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REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/2934

Report of the International Law Commission covering the work of its seventh session, 2 May - 8 July 1955

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Chapter I

INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the Statute of the Commission annexed thereto, held its seventh session at the European Office of the United Nations, Geneva, Switzerland, from 2 May to 8 July 1955. The work of the Commission during the session is related in the present report. Chapters II and III, which constitute a progress report on the Commission's work, are submitted to the General Assembly for information, while chapter IV contains certain proposals which call for decision by the General Assembly.

I. Membership and attendance

2. The Commission consists of the following members:

Mr. Gilberto Amado	Brazil
Mr. Douglas L. Edmonds	United States of America
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China
Faris Bey el-Khoury	Syria

Mr. S. B. Krylov	Union of Soviet Socialist Republics
Mr. L. Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. Carlos Salamanca	Bolivia
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. Jaroslav Žourek	Czechoslovakia

3. Sir Gerald Fitzmaurice and Mr. L. Padilla Nervo were elected members by the Commission, in accordance with article 11 of its Statute, the former on 9 May 1955, and the latter on 16 May 1955, to fill the vacancies caused by the resignation of Mr. H. Lauterpacht and Mr. R. Córdova, respectively, who had been appointed judges at the International Court of Justice.

4. All the members were present at the seventh session except Mr. Radhabinod Pal who, for professional reasons, was prevented from attending, and Mr. L. Padilla Nervo who, for reasons of health and official duties, was also unable to attend.

II. Officers

5. At its meeting on 2 May 1955, the Commission decided to postpone the election of its officers until

9 May 1955, owing to the absence of some of its members, and to meet until that date under the chairmanship of Mr. A. E. F. Sandström, retiring Chairman.

6. At its meeting on 9 May 1955, the Commission elected the following officers:

Chairman : Mr. J. Spiropoulos;

First Vice-Chairman: Mr. S. B. Krylov;

Second Vice-Chairman: Mr. F. V. García Amador;

Rapporteur: Mr. J. P. A. François.

7. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

III. Agenda

8. The Commission adopted an agenda for the seventh session consisting of the following items:

- (1) Filling of casual vacancies in the Commission;

- (2) Régime of the high seas;

- (3) Régime of the territorial sea;

- (4) Law of treaties;

- (5) Diplomatic intercourse and immunities;

- (6) Planning of future work of the Commission;

- (7) Question of stating dissenting opinions;

- (8) Date and place of the eighth session;

- (9) Other business.

9. In the course of the session, the Commission held forty-nine meetings. It considered all the items on the above agenda with the exception of the law of treaties (item 4) and diplomatic intercourse and immunities (item 5), the study of both these subjects being postponed until its next session.

10. The work on the questions dealt with by the Commission is summarized in chapters II to IV of the present report.

Chapter II

REGIME OF THE HIGH SEAS

I. Introduction

11. At its first session, held in 1949, the International Law Commission elected Mr. J. P. A. François as Special Rapporteur to study the question of the régime of the high seas. At its second session, held in 1950, the Special Rapporteur submitted a report on the subject (A/CN.4/17). The Commission also had before it replies from certain Governments (A/CN.4/19, part I, C) to a questionnaire which it had sent to the Governments of all Member States. It considered the topic, using as a basis of discussion the report of the Special Rapporteur, which outlined the various subjects which might, in his opinion, be studied with a view to the codification or the progressive development of international maritime law.

12. The Commission then took the view¹ that it could not undertake a codification of maritime law in all its aspects and that it would be necessary to select the subjects the study of which could be begun as a first phase of its work on the topic. The Commission thought that it could for the time being leave aside all those subjects which were being studied by other United Nations organs or by the specialized agencies, as well as those which, because of their technical nature, were not suitable for study by it. Lastly, it set aside a number of subjects the limited importance of which did not appear to justify their consideration in the present phase of its work. The subjects selected for study by the Commission were: nationality of ships, collision, safety of life at sea, right of approach, slave trade, submarine telegraph cables, resources of the sea, right of pursuit, contiguous zones, sedentary fisheries and the continental shelf.

13. The Special Rapporteur submitted a second report on the subject (A/CN.4/42), which the Com-

mission studied at its third session in 1951, beginning with the chapters concerning the continental shelf and various cognate subjects — namely, conservation of the resources of the sea, sedentary fisheries and contiguous zones. These subjects were subsequently dealt with in the Commission's report on the work of its fifth session in 1953.²

14. In addition, at its fifth session, the Commission to some extent reversed the decision taken at its second session by requesting the Special Rapporteur to prepare for the sixth session a new report covering subjects not dealt with in the earlier reports.³ While reverting to the idea of codifying maritime law, the Commission decided not to include any detailed provisions on technical matters or to encroach on ground already covered in special studies by other United Nations organs or specialized agencies.

