Government do not think it possible, even if agreement should be reached on more detailed regulations, that such regulations would completely prevent abuse.

Therefore, the Netherlands Government deem it preferable only to lay down in article 5 the guiding principle according to which, for purposes of recognition, there must be a genuine connexion between the ship and the State. Apart from such a provision, which aims only at the prevention of abuse in a negative way, the Netherlands Government deem it desirable to prescribe that States by taking the necessary legal measures create safeguards lest ships flying their flag disregard their legislation as to the safety at sea etc. The Netherlands Government are well aware of the fact that such a rule has been laid down by the Commission in article 9 of the present draft, but they are of the opinion that the scope of that article is too narrow.

Moreover, it would be preferable to put the matters dealt with in article 5 and article 9 closely together in order to emphasize that these matters are interrelated. For these reasons the Netherlands Government propose to replace the present article 5 by the following articles 5a and 5b;

“ 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 connection 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.”

The tests which must be applied in order to decide whether there is a genuine connexion as referred to in article 5a should relate to the ownership or to the administration of the ship or to the nationality of the captain and the crew.

The Netherlands Government are of the opinion that in certain respects regulations with regard to labour conditions, such as the regulation of working hours, might affect the operation of a ship. To that extent they deem it desirable to refer to such regulations in article 5b.

Article 6

The Netherlands Government do not agree with the statement in the comment that the purpose of article 6 is to ensure that ships will have only one nationality. They are of the opinion that the purpose is rather to prevent ships which have the right to fly the flag of two or more States from using one or other as the need arises. In order to avoid any misunderstanding it would be desirable to add after the words “ two or more States ” the words “ using one or other as the need arises ”.

Article 7

The Netherlands Government think it desirable that the provision of the second paragraph should be brought into line with The Hague Convention of 1907, No. VII, in which case the provision will have to be worded as follows:

“ 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.”

Article 8

In the opinion of the Netherlands Government there is no reason why Government vessels which are operated for purely commercial purposes should be assimilated, with regard to the immunity of jurisdiction, to warships. In accordance with a general tendency in international law the immunity of foreign States is not recognized in so far as they act in a private capacity. In that connexion mention may be made of the Convention and Statute respecting the international régime of maritime ports, which was signed at Geneva on 9 December 1923, of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926, of the Convention drafted by The Hague Codification Conference of 1930 and of article 23 of the report of the International Law Commission regarding the territorial waters. The same tendency is revealed by the practice of States. Some Governments which for quite a long time have advocated the principle of an unlimited immunity of foreign States have recently changed their attitude (cf. Bulletin of the Department of State, Volume 26, 23 June 1952, page 984). Other States, for example the Soviet Union, have con-

cluded bilateral treaties in which the principle of a limited immunity was recognized.

Besides, in view of the fact that in some countries commerce and shipping are wholly in the hands of State-owned enterprises, the principle of unrestricted immunity would mainly benefit such States.

For these reasons the Netherlands Government would propose, in accordance with the Brussels Treaty, to replace the words "on government service" by the words "on governmental and non-commercial service".

#### Article 9

If the Netherlands proposal with regard to article 5b is accepted, article 9 may be cancelled.

#### Article 10

The matter dealt with in this article has likewise been regulated in article 1 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation, concluded at Brussels on 10 May 1952 (Cmd 8954). On a comparison of the two texts being made a number of discrepancies leap to the eye. In the first place it is apparent that the Brussels Convention does not, like the present draft, recognize *expressis verbis* the jurisdiction of the State of which the persons in the service of the ship are nationals. This does not appear to be an essential difference, however, because the purpose of the draft is only to remove all doubt as to the *jurisdiction* of the national State, whilst it is not intended at all to impose upon that State an *obligation* to exercise its penal jurisdiction.

Further it is apparent that the words "involved in the collision" in the fifth line, do not appear in the Brussels Convention. In the opinion of the Netherlands Government these words are superfluous.

Finally, the Brussels Convention refers to "criminal or disciplinary proceedings", whereas the draft only refers to "proceedings". As it does not serve any useful purpose to restrict the civil jurisdiction of any State, the Netherlands Government would prefer the Brussels text.

Basing themselves on the above considerations, the Netherlands Government would suggest that article 10 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."

#### Article 11

Chapter V, Regulation 10, of the International Convention for the Safety of Life at Sea of 19 June 1948, contains a provision regulating the same matter as the article under discussion, but it goes further in that it also imposes upon ships at sea the obligation to proceed to a ship in distress upon distress messages being received.

Though it would be going too far to include the detailed regulations of 1948 in their entirety in the present draft, it may be advisable to substitute 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."

#### Article 12

The purpose of this article is to enable a State to prevent foreign vessels from unlawfully flying its flag. This purpose might be expressed more explicitly by wording the end of the first sentence as follows:

"...and to prevent foreign vessels from unlawfully using its flag for that purpose."

#### Article 13

A discrepancy is apparent between article 13, which refers to "piracy on the high seas" and the following articles (see, for instance, article 14, paragraph 1, sub-paragraph (b), in which piracy is also considered to be possible elsewhere.

#### Article 14

On the ground of the general tendency in international law outlined in their comments on article 8, the Netherlands Government are of the opinion that State-owned merchant vessels should be regarded as private vessels within the meaning of article 14. That is why the Netherlands Government deem it desirable that article 14 should be supplemented in such a way that it is quite clear that it does not refer to warships and to State-owned vessels having a public function.

Another comment to which article 14 gives rise is that in article 14, paragraph 1, sub-paragraph (a), only the term "vessel" is used, whereas in sub-paragraph (b), the terms "vessels, persons or property" are employed. In the beginning of paragraph 1 of this article the terms "persons and property" are used. In the one case, acts directed against other objects than ships and against persons are regarded as piracy, whereas this is not so in the other case. This distinction may be of practical value in case the acts would be directed against a seaplane which would have landed on the high seas. The removal of this inconsistency may greatly simplify the wording of the entire first paragraph.

In connexion with what has been stated by the International Law Commission in the last paragraph of the comment on article 14, it may be observed that many writers of note hold a different opinion on the subject of mutiny (cf. for instance: Higgens-Colombos, Ortolan, Oppenheim-Lauterpacht 1955, Gidel; cf. also a decision of the Privy Council in the case of the Attorney General Hong Kong v. Kwok-a-Sing). The Netherlands Government are, however, of the opinion that the view of the Commission is correct. The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers are not directed outwards.

If the Netherlands Government's suggestions regarding article 16 are adopted, the second paragraph of article 14 will have to be modified (cf. the comments on article 16). The text might be worded as follows:

"2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge that the ship or aircraft is devoted by the persons in dominant control to the purpose of committing an act described in the present article."

#### Article 15

Consequent upon their remark with regard to article 14, the Netherlands Government deems it desirable that, also for the purpose of article 15, Stated-owned vessels having a public function should be put on a par with warships.

In order to make the English text conform to the French text, in which it says "*dont l'équipage s'est mutiné*", the English text should read: "whose crew has mutinied".

#### Article 16

One might wonder what function this article is meant to have. It is a definition, but the giving of a definition of the term "pirate ship" has little practical significance; apart from article 17, the term is found only in articles 14 and 18. As will appear, however, from its comment, article 18 gives to the term "pirate ship" a different meaning, namely a ship which *has committed* acts of piracy.

That is why the Netherlands Government suggest that article 16 be deleted, that the terminology of article 14, paragraph 2, be made to conform to that of article 16 (see comments on article 14 above), that the wording of article 18 be made to conform to the comment of the Commission and that also in article 17 the phrase "ship or aircraft which has committed acts of piracy" be used. In case article 16 should be retained in principle, the Netherlands Government would state as their view that it does not serve any useful purpose to exclude the acts referred to in article 14, paragraphs 2 and 3, from the reference in article 16 to article 14. In the Netherlands Government's view, article 16 should therefore in that case be concluded with the phrase "an act described in article 15". This view also finds expression in the new text proposed for article 14, paragraph 2.

#### Article 17

See comment on article 16.

#### Article 18

As expounded in the comments on article 16, the phrase "a pirate ship or aircraft" will have to be replaced by "a ship or aircraft which has committed acts of piracy", irrespective of the question whether article 16 is to be retained or not.

In the Harvard draft (*Research in International Law* 1932, pages 743 ff.) more detailed regulations concerning piracy are given than in the present draft. As instances may be adduced article 13 concerning the rights of third parties acting in good faith and article 14 concerning a fair trial. The concise nature of the present draft precludes

the laying down of detailed regulations on these points. It would be desirable, however, if the International Law Commission in its comment would draw the attention of the States to their obligation to observe the principles just mentioned.

As to the question whether article 18 also permits action on account of acts committed in the past, see comments on article 21.

#### Article 19

The question arises why the wording of this article should be different from that used in article 21, paragraph 3, as probably the same is meant in both articles.

#### Article 20

This article requires no comment.

#### Article 21

The Netherlands Government would prefer to see the words "at sea" at the beginning of the first paragraph, replaced by the words "on the high seas" in conformity with the terminology used elsewhere.

A question which is connected both with article 21, paragraph 1, sub-paragraph (a), and with article 18, is the question whether the competence of States to board, examine and seize ships also extends to ships which have committed acts of piracy only during preceding voyages. Two different views may be held on this point: the competence may be restricted either to cases in which *during the present voyage of the ship* acts of piracy were committed, or this competence is extended to past acts of piracy, provided of course that the ship is still in the same hands as during the preceding voyages. The drafters of paragraph 2 of article 4 of the Harvard draft adopted this point of view. This view is justified if the exercise of jurisdiction by the States is regarded as the exercise of international jurisdiction, and piracy as an international offence. From the text it is not clear which view is held by the International Law Commission.

#### Article 22

The second sentence of the third paragraph says that the commencement of the pursuit shall be accompanied by a signal to stop. The French text is more accurate: "*le commencement — devra — être marqué par l'émission du signal de stopper*". This version is also the one that is most in conformity with the 1930 Codification draft.

The last sentence of the third paragraph might be worded more clearly 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."

Finally, the Netherlands Government are of the opinion that the article should indicate who can undertake the pursuit. They would like the following provision to be added to the article:

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

#### Article 23

As far as oil discharged from ships is concerned, it

must be pointed out that the pollution of the sea can also be caused by other oil than fuel oils. That is why these words had better be replaced by "oil".

The Netherlands Government wish to point to the fact that States granting concessions for the exploitation of the continental shelf have already issued regulations concerning the measures to be taken by the grantee to prevent leakages and blow-outs. In view of the enormous quantities of oil which may pollute the sea and the harm which may also be done to third States and their nationals, if such safety measures are not taken, the Netherlands Government are of the opinion that the following should be provided in the interest of all:

*" Article 23a*

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

The Netherlands Government would also point to a new source of pollution of the sea, namely the dumping of radio-active waste matter into the sea, which may especially be dangerous to fish and to consumers of fish. They therefore propose to insert the following provision:

*" Article 23b*

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

*Articles 28 and 29*

It is doubtful what has to happen if the negotiations referred to in article 29 do not produce any positive results with regard to an area for which other States had already made regulations, so that article 28 also applies: Should paragraph 2 of article 28 then be observed or is the coastal State in question entitled under paragraph 1 of article 29 to adopt unilaterally "appropriate conservation measures"? Or must it be assumed that the negotiations referred to in article 29 could not have been opened in such a case and that the coastal State in question could only apply for participation in the (existing) regulations in virtue of article 28?

Paragraph 3 of article 29 stipulates that, as soon as an arbitral decision is made, the right to adopt unilateral measures shall cease. The Netherlands Government assume that this is also the case when an arbitration procedure begun under the preceding articles has led to a decision, and that the same is true when an arbitral commission set up in case of disagreement on some unilateral measures should rule that the above right shall cease in virtue of an interim decision made by that commission.

The determination of the concept of "scientific evidence" should be left to the arbitral commission.

*Articles 31-33*

Since the arbitral commissions referred to in these articles imply a kind of legislative arbitration, it would be more correct if the International Law Commission would bring out more clearly in its report that these commissions are free to lay down any regulations they think justified and efficient, even though they should deviate

from the existing regulations. That is why the terms "parties" and "differences to be settled" had probably better be dropped in this connexion.

*Article 34*

In connexion with this article it must be pointed out that in the third paragraph of the comment it erroneously says that paragraph 1 of article 34 was taken from article I of the 1884 Convention. This must be an error as article I of the Convention runs as follows:

*" La présente convention s'applique, en dehors des eaux territoriales, à tous les câbles sous-marins légalement établis et qui atterrissent sur les territoires, colonies ou possessions de l'une ou de plusieurs des Hautes Parties contractantes."*

Furthermore the Netherlands Government would like to note that article 34 is a duplicate of article 5 of the regulations concerning the continental shelf, laid down by the Commission during its 1953 session.

*Article 35*

In the Netherlands Government's view the phrase "resulting in the total or partial interruption etc." should be replaced by: "in such a manner as might interrupt or obstruct telegraphic communication", this being the official English translation of the Convention concerning Telegraph Cables of 1884 (H.M.S.O., Cmd 4384).

After the words "in like circumstances", occurring in the same sentence, the Netherlands Government would like to insert "which might result in loss of the material carried by the pipeline". This is a natural consequence of the analogous application of the regulation concerning submarine cables. The addition clearly shows that the protection envisaged in article 35 only applies to those pipelines that are in use.

*Articles 36 and 37*

These articles require no comment.

*Article 38*

The Netherlands Government would suggest that after the words "a submarine cable" the words "or pipeline" be added and that the last words "of the cable" be deleted. The word "pipeline" was probably omitted by mistake.

COMMENTS ON THE DRAFT ARTICLES ON THE REGIME OF  
THE TERRITORIAL SEA

*Article 3 (territorial sea)*

As regards this article the Netherlands Government would merely refer to their earlier exhaustive comment (A/CN.4/90) on their standpoint concerning the breadth of the territorial sea. They regret that the Commission has apparently not succeeded in finding a solution for the difficulties that have been encountered.

*Article 13*

The situation described by the Commission in its comment on this article does not exist in the Netherlands. In the Netherlands Government's view special regulations will have to be made concerning this matter by the States

concerned if this should be demanded by the existing situation.

#### Article 14

The Netherlands Government wonder if this article has still any *raison d'être* by the side of the articles drafted by the Commission for straits.

#### Articles 16-18

The Netherlands Government express their agreement with these articles and are of the opinion that a number of vague definitions as, for instance, "any act prejudicial to its security or to such other of its interests as the coastal State is authorized to protect under the present rules" are unavoidable, and, though it is desirable that the States should ensure innocent passage to the fullest possible extent, reference will nevertheless have to be made to the vague definitions in paragraph 3 of article 18.

#### Article 25

The Netherlands Government would wish to see the wording of article 26 of the Commission's report of 1954 restored. They do not see any grounds for changing the earlier regulations as, in their view, those regulations fully met the requirements of actual practice. As far as the Netherlands is concerned these regulations have never produced any difficulties.

In general, the Netherlands Government suggest that the International Law Commission make it clear that "mile" means the nautical mile of sixty to the degree of latitude.

Finally, the Netherlands Government wish to point to a number of inconsistencies in the terminology of the above-mentioned draft articles. Instances are: "regulations" in article 7 by the side of "draft articles" in the title, and in paragraph 3 of article 12 the words "two miles in breadth" and "within" by the side of "two miles across" and "in" in paragraph 4. Further there is the inconsistent use of the hyphen in words as "straight baseline" (article 5 by the side of article 7, paragraph 5) and "largest-scale chart" (article 4 and article 15 by the side of article 14).

### 18. Norway

#### *Document A/CN.4/99/Add. 1*

TRANSMITTED BY A LETTER DATED 27 MARCH 1956 FROM  
THE PERMANENT MISSION OF NORWAY TO THE UNITED  
NATIONS

[Original: English]

The Norwegian Government has not had sufficient time for a thorough examination of all the proposed articles. While offering certain suggestions it wishes therefore, in general, to reserve its position.

#### *Régime of the high seas*

It should be made clear to what extent the articles under this heading are intended to be applicable in time of war as well as in time of peace.

The term "merchant vessel", which is employed in

several of the draft articles, should be defined. It might, in the first place, be made clear that the term includes fishing vessels and other private vessels not used for trading purposes (in articles 14 and 15 the term "private vessel" is employed). In the second place, it should be made clear whether, and to what extent, the term is meant to include state ships other than warships.

#### Article 5

The provisions contained in paragraphs 2 (a) and 2 (b) would gain in clarity if the word "actually" were deleted.

The provision contained in paragraph 2 (c) should be made more restrictive in harmony with the principle embodied in paragraphs 2 (a) and 2 (b). The present Norwegian Law on Navigation of 20 July 1893 prescribes, in § 1, 2, that ships belonging to a joint stock shipping company may be registered in Norway only if the following conditions are fulfilled: Its main office and the seat of its board of directors must be in Norway. Its board of directors must be composed of Norwegian nationals who are shareholders and residents of Norway. Six-tenths of the share capital must be owned by Norwegian nationals.

#### Article 8

In order to avoid misinterpretation, attention is drawn to the fact that the term "commercial" in the fourteenth line of the comments on article 8 is a misprint for "non-commercial".

#### Article 11

Although concerned in substance with individual duties, this article, according to the comments, is intended to be an expression of international law. It is not clear why the article, in contradistinction to other articles relating to individual duties (see, for example, articles 9, 12, 23, 35 and 38), fails to enjoin States to enact the necessary legislation.

#### Articles 19 and 21.3

The relationship between these two provisions is not clear. In particular, it is not clear why article 19, dealing only with piracy provides for liability towards the "State" of the seized ship if the seizure has been effected "without adequate grounds", whereas article 21.3, dealing with piracy and other crimes, provides for compensation to the "vessel" if "the suspicions prove to be unfounded".

#### Article 22

It should be made clear that the right of pursuit may be exercised by State vessels other than warships, such as customs, police and fishery patrol vessels. It should also be made clear whether the right of pursuit may be exercised by aircraft.

#### Articles 24-33

The Norwegian Government concurs in the view that—because of the great economic importance of fisheries for the world at large and for the particular nations engaged in fishing, and in view of the danger of over-

exploitation involved in unlimited and uncontrolled fishing—it is imperative that international co-operation in this field should be further developed and safeguarded.

The Norwegian Government is in favour of the settlement of international disputes by arbitration, and would welcome the introduction of arbitration into this new field, in so far as it is practically possible. However, if questions relating to the regulation of fisheries are to be decided by arbitration, it is essential that the criteria upon which the arbitration is to be based should be defined precisely and exhaustively. Otherwise the interested States might hesitate to accept the jurisdiction of the commission, and the commission itself would have great difficulties in discharging its duty.

The draft appears to envisage arbitration awards based upon biological criteria. In this connexion the Norwegian Government wishes to draw attention to two important difficulties.

During the Rome Conference on the Conservation of the Living Resources of the Sea it was demonstrated that very detailed and extensive investigations will often be necessary in order to determine the need for conservation measures, and that further development of maritime research will be required to provide sufficiently reliable scientific evidence. But even if these conditions were met, the scientists would probably still find ample room for doubt in regard to the conclusions to be drawn from such findings and in regard to the measures of conservation they might indicate.

If the scientific evidence establishes beyond doubt the need for measures of conservation, such measures 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, as has been done in the existing fisheries conventions and the regulations adopted under these. The matter is further complicated by the great differences which exist in the various countries in regard to methods of fishing and fish processing, consumption habits and marketing conditions. Thus, one particular restriction may hit one country hard, while it may affect other countries to a lesser extent. Consequently a regulation may be discriminating in fact, even if it is not discriminating in law.