15. At its seventh session, the Commission studied the subject, on the basis of the new report (A/CN.4/79) submitted by the Special Rapporteur, at its 283rd to 286th, 288th to 298th, 300th to 306th, 320th, 321st, 323rd, 326th, 327th, 329th and 330th meetings. It adopted a provisional draft, with commentaries, which is reproduced in the present chapter and the annex thereto and which is to be submitted to Governments for observations. The Commission also decided to communicate this chapter with the annex to the following organizations which were represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome from 18 April to 10 May 1955: United Nations Food and Agriculture Organization, United Nations Educational, Scientific and Cultural Organization, General Fisheries Council for the Mediterranean, Indo-Pacific

² See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456*, chapter III.

³ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456*, para. 165.

¹ See *Official Records of the General Assembly, Fifth Session, Supplement No. 12, A/1316*, part VI, chapter III.

Fisheries Council, Inter-American Tropical Tuna Commission, International Commission for the Northwest Atlantic Fisheries, International Council for the Exploration of the Sea, International North Pacific Fisheries Commission, International Pacific Halibut Commission, International Pacific Salmon Fisheries Commission, International Whaling Commission, Permanent Commission for the Exploitation of the Maritime Resources of the South Pacific, Permanent Commission under the 1946 Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish. The Commission would welcome their observations on this matter.

16. In accordance with General Assembly resolution 821 (IX) of 17 December 1954, the Commission had before it the records and other documents of the meetings of the *Ad Hoc* Political Committee at which the complaint of violation of the freedom of navigation in the China seas was considered. The documents referred to in the above-mentioned resolution were issued to the members of the Commission. The Commission also had before it a memorandum concerning freedom of navigation on the high seas, submitted on behalf of the Government of the People's Republic of Poland by Mr. Jan Balicki, official Polish observer at the seventh session of the Commission. After an exchange of views, the Commission decided that it was not competent to examine the charges set forth in the documents transmitted by the General Assembly and referred to in the memorandum submitted on behalf of the Government of the People's Republic of Poland (A/CN.4/L.53). On the general question whether warships can commit acts of piracy, the Commission has stated its position in articles 14 and 15 of the draft now submitted.

17. In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission proposes at its eighth session to group together systematically in a single report all the rules adopted by it in respect of the high seas, the territorial sea, the continental shelf, contiguous zones, fisheries and the protection of the living resources of the sea, after examining the comments by Governments on the present regulations and on those concerning the territorial sea which were left in abeyance.

18. The text of the provisional articles concerning the régime of the high seas as adopted⁴ by the Commission is reproduced below.

II. Provisional articles concerning the régime of the high seas

Definition of the high seas

Article 1

The term "high seas" means all parts of the sea which are not included in the territorial sea or internal waters of a State.

⁴ Mr. Edmonds entered a reservation to the articles on fishing (articles 24 to 33) for the reasons stated by him in the course of the discussions. Sir Gerald Fitzmaurice recorded dissent from the last sentence of paragraph 1 of article 22 (hot pursuit from a contiguous zone) for the reasons given in the summary record of the 330th meeting. Mr. Hsu, for the reasons explained in the summary record of the 330th meeting, entered a reservation to the second

Comment

The waters of the sea belong either to the high seas or to the territorial sea or to internal waters. In the part of the present report dealing with the territorial sea, the Commission has attempted to define the external limits of the territorial sea and indicated the base lines from which it should be measured. Waters within these base lines constitute internal waters. Article 1 and the articles contained in the chapter on the territorial sea thus furnish a definition of the high seas.

Freedom of the high seas

Article 2

The high seas being open to all nations, no State may subject them to its jurisdiction. Freedom of the high seas comprises, *inter alia*:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

Comment

The principle generally adopted in international law that the high seas are open to all nations governs all regulations on the subject. No State may subject the high seas to its jurisdiction, the term "jurisdiction" being used here in a broad sense, including not merely the judicial function but any kind of sovereignty or authority. States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States. Freedom of the high seas includes freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly through the superjacent air-space. Freedom to fly over the high seas is mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea. The Commission has refrained from formulating rules on air navigation, however, since the task it set itself for this phase of its work is confined to the codification of maritime law proper.

The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified four of the main freedoms. It is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to

paragraph of the commentary to article 14 (piracy). Mr. Krylov abstained in the vote on article 9 (signals and rules for the prevention of collisions), and could not agree to the text of, and commentary to, article 14 (piracy), and voted against article 31 (arbitration in fishery disputes), for the reasons stated in the summary record of the 330th meeting. Mr. Scelle, for reasons explained in the course of the discussions, expressed reservations on some points regarding the position taken by the Commission with respect to the continental shelf and the freedom of the high seas. Mr. Žourek explained that, although he had voted for the draft on the régime of the high seas as a whole, he was still opposed to article 5 (right to a flag), article 9 (signals and rules for the prevention of collisions), article 31 (arbitration in fishery disputes) and article 33 (binding force of the decisions of the arbitral commission), for reasons which he had stated during the discussions. He maintained his reservations concerning the definition of piracy contained in article 14 and did not accept the comments on that article.

engage in scientific research therein. It is evident that in the high seas covering a continental shelf the latter freedoms can only be exercised subject to any rights over that shelf which the coastal State can invoke. The Commission did not study this problem in detail at the seventh session.