The Norwegian Government is not convinced that it will be possible to establish satisfactory general criteria whose relative importance are clearly determined, and it should be noted that if a general system for safeguarding the regulation of fisheries is to serve its purpose, it must gain *general acceptance*.

In view of these difficulties and the fact that no conclusion has been arrived at in regard to the breadth of the territorial sea, the Norwegian Government must reserve its position on the proposal that the coastal State be empowered to adopt measures of conservation unilaterally.

The Norwegian Government considers it premature at this stage to enter into details. As pointed out by the International Law Commission in the report on its fifth session,<sup>18</sup> only a detailed convention or conventions can translate the general principles drawn up by the Com-

mission into a system of working rules. The drafting of such a convention cannot be undertaken until the main principles have been agreed upon.

The Norwegian Government therefore reserves the right to revert to the details of chapter II when it shall have become clear to what extent its basic principles command general approval.

At this stage it merely wishes to point out that it is not clear whether the arbitration procedure prescribed, in case the states concerned do not reach agreement (articles 26.2, 27.2, 28.2 and 30.2), also applies when the parties to an existing convention for the regulation of fisheries fail to agree in regard to proposals for the adoption or modification of specific measures of conservation within the framework of that convention.

It does not clearly appear, from the draft articles whether they are also intended to apply to whaling and seal-catching. An application of a general convention to these industries would give rise to particular problems. And it should be taken into account that whaling has already been made the subject of an effective regulation on a global basis. It is difficult to form a valid opinion on these problems until they have been submitted to further examination by experts, notably by the International Whaling Commission.

#### *Articles 34, 35 and 38*

Power cables should be added in article 34.1, and article 35 should be amended accordingly.

It is not clear why pipelines have not been mentioned in articles 34.2 and 38.

#### *Régime of the territorial sea*

The Norwegian Government has noted with appreciation that some of the suggestions made in its comments to the 1954 draft have been complied with by the International Law Commission. Referring to the general points of view presented in its previous comments,<sup>19</sup> the Norwegian Government would like to present the following specific comments on the revised draft concerning the régime of the territorial sea.

#### *Article 1*

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

#### *Article 3*

The Norwegian Government notes that the International Law Commission recognizes that international practice is not uniform as regards the breadth of the territorial sea. The Norwegian Government wishes to support efforts to prevent unreasonable extensions of the breadth of the territorial sea. In its opinion a close proximity to the territory is inherent in the very concept of *territorial sea*. In the judgement in the Anglo-Norwegian Fisheries Case it was emphasized by the Court that one of the "basic considerations inherent in the nature of the territorial sea" is "the dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal

<sup>18</sup> *Ibid.*, p. 18.

<sup>19</sup> *Ibid.*, Tenth Session, Supplement No. 9, annex, section II.

state a right to the waters off its coasts".<sup>20</sup> Exorbitant claims in regard to the breadth of the territorial sea are incompatible with this basic concept.

On the other hand the Norwegian Government would consider it futile to seek general agreement on rules governing the extent of the territorial sea which would deprive any country of territorial sea over which today it enjoys uncontested jurisdiction. Thus the Norwegian Government would find it impossible to accept a breadth of less than four miles for its own coasts.

#### Article 5

The first three periods of article 5, as amended, seem to reflect principles of international law which were enunciated by the International Court of Justice in the Anglo-Norwegian Fisheries Case. The last sentence of paragraph 1 of article 5, however, still maintains the arbitrary rule that drying rocks and drying shoals cannot be used as points of departure for the drawing of straight base lines. This sentence should be deleted. The International Court of Justice, in the above-mentioned judgment, recognized the Norwegian base line system where some of the straight base lines are drawn from drying rocks.<sup>21</sup> The proposal to exclude the use of drying rocks as points of departure for straight base lines is therefore contrary to obtaining principles of international law. Nor can it be considered a desirable development of international law.

#### Article 7

This article is not clear. None of the paragraphs reflect obtaining principles of international law and it is highly doubtful whether the proposed article would constitute an improvement. The exception made in paragraph 5 of article 7 as to the straight base line system would, at any rate, have to be made applicable to the article as a whole.

#### Articles 14 and 15

While supporting the principle of the median line laid down in these articles, the Norwegian Government wishes to draw attention to the fact that, in their present wording, the articles do not seem to take into consideration that the two States concerned may have territorial seas of different breadth.

Thus, if in the case of two *opposing* coasts one State claims six miles and the other three miles, and the total distance between the opposing coasts is eight miles, the breadth of the territorial sea of each State in the area concerned would be four miles under the proposed rule. One of the States would consequently get a broader territorial belt than it actually claims. On the other hand, if the total distance between the two opposing coasts is ten miles, the proposed article would not apply, and the States would obtain breadths of six and three miles respectively. The territorial waters of the State claiming six miles would then extend *beyond* the median line.

Similar difficulties arise in the case of two *adjacent* States, if the angle between their coasts, or base lines, is

less than 180°, and especially if their common land frontier meets the sea at the inland end of a bay.

In view of the fact that the problems treated in articles 14 and 15 are essentially similar, it would, perhaps, be just as well if the two articles were merged into one. This article might provide that, in the absence of special agreement, no State is entitled to extend the boundary of its territorial sea beyond the median line.

#### Article 16

It should be made clear that the right of innocent passage applies only in time of peace (cf. the comments of the International Law Commission and of the Norwegian Government on article 17 of the 1954 draft).

#### Article 18

The interests which the coastal State is authorized to protect have not been exhaustively specified in "the present rules". Rights in respect of fishing, among others, are not mentioned. At the end of paragraph 1 it would therefore seem necessary to add the words "or other rules of international law" in conformity with the corresponding formulation in article 19.

#### Article 21.1 (a)

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.

#### Article 22

The Norwegian Government is not in a position to accept paragraph 3 of this article in so far as it sanctions the arrest of a vessel other than that in respect of which the maritime claim arose. It is especially for this reason that the Norwegian Government has been unable to ratify the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, concluded at Brussels on 10 May 1952. The Norwegian Government would find it easier to accept the corresponding provision in the last sentence of article 24.1 of the 1954 draft of the International Law Commission, with the addition that the owner of the vessel shall be entitled to compensation if the arrest is not upheld by the courts.

## 19. Philippines

### Document A/CN.4/99

NOTE VERBALE DATED 20 JANUARY 1956 FROM THE PERMANENT MISSION OF THE PHILIPPINES TO THE UNITED NATIONS

[Original: English]

The Permanent Representative of the Philippines to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to refer to the latter's communication (LEG 292/9/01;

<sup>20</sup> *I.C.J. Reports 1951*, p. 133.

<sup>21</sup> *Ibid.*, pp. 128 and 143.

LEG 292/8/01), dated 24 August 1955, addressed to the Vice-President and Secretary of Foreign Affairs of the Philippines, drawing his attention to the report of the International Law Commission covering the work of its seventh session held in Geneva from 2 May to 8 July 1955, and inviting the Philippine Government to submit observations on the drafts contained in chapters II and III.

The Philippine Government is in general agreement with the technical and scientific aspects of the provisions of chapter II (régime of the high seas), the annex to chapter II, and the "Draft articles on the régime of the territorial sea" in chapter III. However, on certain specific provisions in the report, the following observations are submitted:

[Provisional articles concerning the régime of the high seas]

1. On the "Definition of the high seas", article 1.

As already stated, in this Mission's *note verbale* of 7 March 1955, in response to the Secretary-General's telegram LEG 292/9/01 of 3 February 1955:

"All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act. No. 4003 and article 1 (this was inadvertently given as article 2 in the note verbale of 7 March 1955) of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters."

In view of the foregoing considerations, and in line with this article, the Philippine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Philippines as set down in the international treaties referred to above. In case of archipelagos or territories composed of many islands like the Philippines, which has many bodies of water enclosed

within the group of islands, 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.

[Draft articles on the régime of the territorial sea]

2. On chapter II (Limits of the territorial sea), article 3 (Breadth of the territorial sea).

The Philippine Government considers the limitation of its territorial sea as referring to those waters within the recognized treaty limits, and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States. It would seem also that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of a coastal State. The Philippine Government is of the opinion that certain provisions should be made taking into account the archipelagic nature of certain States like the Philippines.

## 20. Sweden

### Document A/CN.4/99

LETTER DATED 4 FEBRUARY 1956 FROM THE  
MINISTRY FOR FOREIGN AFFAIRS OF SWEDEN

[Original: French]

By letter dated 24 August 1955 you invited the Swedish Government to submit its observations on the drafts—contained in the report of the International Law Commission covering the work of its seventh session—relating to the codification of certain parts of international law, i.e., the provisional articles concerning the régime of the high seas (chapter II of the report) and the draft articles on the régime of the territorial sea (chapter III of the report).

The Swedish Government has studied the Commission's drafts with the greatest interest, and would like to express the following views.

I. As regards the "provisional articles concerning the régime of the high seas", the Swedish Government wishes to confine itself for the time being to the following comments.

With respect to the right to fish (articles 24 *et seq.*), the Swedish Government considers that the conclusion of an international convention concerning fishing on the high seas would be particularly desirable, and believes that the establishment of an arbitral commission, as proposed in article 31, might serve a useful purpose.

The provisions of article 29 granting the coastal State the right unilaterally to adopt measures of conservation are open, in the Swedish Government's view, to the 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? That is a question which may justifiably be asked. The measures adopted could, of course, be examined by an international

organ; but such an organ might be long in coming to its decision, and the delay might entail considerable losses. The provision proposed in article 29 might lead to abuse, and in the Swedish Government's view should be deleted.

Article 34 concerns the right of States to lay telegraph or telephone cables and pipelines on the bed of the high seas. But by modern technical methods electric power too may be transmitted beneath the sea, through high-tension cables. The Swedish Government considers that this possibility should be taken into account in drafting a provision on the subject.

II. As regards the rules of international law concerning the territorial sea, the first questions that arise are those relating to the breadth of the territorial sea and the base line for measuring it. The Swedish Government stated its position on these matters in its letter of 12 April 1955, and it still holds the same views.

With respect to the new draft prepared by the International Law Commission at its seventh session, the Swedish Government desires to add the following observations.

There are marked differences of opinion among States on these questions, and experience has shown that a generally acceptable solution will be difficult to achieve. Nor has the International Law Commission succeeded in embodying a definitive text on the breadth of the territorial sea in its latest draft; it has merely set forth the following considerations:

1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles;

2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles;

3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.

In formulating these propositions, the Commission's apparent intention was to take into account the divergent opinions which have been expressed on the matter. Since, however, these opinions are actually irreconcilable, the Swedish Government considers that the Commission's propositions cannot be accepted as a statement of existing law, or as a useful basis for future solutions.

The Swedish Government supports the Commission's view that the limitation of the territorial sea to three miles is not based on uniform international practice, since besides the three-mile limit international law also recognizes other limits, for instance four miles and six miles. The Swedish Government believes that Sweden's four-mile limit may as justifiably be considered traditional as the three-mile limit fixed by some countries; and presumably the same applies to the six-mile limit applied by some other countries. 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 territorial sea is part of the coastal State's territory, and, as stated in article 1 of the Commission's draft, is subject to its sovereignty. One of the fundamental rules of international law is that States are bound to respect the territories of other States. It is hard to conceive of any State territory which a few States would be bound to respect while other States would not. 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 formulated by the Commission, which, as it now stands, it really contradicts.

The Swedish Government shares the Commission's view that any extension of the territorial sea beyond twelve miles infringes the principle of freedom of the seas, and is therefore contrary to international law. In connexion with the twelve-mile limit, the Swedish Government would point out that until recent years a territorial sea of twelve miles in breadth has been applied only in a few isolated instances, and to waters of little importance for international shipping. The Swedish Government feels that any extension of the territorial sea to twelve miles must be considered an exception, and that six miles is a maximum breadth claimed by enough States, and over a sufficient period of time, to be considered the breadth of the territorial sea recognized in international practice. Moreover, it should be borne in mind that the extension of the territorial sea to twelve miles practised in recent years by some States has elicited protests from other States.

Similarly, the Swedish Government does not believe that the views set forth by the Commission are calculated to provide a basis for a future solution of the question. A solution along these lines would mean that while each State would acquire the right to extend its territorial sea to twelve miles, the other States would not for their part be bound to recognize any extension of the territorial sea beyond the three-mile limit. A solution of this kind 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 the existing divergencies. The present state of uncertainty on the subject would therefore persist, and constant disputes would arise, disputes which would indeed defy solution because both of the two mutually exclusive positions would be declared to be in conformity with international law. Let us assume, for instance, that a State fixes the breadth of its territorial sea at six miles and prohibits foreigners from fishing within the zone thus delimited—a step which it would clearly be entitled to take if we follow the Commission's view—and let us assume further that fishermen who are nationals of a State which refuses to recognize any limit in excess of three miles engage in fishing in the disputed zone. If these fishermen are arrested and fined by the coastal State, the other State will undoubtedly protest and support its nationals. How will an international court be able to rule on a dispute of this kind if both parties are able to base their case on international law? In the Swedish Government's view, it is essential that the territorial sea

to which a State is entitled should be respected by other States.

The Swedish Government wishes to reiterate the opinion expressed in its letter of 12 April 1955: that the solution most likely to meet the conflicting views would be one which would grant States a certain freedom in establishing the breadth of their territorial sea themselves, while at the same time restricting that freedom within rather narrow limits.

The Swedish Government considers that the maximum breath for the extension of the territorial sea should be fixed at six miles, perhaps with the proviso that States which can show a historical right should be entitled by way of exception to claim a larger territorial sea. The Swedish Government feels that such a solution would be reasonably well in keeping with the present position in law.

However, the outer limit of the territorial sea depends not only on the breadth of the territorial sea but also on the base line from which it is measured. Article 5 of the Commission's draft, concerning straight base lines, is of particular importance in this connexion.

The Swedish Government considers this article to be a distinct improvement over the draft prepared by the Commission at its sixth session, particularly because the provisions of paragraph 2 of the article, concerning the maximum length for such base lines, have not been retained. However, the Swedish Government still feels that the article is unduly complicated, and that it contains several conditions and reservations which serve no useful purpose. The most important provision in the article, in its view, is that which states that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. This provision is based on the fact that it is primarily geographical conditions that make "internal waters" of a stretch of sea, and that these conditions are bound to have legal consequences. Stretches of water which are geographically linked to the land domain must obviously be treated juridically as part of the land domain; in other words, the geographical and the juridical concepts of internal waters are identical. It follows, in the Swedish Government's view, that the lines constituting the outer limits of internal waters must also, and on the same grounds as the land domain, serve as the base lines 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 base lines can be of any value. If the straight lines do not form the limits of internal waters, no economic interests peculiar to a region can, according to the provisions of the article in question, justify their use as base lines. If, on the other hand, the straight lines do form the outer limits of internal waters, it follows *ipso facto* that they must be employed as base lines for measuring the territorial sea. As the Swedish Government pointed out in its letter of 12 April 1955, any other solution would lead to absurd consequences. The fact of the straight lines constituting the limits of internal waters is therefore both a necessary and a sufficient condition for their use as

base lines for measuring the territorial sea; and any mention in this connexion of circumstances necessitating a special régime is superfluous. 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. It might be useful to have a definition of "internal waters"; this could be extracted from article 5 "sufficiently closely linked to the land domain" etc.) and inserted in article 4.

The Commission naturally attached considerable significance to the judgement of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway. However, the Swedish Government ventures to draw attention to article 59 of the Statute of the Court, which provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Hence, while a judgement of the Court is law so far as the parties are concerned, it does not constitute international law. As for the general reasons and considerations upon which a judgement of the Court may be based, they affect other cases only in so far as they reflect generally recognized principles of international law. In the case in point, for instance, the geographical reasons may be accepted without accepting the economic reasons.

The Swedish Government believes that in drawing base lines geographical considerations alone should be applied, not economic factors. To draw base lines for the purpose of extending the territorial sea to a point which would satisfy the coastal State's economic interests could only lead to abuse. Such a method of delimiting internal waters has no foundation in existing law, nor can it be accepted from the standpoint of *lex ferenda*. The Commission's stipulation, that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters, would preclude the coastal State from arbitrarily drawing base lines by which sea areas that are not internal waters geographically would become internal waters.

Unlike the territorial sea, which is a purely juridical concept—from the geographical standpoint the territorial sea naturally forms part of the high seas—the term "internal waters" is essentially a geographical concept. To turn part of the high seas into internal waters on economic grounds can no more be condoned, surely, than to change internal waters into high seas or the territorial sea by applying a maximum length of, say, ten miles.

The Swedish Government sees no need for a definition of the term "bay", since this is a purely geographical concept which corresponds to the general acceptance of the term. It would be more to the point define the conditions under which a bay could be considered internal waters. The Swedish Government considers that a bay should not be regarded as constituting internal waters unless it is a well-marked indentation and its coasts belong to a single State. The definition of the conditions under which a bay could be regarded as constituting internal waters might be taken from the provisions of article 7,

paragraphs 1 and 2, concerning the term "bay",<sup>22</sup> Accordingly, the Swedish Government considers that the term "historical bay", which implies that a certain limit is set on the breadth of bays, is both redundant and unwarranted.

The Commission raised a question concerning the measuring of the territorial sea in bays the coasts of which belong to several States. In this connexion, the situation on the frontier between Sweden and Norway is of some interest. The frontier crosses a bay and then an archipelago situated outside the entrance to the bay. Under the terms of certain Swedish Orders on fishing and customs control, the base line for measuring the territorial sea outside the archipelago is constituted by a straight line connecting the outermost islet on the Swedish side with the outermost islet on the Norwegian side. However, this is a rather special case.

As regards the other provisions of chapter II of the Commission's draft concerning the régime of the territorial sea, the Swedish Government refers to its letter of 12 April 1955.

In conclusion, the Swedish Government wishes to point out that several provisions in both of the Commission's drafts can obviously apply only to peacetime conditions. This point should be clarified in future conventions. In this connexion, article 8 of the Barcelona Statute of 20 April 1921 on freedom of transit might serve as a model.

## 21. Turkey

### *Document A/CN.4/99*

NOTE VERBALE DATED 2 MARCH 1956 FROM THE PERMANENT MISSION OF TURKEY TO THE UNITED NATIONS

*[Original: English]*

The Permanent Representative of Turkey to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's note of 24 August 1955, No. LEG 292/9/01, LEG 292/8/01, concerning the provisional articles on the régime of the high seas and on the régime of the territorial sea formulated by the International Law Commission.

The Representative of Turkey will be grateful to His Excellency the Secretary-General if he would kindly transmit the following observations to the members of the Commission.

#### I. GENERAL

In the view of the Turkish Government the work of the International Law Commission has already contributed precious data on many important aspects of international maritime law. Part of these preliminary data might form a valuable basis for discussions on a future international

convention concerning the régimes of the high seas and of the territorial sea.

However, in the opinion of the Turkish Government, other parts of the Commission's work have already shown that the subject matter of a certain number of the provisional articles does not lend itself to general codification. The foremost among these are the provisional articles in which an attempt has been made to insert some general principles regarding the régime of straits.

In opposition to the general conditions affecting the application of the régime of the high seas, and in certain cases of the territorial sea, which may provide, to a certain extent, common criteria all over the world, the conditions affecting the régimes of straits are, and by nature ought to be, widely divergent.

Indeed, the impossibility of working out general rules applicable to all straits is not only illustrated by the divergent practices at present applicable in various straits but is also recognized by doctrine.

The Preparatory Committee appointed in 1924 by the Council of the League of Nations to report on certain aspects of international law which might lend themselves to a solution by international conventions, had attempted to render this task easier by setting down distinctions on the characteristics of various straits. It was suggested that the question should be approached from the basis of whether the straits are subject to treaty regulations, whether the entrances are wider or narrower than twelve nautical miles, whether the straits are less than twelve miles wide at their entrances and exceed this limit at their subsequent course. In this latter case, a further distinction was made on such salt-water areas which exceed the twelve-mile limit but whose coasts belong to a single State, in which case they were recognized as internal waters.

However, even this detailed method of approach has not made it possible to reach agreement on general rules regarding the régime of straits.

The Turkish authorities are well aware that the International Law Commission has not attempted a general codification of the régime of straits, and that the provisional articles under consideration are only aimed at dealing with certain general aspects regarding passage. But the difficulties involved in having to choose only some of the general principles admitted in international law, and of stating them out of the general context of rules and regulations which condition and modify their essence, are noticeable in the present text.

For example, although existing rules of international law, provisions of special conventions, precedent and State practice admit freedom of innocent passage in the best interests of international commerce and navigation, there is no case where such freedom might be interpreted to disregard the security, public order, sanitary well-being and other duties of the coastal State towards its own people. On the contrary, wherever written rules have been set down, special attention has been given to protect the sovereignty, security, public order, sanitary well-being, economic, fiscal and other interests of the coastal State, as well as to safeguard the legitimate interests of international commerce and navigation.

For the particular implementation of this general rule

<sup>22</sup> The Swedish Government feels that in principle no limit should be placed on the breadth of bays which can be considered as internal waters.

in régimes of passage through different straits, the individual characteristics of the straits concerned, the degree of their importance to the security of all the territory of the coastal State, the proximity of the routes of passage to the coasts, the size and importance of the towns and cities situated on the shores of the straits, established practices existing by virtue of historical precedent and of international treaties, and numerous other considerations have formed the basis upon which final rules of practice have been agreed.

In view of the considerations stated above, the Turkish authorities are doubtful that any useful purpose can be served by an attempt to formulate provisional articles on passage through straits, even though these articles may only attempt to deal with certain of the more general principles, and even though the special circumstances affecting the régime of certain straits which are of vital importance to the security and well-being of the coastal State, may be noted by amending these articles. It is, therefore, considered that the provisional articles regarding certain aspects of passage through straits should not be included in the final report of the International Law Commission to the General Assembly. If the Commission considers it to be useful, a compilation of the various régimes applicable in different straits might be added as an appendix to the above-mentioned report.

Having stated their preference for a change of method in dealing with some of the subjects included in the provisional articles, the Turkish authorities would like, however, to make certain suggestions in an attempt to render the present text, as far as possible, more harmonious with certain aspects of international law.

As the work of the Commission at this stage is considered to be exploratory and preliminary, and as any final interpretation of the various articles will be possible only when the Commission's work is ready as a whole, the Turkish Government wishes to state that it does not consider itself committed in any way by the opinions expressed by it at this stage on the work of the Commission.

PROVISIONAL ARTICLES ON THE REGIME OF THE  
TERRITORIAL SEA

*Article 2. Juridical status of the air space over the territorial sea and of its bed and subsoil.*

Add the following paragraph:

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

Comment: Although the addition of this provision might seem superfluous in a set of provisional articles dealing exclusively with maritime law, the fact that in the present text the sovereignty of the coastal State over the air space is defined as an extension of its sovereignty over its territorial sea, makes it necessary to specify that any conditions which may exist on the exercise of this latter sovereignty are not applicable by extension to navigation by air, which is regulated by other rules of international law.

*Article 3. Breadth of the territorial sea.*

Delete paragraph 3.

Comment: Paragraphs 2 and 3 of the present text of article 3, summarizing the views of the Commission on the breadth of the territorial sea, are contradictory. According to paragraph 2, international law admits the extension of the territorial sea up to twelve miles. This indeed is a correct assertion as numerous States have already accepted the twelve-mile limit for their territorial seas. Paragraph 3, however, asserts that international law does not require States to recognize a breadth beyond three miles and, therefore, not only contradicts paragraph 2 but also constitutes a future source of conflict, as the Commission is indicating the acceptance as well as the negation of the same principle. The Turkish authorities are of the opinion that the twelve-mile limit has already obtained the general practice necessary for its acceptance as a rule of international law.

*Article 7. Bays.*

1. Change the title of this article to "Bays and internal seas".

2. Add the following paragraph as paragraph 2:

"For the purpose of these regulations an internal sea is a well marked sea area which may be connected to 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."

Comment: The twelve-mile limit of the breadth of the entrances has been retained from the work of the Preparatory Committee of the League of Nations. It may be changed to two belts of the territorial sea.

*Article 12. Delimitation of the territorial sea in straits.*

Paragraph 4: After "... straits which join two parts of the high seas..." add "except where the connexion passes through an internal sea...".

*Article 18. Rights of protection of the coastal State.*

Paragraph 4: Begin the paragraph with the words "In peace time...".

Add the following sentence:

"The rights of the coastal State to enforce appropriate measures in times of war or when it considers itself under the menace of war or in conformity with its rights and obligations as a Member of the United Nations are reserved."

*Article 19. Duties of foreign vessels during their passage.*

Re-number first sentence as paragraph 1. After the end of sub-paragraph (e) add the following sentence as paragraph 2:

"Submarines shall navigate on the surface."

Comments: This provision exists in the present text under article 25 regarding the passage of warships. However, the eventuality of the passage of non-military submarines, such as those which may be used for scientific or other purposes, is not covered by paragraph 3 of the

present article 25. As article 25 in its entirety should be conceived subject to the provisions of articles 16 to 19, it would be preferable to delete the paragraph on the passage of submarines from article 25 and add it to article 19. Under the provisions suggested here below to be included for a re-drafting of article 25, other restrictions on the passage of submarines existing at present in certain areas cannot be affected by the provisional articles and shall, therefore, continue to be enforced.

*Article 20. Charges to be levied upon foreign vessels.*

Paragraph 2: Delete the words "rendered to the vessel." 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."

Comments: The present wording of this paragraph is in contradiction to régimes now being applied in various parts of the world. By deleting the words "rendered to the vessel" more elasticity will be given to the text so that it might be applied in various ways in accordance with international agreements or other forms of established precedent. The additional third paragraph is also necessary in view of existing practices.

*Article 23. Government vessels operated for commercial purposes.*

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

*Article 25. Passage (Warships).*

Comments: In the view of the Turkish authorities, paragraph 2 of the present text will have to be completely re-drafted in order to reflect rules of international law now being applied in connexion with the innocent passage of warships through straits.

The report of the International Law Commission for 1955 mentions the fact that "this article does not affect the rights of States under a convention governing passage through the straits to which it refers."<sup>23</sup> However, having taken note of this assertion, the Turkish authorities still do not consider the present text of the paragraph as an accurate and realistic description of the actual practice existing today regarding the innocent passage of warships through straits.

In the first place, the texts of paragraph 2 and paragraph 3 of the article are, in themselves, contradictory. Paragraph 2 in its present form might be interpreted to imply that, except in cases where international conventions have established different procedures, the innocent passage of warships through straits is in general entirely independent of any considerations regarding the security and well-being of the coastal State which "may not interfere in any way" with such passage. In opposition to this statement, paragraph 3 stipulates that "submarines shall navigate on the surface", thereby admitting that the security of the coastal State cannot be ignored. Having

thus admitted a principle which reflects more accurately present day practices, the question remains whether the navigation of submarines on the surface is the only rule affecting the innocent passage of warships through straits. As it is known, the régime applicable in certain straits eliminates completely the passing of submarines whether on the surface or not, except in special circumstances well defined in international conventions. Furthermore, the special nature of certain straits has made it necessary to set special rules and regulations affecting the innocent passage of warships other than submarines. In this category, for example, international law provides in certain cases rules which limit the tonnage of individual warships as well as that of the global forces which may effect simultaneous passage.

Further rules exist to regulate the time of the day when passages are allowed, and the general conditions under which they may be effected. The preceding regulations cited as examples, and other norms which are applicable at present in connexion with the innocent passage of warships through straits, show clearly that the present text of paragraph 2, article 25, does not reflect existing rules of international law. It is, therefore, deemed necessary to consider a re-drafting of the paragraph in order to reflect the general principles upon which have been based the various régimes now being applied.

In the second place, the present wording of the article is rather vague on the fact that the provisions of articles 16 to 19, which are applicable in the case of the innocent passage of ships through the territorial sea in general, are equally applicable in connexion with the innocent passage of warships through straits as far as the waters of such straits form a part of the territorial sea of the coastal State. The rights of the coastal State to demand previous notification and authorization in certain cases, as noted in paragraph 1, are also dealt with vaguely in connexion with paragraph 2. While re-drafting the paragraph, special care should be taken to eliminate any ambiguities in these matters.

In the third place, the general principles regarding the innocent passage of warships through straits are in themselves based upon different premises according to whether the passage is effected in times of peace, in times of war, in times when the coastal State considers itself to be under the menace of war, or in certain conditions which might exist in conformity to the provisions of the Charter of the United Nations. A new paragraph should be added to take note of this situation.

The comments submitted above are aimed to render the present text of article 25, concerning the general principles of the innocent passage of warships through straits, more harmonious with present-day rules of international law. However, as the subject is one of vital importance in many respects, and as the details of application are very intricate in certain cases, it is suggested that, apart from re-drafting the article in the manner submitted above, a further paragraph should be added with direct reference to the fact that régimes which are applied by virtue of international treaties or conventions shall not be affected by the provisions of this article. The substantial discrepancies existing between the French and

<sup>23</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, p. 22.*

English texts of paragraph 2 should also be noted.

*Addition of a new article:*

Add the following text as article 27:

“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.”

Comment: While paragraph 2 of article 1 refers to “other rules of international law”, it does not cover clearly the implications of the text submitted above. It is considered necessary to make a specific reference to the provisions of the Charter and to situations which may arise through the application of these provisions within the scope of the United Nations.

PROVISIONAL ARTICLES ON THE REGIME OF THE  
HIGH SEAS

*Article 1. Definition of the high seas.*

After the words “...not included in the territorial sea...” and before the words “...or in the internal waters...” insert the words “...or in the internal seas...”.

Comments: The necessity of inserting internal seas in this article is due to the fact that no satisfactory definition or enumeration of internal waters exists in the present text of the provisional articles on the régime of the high seas and the régime of the territorial sea. If such a definition, which would specifically include internal seas, were to be added to the present text, it might be possible to leave the text of article 1 in its present form. However, until proper amendments are made elsewhere, the addition suggested above is considered as essential to the text.

*Article 10. Penal jurisdiction in matters of collision.*

The Turkish authorities appreciate the fact that the International Law Commission has made an endeavour in this article to find a solution to the question of competing and conflicting juridical authorities in problems arising out of collisions and similar incidents of navigation on the high seas. However, the present text of article 10 does not seem to bring a satisfactory solution to the problem involved. No legal basis can be found to substantiate the assertions of this article which are contradictory to existing practices and to the judgement rendered by the Permanent Court of International Justice on 7 September 1927 in the “*Lotus*” case. Furthermore, the present text does not take into account some of the basic general principles of penal law.

The subject is considered as one in which further studies might be of special value. For example, the possibility of establishing some kind of international penal court competent to deal with these cases or of extending such competence to existing bodies of international jurisdiction might be studied.

However, if such competence is left to national jurisdiction, the Turkish authorities are of the opinion that 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 recognized 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 recognized 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.

COMMENT ON SOME IMPORTANT DISCREPANCIES BETWEEN  
THE ENGLISH AND FRENCH VERSIONS OF THE PROVISIONAL  
ARTICLES

Some important discrepancies between the English and French versions of the provisional Articles render particularly difficult the interpretation of the intentions of the Commission. Foremost among these is the substantial difference in the scope and the meaning of the French and English versions of article 25, paragraph 2, of the provisional articles on the régime of the territorial sea. The words “ne peut entraver le passage inoffensif” of the French text appear as “may not interfere in any way with innocent passage” in the English text. It is considered that a divergence exists in the meaning of these two texts. However, as the comments submitted above regarding this article apply equally to both texts which, in the view of the Turkish authorities, should be re-drafted, this example has been furnished only as an indication to facilitate the work of the Commission.

22. Union of South Africa

*Document A/CN.4/99*

A. TRANSMITTED BY A LETTER DATED 23 FEBRUARY 1956  
FROM THE PERMANENT MISSION OF THE UNION OF  
SOUTH AFRICA TO THE UNITED NATIONS

[Original: English]

COMMENTS ON THE DRAFT ARTICLES ON THE  
REGIME OF THE TERRITORIAL SEA

*Chapter II. Limits of the territorial sea*

*Article 3*

The Union Government concurs with the view expressed in the fourth paragraph of the Commission’s comment, that the task of harmonizing divergent views regarding the delimitation of the territorial sea between three miles and the maximum of twelve miles which the Commission is prepared to recognize, could best be entrusted to a diplomatic conference.

Pending the adoption by international agreement of a common standard—which should be binding without exception on all contracting States—the Union Government considers that the rules enunciated in draft article 3 embody as good an interim solution of the problem as can be expected at the present stage.

The Union Government supports the view of the Commission that the breadth of the territorial sea should not exceed twelve miles.

#### Article 4

The Union Government adheres to the view expressed in its comment on the 1954 draft, namely that the seaward edge of the surf should in certain cases be taken as the point of departure in measuring the breadth of the territorial sea.

#### Article 5

The amendments embodied in the present draft of this article appear to be an improvement on the 1954 text.

#### Article 7

Paragraph 5 of this article is to the effect that "the provisions laid down in paragraph 4 shall not apply to so-called 'historical' bays...". In its comment, the Commission explains that "paragraph 5 states that *the foregoing provisions shall not apply to 'historical' bays.*"

It seems clear that there is a contradiction, arising possibly from a misprint, between the text of paragraph 5 and the Commission's explanatory comment.

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 criteria laid down in the rest of the article.

As the draft stands, it would appear that "historical" bays which do not conform to the definition contained in paragraph 1—i.e., whose area is less than that of a semi-circle drawn on the closing line of the indentation—must lose their status as bays. It seems doubtful, both from the tenor of the draft articles as a whole and from the explanatory comment given by the Commission, whether this was the intention. A small amendment to the wording of paragraph 5 would suffice to remove any ambiguity about the special status of historical bays, in regard to which international law has always recognized, and must continue to recognize, more elastic criteria than are laid down in article 7.

#### Article 10

It is noted that the Commission did not take up the Union Government's suggestion for a modification of the 1954 draft, the effect of which would have been to eliminate narrow enclaves of high seas between the outer limit of the territorial sea of the mainland and that of an island lying offshore at a distance equivalent to twice the breadth of the territorial sea.

Article 12, paragraph 3, provides that:

"if as a consequence of this delimitation (of the territorial sea in a strait separating two or more States) 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."

While the analogy is not an exact one, the principle underlying this rule appears to be that an isolated enclave of the high seas would be of little value to navigation; and it has felt that the same consideration would apply to narrow wedges of the high seas lying between an island and the mainland.

The Union Government is still inclined to the view that a modification of article 10 on the lines suggested might be of practical value.

#### Article 11

The Union Government adheres to the view, expressed in its comments on the 1954 draft of this article, that States should be permitted to take the surf-line to seaward of a drying rock or shoal which lies within the territorial sea as the point of departure for measuring the territorial sea, rather than the rock or shoal itself.

The minor drafting changes which have been introduced in the revised text of this article are regarded as an improvement.

#### Chapter III. The right of innocent passage

The arrangement of articles in the present version represents a distinct improvement on the 1954 text. The following points, however, appear to call for further comment.

#### General

It is suggested that suitable provision should be made in this chapter, requiring submarines to navigate on the surface when passing through the territorial sea of another State.

#### Article 19

This article imposes on foreign ships exercising the right of passage the duty to observe the laws and regulations of the coastal State, particularly where they relate to the matters specified in paragraphs (a) to (e).

The new paragraph (c) is regarded as an improvement on the old text in that it refers specifically to "living" resources whereas the 1954 draft refers merely to "products", a term which is open to various interpretations. The Union Government feels, however, that a reference should also be made to the duty of foreign ships to respect laws and regulations of the coastal State designed to conserve or protect mineral or other resources of the territorial sea and of the sea-bed and subsoil beneath it. Such provision could be made either by way of an addition to paragraph (c) or by means of a new paragraph. It is urged that the right of the coastal State to make regulations to protect mineral and other resources in the territorial sea, and the corresponding duty of foreign vessels to observe such regulations, is sufficiently important to warrant inclusion even though the list contained in paragraphs (a) to (e) is not intended to be exhaustive.

#### Article 21

In the revised text the arrangement of chapter III has been changed by introducing the following headings:

A. General rules (articles 16 to 19)

- B. Merchant vessels (articles 20 to 22)
- C. Government vessels other than warships (articles 23 and 24)
- D. Warships (articles 25 and 26).

In view of these specific headings, and on the assumption that it is necessary to have a separate section to cover Government vessels, it is suggested that for the sake of clarity the heading to section A should be amended to read:

“A. General rules relating to all vessels”.

If this amendment is agreed to, as section B applies only to “merchant vessels”, the word “merchant” appearing in article 21 (1) might be deleted.

In any case, it is not clear why the phrase “foreign merchant vessel” is used in paragraph 1 but not in paragraph 2 or in article 22, where the phrase “foreign vessel” is employed. It is felt that in the interests of consistency the same phrase should be used throughout unless it is desired to draw a distinction between merchant vessels and others.

### *Document A/CN.4/99/Add. 1*

- B. TRANSMITTED BY A LETTER DATED 12 MARCH 1956 FROM THE PERMANENT MISSION OF THE UNION OF SOUTH AFRICA TO THE UNITED NATIONS

[Original: English]

#### COMMENTS ON PROVISIONAL ARTICLES CONCERNING THE REGIME OF THE HIGH SEAS

##### *Article 1*

The definition of the high seas contained in this article appears to be satisfactory.

##### *Article 2*

No comment.

#### *Chapter I. Navigation*

##### *General*

As presently framed the draft articles appear to apply to submarines, irrespective of whether they are warships, only when they are navigating “on” the high seas. It is felt that specific provision should be made in the appropriate article, to apply the provisions of the draft code to submarines at all times when such vessels are “in” the high seas, whether they are navigating on the surface or submerged.

##### *Article 3*

No comment.

##### *Article 4*

The Union Government is inclined to agree with the Commission's view that the flag of an international organization cannot be assimilated to the flag of a State for the purpose of conferring exclusive jurisdiction over a vessel flying such flag on the high seas. It is felt that the whole question of jurisdiction over ships flying the flag of international organizations requires further study and

the decision to defer consideration of the matter is therefore welcomed.

##### *Article 5*

The Union Government agrees with the Commission's view that the framing of criteria, based on the nationality of the captain and crew, which would entitle a vessel to fly its flag can best be left to individual States. Should it become necessary at some future date to include an article of this nature, consideration might be given to a provision that the State in which a ship is registered should license the captain and certain crew members or, if they have been licensed by another State, should validate such licenses. This system has been found to work well in the field of civil aviation.

With regard to paragraph 2, sub-paragraph (c), it is felt that in order to qualify for registration in a particular country a ship should have its principal place of business in that country.

It is suggested that it would be more in accord with the intention which appears to underlie paragraphs 2(a) and 2(b) if paragraph 2(c) were expanded by the addition of the following words:

“... 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”.

##### *Article 6*

The principle underlying this article is accepted, but the Commission may wish to consider whether the drafting might be revised in order to bring out the meaning more clearly. The phrases “nationalities in question” and “with respect to other States” could perhaps be made more specific.

##### *Article 7*

No comment.

##### *Article 8*

The situation might arise where a State-owned ship is employed on a commercial basis and engaged in ordinary trading activities. Although such a ship might be owned by the State and technically employed on Government service, it does not seem desirable that it should be assimilated to a warships and enjoy the immunities granted to warships. It seems to be implicit in article 8 that it is intended to cover Government-owned and operated ships which are employed otherwise than for commercial gain. It is felt that the article should be re-phrased to make this clear—for example, by adding the words “and otherwise than for commercial gain” after the words “on Government service”.

##### *Article 9*

No comment.

##### *Article 10*

As the Commission explains at the end of its comments, the draft article is designed “to spare vessels and their

crews the risk of criminal proceedings before foreign courts in the event of collision on the high seas”.

The Union Government agrees with the principle that proceedings should not be instituted *as a matter of right* against the captain or a crew member, in the circumstances envisaged in this article, in the courts of any State other than the flag State or the State of which the officer or crew member is a national.

As it stands, however, the draft article makes no provision for the case where the State of which the person concerned is a national waives its jurisdiction in favour of another State. Provision is made for such waiver in South African legislation and no doubt in that of other countries.

It is therefore urged that the article be amended (e.g. by the addition of a sentence at the end of paragraph 1) 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.

#### Articles 11-13

No comment.

#### Article 14

In the fourth paragraph of its comments the Commission explains that acts committed by one aircraft against another aircraft cannot be regarded as acts of piracy, and adds the rider that such acts are in any case outside the scope of the draft articles.

It is not clear why acts committed by one aircraft against another over the high seas should be outside the scope of the draft articles, while acts committed by an aircraft against a vessel on the surface are covered. According to article 2, the freedom of the high seas includes the freedom to fly above them.

It was felt that the study of the régime of the high seas might have provided the Commission with the opportunity to fill in some of the admitted lacunae in international law relating to the régime of the airspace above the high seas.

In its comment on article 8, the Union Government expressed the view that a ship owned and operated by a State, but engaged in normal trading activities, should not in principle be assimilated to a warship.

Once having been assimilated to a warship, such a vessel could only assume the status of a private vessel—and thus become capable of committing acts of piracy—if the crew mutinied (article 15).

It is felt, however, that there is no valid reason why a ship owned and operated by a State but engaged in commerce should be regarded as incapable of committing acts of piracy. This lends further support to the view that such ships should be assimilated to private vessels.

In numbered paragraph 6 of its explanatory notes, the Commission concludes that “Acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel cannot be regarded as acts of piracy”.

It is not unknown for passengers on a ship to engage in acts of robbery and violence in concert with vessels, known to be engaged in piracy, which are not in the immediate vicinity. Although such action as is envisaged in paragraph 1 of article 14 cannot be classed as piracy when committed by the crew, it seems possible that similar action instituted by the passengers in concert with pirates might, in certain circumstances, be so construed.

#### Articles 15-19

No comment.

#### Article 20

It is felt that this article is justified by necessity despite the fact that it tends to favour pirate vessels *vis-à-vis* States with small fleets and a long coastline. Under article 8, State ships which are assimilated to warships “for all purposes connected with the exercise of powers on the high seas by States other than the flag State” would presumably also have the right to effect a seizure because of piracy.

It is noted that no specific provision is made for the case where legitimate self-defence against piracy results in a combat during which the pirate vessel and its crew are overcome. In such a case the master of the vessel against which the act of piracy was committed would presumably be entitled to seize the vessel and its crew pending the arrival of a warship or military aircraft.

The Commission may wish to consider whether a specific provision should be made to cover such cases, which are not uncommon in areas where piracy is still prevalent.

#### Article 21

It is suggested that paragraph (b) should be extended to cover the high seas generally.

Reasonable ground for suspicion that a vessel is engaged in the slave trade should be sufficient justification for exercising the right of visit, even if the vessel concerned is not encountered in one of the “maritime zones regarded as suspect in international treaties for the abolition of the slave trade”.

The Union Government agrees that anything less than absolute liability for damages if a vessel is boarded without justification, would be a derogation from the principle of the freedom of the high seas.

#### Article 22

The Union Government agrees with the view of the Commission as explained in numbered comment 3, that orders given by radio should not be admitted. There would presumably be no objection to the use of radio as ancillary to the other recognized methods of signalling.

#### Article 23

The Commission remarks that “almost all maritime States” have laid down regulations to prevent the pollution of their internal waters and their territorial sea. The intention of article 23 appears, therefore, to be to place upon States the obligation to draw up regulations

to combat pollution of the high seas as well. The Union Government feels that while this intention emerges from the heading of the article and from the Commission's comments, the text of the article itself should include a reference to the high seas.

*Articles 24 and 25*

No comment.

*Article 26*

In the interests of clarity, it might be advisable to add the words "in such area" at the end of paragraph 1.

*Articles 27-30*

No comment.

*Article 31*

As it stands at present, the article provides for the appointment of an arbitral commission by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The wording implies that the Secretary-General of the United Nations and the Director-General of FAO will be *ad idem*, and makes no provision for the event of their not agreeing on the personnel of the commission. It is suggested, therefore, that either the Secretary-General be empowered, *after* consultation with the Director-General, to appoint the commission; or that machinery providing for the case of a disagreement between the Secretary-General and the Director-General be included.

*Articles 32-38*

No comment.

**23. United Kingdom of Great Britain and Northern Ireland**

*Document A/CN.4/99/Add. 1*

A. TRANSMITTED BY A NOTE VERBALE DATED 15 MARCH 1956 FROM THE UNITED KINGDOM DELEGATION TO THE UNITED NATIONS

[*Original: English*]

INTRODUCTION

Her Majesty's Government in the United Kingdom stated in their comments transmitted to the United Nations on 1 February 1955, that they found the Commission's report a valuable contribution towards the codification of the law of the sea. They wish to reiterate this expression of their interest in the work of the Commission and welcome the present draft articles upon the régime of the high seas and the régime of the territorial sea, particularly article 3 of the latter, which they consider to be a valuable contribution.

In accordance with the terms of General Assembly resolution 899 (IX) of 14 December 1954, Her Majesty's Government have thought it fit to suggest certain amendments also to the draft articles upon the continental shelf

and the contiguous zone drawn up at the 1953 session of the International Law Commission. The present comments do not however cover the subject of fisheries. A commentary on this matter will be forwarded later.

REGIME OF THE HIGH SEAS

A. *Comments of substance*

*Article 2*

1. It would be preferable for the first sentence in this article to read

"the high seas being open to all nations, no State may purport to subject any part of them to its jurisdiction".

2. The United Kingdom Government have received evidence that a number of learned and scientific bodies are concerned lest recent developments should impede the freedom of research, exploration and experiment. They would accordingly propose to add a fifth item to those listed in article 2, reading:

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

3. The penultimate paragraph of the Commission's comments lists certain matters in which the coastal State is permitted to exercise forms of control outside the territorial sea. The United Kingdom Government draw the attention of the Commission to the fact that certain States (including the United Kingdom) allow vessels to engage in their coastal trade, while claiming the right to board and search such vessels engaged in that trade, whether they are in or out of the territorial sea. To take account of the exercise of this right, the United Kingdom Government suggest the addition of a further item to those set out in the paragraph referred to, to read as follows:

"6. 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".

*Articles 4 and 5*

Her Majesty's Government approve the provision that ships shall be subject to the exclusive jurisdiction of the flag State on the high seas, subject to the exceptions mentioned in article 4.

It is stated in article 4 that ships possess the nationality and shall fly the flag of the State in which they are registered, from which it might appear that registry was the criterion of the national character of all ships. The conditions governing registry are, however, an internal matter for each State and they will vary widely from one country to another and may, indeed, not exist at all. Even highly developed maritime States will not always require the registration of every ship. For example, warships, to which this article appears to apply, will not be registered, and many types of Government vessel may be exempt from registry but nonetheless entitled to fly a national flag. Small ships may be exempt from registry but may use the national flag.

As regards the draft provisions in article 5 stating the conditions which must be observed for the purposes of recognition of the national character of a ship, the

United Kingdom Government consider that any attempt to reduce the criteria governing recognition of a national flag to a few simple rules is bound to be extremely difficult, and it may well prove impossible to draft rules which are not in conflict with national law in one country or another. In the present draft, for example, the provisions or article 5 are wide enough to permit the establishment of "flags of convenience" even where the country of flag has no relationship to the country of real ownership, but at the same time are too narrow to permit the recognition of a large number of bona fide British ships on the British register.

Also, as the articles are at present drafted, they do not provide for the control and jurisdiction which, according to the Commission's comment to article 5, should be effectively exercised by the flag State. For example, the draft provisions in article 5 in respect of ownership of ships by persons or partnerships would be fulfilled if a ship were owned as to nearly half by foreigners living outside the flag State and the remainder by foreigners living in the flag State; whereas in the view of the United Kingdom Government effective control over ships owned by persons or partnerships can only be exercised if all the persons owning the ship or all the partners are nationals of the flag State. Again, in the case of corporate bodies (which may include other bodies than joint stock companies), it is not sufficient merely to require a registered office in a State if it is desired to establish effective control. If the business of the body corporate owning the ship is conducted away from the flag State, and the ship itself does not call at the ports of the flag State, the ship may well be beyond the control of that State.

Conversely article 5 is too narrowly drawn at present to permit recognition of ships sailing as a matter of historical right or custom under the flag of another State. In the British Commonwealth it has always been possible (subject to the laws of any particular Commonwealth country) for a ship wholly owned in and controlled from one of the countries of the Commonwealth to be registered in any of those countries and to fly its flag. This is done without any loss of the effective control and jurisdiction which is stated by the Commission to be a requirement of national character and permission to fly a flag.

The criteria set down in article 5 governing the recognition of nationality appear to be a statement of the factors found by the Institute of International Law to be common to the registration systems of a number of countries in 1896, and therefore represented a lower common factor than the standards adopted by any of the individual countries. Any such common standards are likely to omit important provisions peculiar to individual countries for establishing control and jurisdiction, such as those concerning the location of the principal place of business or the controlling interest of shareholders. A detailed statement of the criteria governing nationality by reference to the standards found to be common to all countries is, therefore, unlikely to be satisfactory in principle, and may well encourage the adoption of inferior standards.

Her Majesty's Government therefore suggest that it

would be preferable for the articles to be confined to broad principles which are established in international law to read as follows:

*" Article 4*

" 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.

*" Article 5*

" 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 others 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."

*Article 8*

1. The purpose of this article would be clearer if the words "shall be assimilated to" were replaced by the words "shall have the same immunity as".

2. The question arises here of how a warship shall be entitled to verify the flag of a vessel if that vessel claims to be government-owned or operated. This difficulty arises because there is no way in which a warship can verify the title of a merchant ship operated by a State and used on government service to fly its flag, other than by boarding it in order to establish that it is being used on government service only.

3. The phrase "other ships" in the last sentence of the Commission's comment is somewhat ambiguous in this particular context. The United Kingdom Government therefore suggest the substitution of "foreign" for "other".

*Article 18*

This article can be read, at present, as not dealing with the problem of the disposal of the pirate ship or aircraft itself, after seizure. The Commission may wish to consider inserting some provision on this point, e.g. that it will be for the original owner to have the opportunity of putting in a proprietary claim in the courts of the country which has taken the vessel or aircraft.

*Article 21, paragraph 3*

Instead of "shall be compensated for the loss sustained" it would seem better to say "shall be compensated for any loss sustained". Unless a very long delay were entailed, it is doubtful whether any loss would have been sustained. It is, however, for consideration whether the word "damage" should not be mentioned as well as "loss".

*Article 22, paragraph 1*

The United Kingdom Government consider the last sentence of this paragraph to be based on an erroneous conception of the nature of the contiguous zone and they would propose its omission. The contiguous zone is not part of the territorial sea, but part of the high seas. It is not, like the territorial sea, under the sovereignty or jurisdiction of the coastal State. The laws of the coastal State are not, as such, applicable in the contiguous zone, as they are in the territorial sea. The coastal State is, however, permitted to exercise certain powers within the contiguous zone, not because an infraction of its laws is at the moment taking place, but in order to prevent an *eventual* infraction of its laws when the vessel actually arrives within the territorial sea, or comes into port. Thus the position in the contiguous zone is entirely different from that in the territorial sea. The United Kingdom Government consider that the doctrine of hot pursuit should only be applicable in those cases, where, at the moment when the pursuit starts, the vessel is within the jurisdiction of the coastal State and there has actually been an infringement of its laws or it is suspected that such an infringement has occurred. This cannot be the position in the contiguous zone and consequently the doctrine of hot pursuit should have no application to a vessel within the contiguous zone.

This paragraph should also, in the opinion of the United Kingdom Government, make clear that the infringement for which the pursuit is being undertaken need not still be taking place at the precise moment it is begun. It is clear that in the case of, for example, oil pollution, the actual infringement may take only a matter of a few moments, during which it would be quite impossible for the pursuit to be begun.

*Article 22, paragraph 3*

The United Kingdom Government suggest that this paragraph should include also a provision that the pursuing vessel must establish the position of the vessel pursued, e.g., by the dropping of a buoy.

## Use of aircraft for purposes of hot pursuit

Some States employ aircraft in co-operation with vessels for the purposes of fishery protection. The United Kingdom Government agree that this practice is lawful in principle, but only if it is carried out under the correct conditions, to ensure compliance with the principles contained in article 22 of the International Law Commission's draft. They therefore suggest that the International Law Commission should at its next session study the implications of a pursuit initiated by an aircraft.

The preliminary views of the United Kingdom Government are that the following principles should apply:

(1) The essence of pursuit is that the offending vessel shall have been made aware that it is required to stop. An aircraft, acting by itself, must therefore be capable of issuing a visible and comprehensible order to stop to the offending vessel when the latter is still within the territorial sea. Only from the moment of such an order can pursuit as properly to be understood, and for the pur-

poses of justifying its extension on to the high seas, be said to commence.

(2) Since pursuit must be immediate, hot and continuous, an aircraft, having given the order to stop, must itself actively pursue the vessel until a vessel summoned by the aircraft arrives and takes over the pursuit. It would not be an appropriate exercise of the right of pursuit that a vessel should be able to arrest another vessel outside the territorial sea merely because that vessel had been sighted as an offender when in the territorial sea, by an aircraft.

## Chapter II. Fishing

The United Kingdom Government will comment separately at a later date upon the articles contained in this chapter.

## Chapter III. Submarine cables and pipelines

The United Kingdom Government approve the articles in this chapter, but suggest that both they and the comments be amended where necessary (as follows) to include electric cables generally.

*Article 34, paragraph 1*

For "telegraph or telephone" read "electric".

*Article 34, comment*

In paragraph 2, after "pipelines" insert "and power cables".

*Article 35*

In line 7, after "communications" insert "or of electric power", and in the comment, after "pipelines" insert "and power cables".

## B. Drafting points

*Article 1*

For "which are not included" substitute "that are not included".

*Article 3*

For "shall have" substitute "has".

*Article 6*

The United Kingdom Government suggest that this article be redrafted to read:

"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".

*Article 7, paragraph 2*

Insert commas after words "Government" and "military fleet".

*Article 10, paragraph 1*

Insert a comma after the words "flying the flag" in the penultimate line.

*Article 12*

Insert after the word "vessel", the words "of any State".

*Article 14, paragraph 1*

Insert a comma after the word "degradation". In line 2 of paragraph 1 (a) for "on" insert "by".

*Article 16*

Certain of the expressions used in this article are not usual in English. It is suggested that the word "devoted" should be deleted and the word "utilized" be inserted; this requires the insertion of "for" for "to" in the following line. "Dominant control" is also not usual; "control" by itself would be sufficient. If an additional word is necessary, something like "actual" or "effective" would be more appropriate.

*Article 20*

For "because of" substitute "on account of".

*Article 21, paragraph 1 (b)*

Redraft this paragraph to read: "That while in the maritime zones indicated as suspect in the international treaties for the abolition of the slave trade, the vessel is engaged in that trade."

*Article 22*

Comment, point 3: for "spotted" insert "sighted" and for "hoisting" insert "making".

*Article 23*

"Fuel oil" is used as a technical term; the plain "oil" is therefore preferable.

## Régime of the territorial sea

The following represent the comments of substance that Her Majesty's Government desire to make. Certain purely drafting comments may follow at a later date.

*Article 1*

The United Kingdom Government approve this article.

*Article 2*

The United Kingdom Government approve this article.

*Article 3*

In their comments submitted to the International Law Commission on its 1954 report (1 February 1955) the United Kingdom Government set out fully their view that the problem of the breadth of the territorial sea demands a uniform world-wide solution and that, while special historical grounds may provide a valid reason for claims to a wider limit in certain cases, there is no geographical or economic justification for claims to more than the traditional three-mile belt. The United Kingdom Government accordingly welcome the statement by the Commission in paragraph 3 of this article that States are not required to recognize claims to a breadth of territorial sea of more than three miles. They urge the Commission

to restate this view more strongly in the revised text, and would stress in this connexion the pronouncement of the International Court of Justice in its judgement upon the Anglo-Norwegian Fisheries Case, in which the Court asserted that the limitation of the territorial sea always has an international aspect.

In the second paragraph of its comment upon article 3, and discussing paragraph 2 of the article, the Commission states that it considered that extensions of the territorial sea beyond a twelve-mile limit infringe the principle of the freedom of the seas. The United Kingdom Government would point out that this principle was established during the period which witnessed also the general acceptance by States of the three-mile limit for the territorial sea. Attempts to derogate from the principle have largely taken the form of claims to wider belts of territorial sea than three miles. Since the principle of the freedom of the seas is incompatible with claims to exercise exclusive jurisdiction over large areas of sea, the United Kingdom Government suggest that the recognition of the principle must entail the limitations to 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 wish to recall that in their comments to the Commission of 1 February 1955, they put forward various arguments in favour of a uniform breadth of territorial waters throughout the world. They request the Commission to consider again these arguments and to take into account certain recent developments in international co-operation in maritime matters and in the work of the Commission itself, which in their view have strengthened the case for a uniform three-mile limit of territorial sea.

In the first place, the Commission has provided a set of articles upon the conservation of the living resources of the sea. The United Kingdom Government welcome these articles in principle, and consider that a set of articles upon this subject should allay the often legitimate fears of coastal States for the conservation of fishery resources outside the three-mile limit—fears which have motivated many excessive claims to wide belts of territorial sea. They believe that such a set of articles should provide a basis for future agreements upon the conservation of the living resources of the sea. It will henceforth be clear that States disregarding the principle underlying these articles, yet continuing to base their claim to a wider belt of territorial sea upon a desire to preserve or conserve fishery resources, are seeking, without legitimate ground, to assert exclusive jurisdiction and rights of exploitation over areas that should be open for the use and benefit of all countries.

In the second place, the United Kingdom Government have already expressed their readiness to accept a "contiguous zone" of up to twelve miles in width measured from the low-water mark or base-line, in which the coastal State shall be entitled to exercise certain specific rights. They reaffirm their readiness to accept such an arrangement upon the conditions set out when the proposal was first made in the comments of the United Kingdom Government dated 2 June 1952, and restated in those of



