Any freedom that is to be exercised in the interests of all entitled to enjoy it must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed not to limit or restrict the freedom of the high seas but to safeguard its exercise in the interests of the entire international community. Among the points covered by these rules are:

1. The right of States to exercise their sovereignty on board ships flying their flag;
2. The exercise of certain policing rights;
3. The right of States concerning the conservation of the living resources of the high seas;
4. The institution by coastal States of zones contiguous to their shores for the purpose of exercising certain well-defined rights;
5. The right of coastal States with regard to the continental shelf.

Points 1, 2 and 3 are the subject of the present regulations; points 4 and 5 were dealt with by the Commission in the report covering the work of its fifth session.⁵

CHAPTER I. NAVIGATION

Right of navigation

Article 3

Every State shall have the right to sail ships under its flag on the high seas.

Comment

See comment under article 4.

Status of ships

Article 4

Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in these articles, they shall be subject to its exclusive jurisdiction on the high seas.

Comment

This rule, which is generally recognized in international law, is one of the essential adjuncts to the principle of the freedom of the high seas. The absence of any authority over ships sailing the high seas would lead to chaos. In general, the authority exercised is that of the flag State. In certain cases, however, policing rights have been granted to warships in respect of foreign ships. Some of these cases are the subject of

international treaties, although the regulations the latter contain cannot yet be regarded as part of general international law. Such of these rights as are recognized in international law are incorporated in the present draft articles (articles 18, 21 and 22).

The term "jurisdiction" is used here in the same sense as in article 2.

The question was raised whether the United Nations and possibly other international organizations also should be granted the right to sail vessels exclusively under their own flags. The Commission recognized the great importance of this question. Member States will obviously respect the protection exercised by the United Nations over a ship where the competent body has authorized the vessel to fly the United Nations flag. It must, however, not be forgotten that the legal system of the flag State applies to the vessel authorized to fly the flag. In this respect the flag of the United Nations or that of another international organization cannot be assimilated to the flag of a State. The Commission was of the opinion that the question calls for further study, and it proposes to undertake such study in due course.

Right to a flag

Article 5

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 its national character by other States, a ship must either:

1. Be the property of the State concerned; or
2. Be more than half owned by:

(a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

(b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

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

Comment

Each State lays down the conditions on which sea-going ships may fly its flag. Obviously the State enjoys complete liberty in the case of ships owned by it or ships which are the property of a nationalized company. With regard to other ships, the State must accept certain restrictions. As in the case of the granting of nationality to persons, national legislation on the subject must not diverge too far from the principles adopted by the majority of States, which may be regarded as forming part of international law. Only on that condition will the freedom granted to States not give rise to abuse and to friction with other States. With regard to the national element required for permission to fly the flag, a great many systems are possible; but there must be a minimum national element, since control and jurisdiction by a State over ships flying its flag can only be effectively exercised where there is in fact a relationship

⁵ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456, chapter III.*

between the State and the ship other than that based on mere registration.

On this principle, the Institute of International Law, as long ago as 1896, adopted certain rules governing permission to fly the flag. The Commission deemed these rules acceptable in slightly amended form. It is of the opinion that the principle laid down in the present article, which is found in the national legislation of the great majority of States, should be regarded as forming part of existing international law. The Commission realizes, however, that, if the practical ends in view are to be achieved, States must work out more detailed provisions when they incorporate the above rules in their legislation.

The Commission considered the possibility of further ensuring the national character of the ship by requiring that the captain, and perhaps also a majority of the crew, should have the nationality of the flag State. Legal provisions to that effect exist in several countries; but the Commission, while recognizing their value, was of the opinion that certain countries had not yet enough trained personnel to enable them to comply with such a requirement.

Ships sailing under two flags

Article 6

A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to other States and may be assimilated by them to ships without a nationality.

Comment

The purpose of article 5 is to ensure that ships will have only one nationality. It often happens that a ship sails the high seas with certificates of registry from two or more States, using one or other as the need arises. This practice is inadmissible. There is a definite school of thought which recognizes the right of other States to regard such ships as having no proper nationality. In view of the serious disadvantages in "statelessness" for a ship, this sanction will do much to prevent ships from sailing under two flags and to induce those concerned to take the necessary steps to regularize the situation.

With that end in view, the Commission adopted article 6.

The Commission considered the advisability of also including stipulations as to the rights and obligations of States concerning change of flag, but reached the conclusion that such regulations would raise rather complicated problems outside the agreed scope of this initial attempt to codify maritime law.

Immunity of warships

Article 7

1. Warships on the high seas shall enjoy complete immunity from the jurisdiction of any State other than the flag State.

2. The term "warship" means a vessel belonging to the naval forces of a State, which is under the command of an officer duly commissioned by the

Government whose name figures on the list of officers of the military fleet and the crew of which are under regular naval discipline.

Comment

This principle is generally accepted in international law. The definition of the term "warship" is based upon articles 3 and 4 of The Hague Convention of 18 October 1907 relating to the conversion of merchant ships into warships.

Immunity of other state ships

Article 8

For all purposes connected with the exercise of powers on the high seas by States other than the flag State, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used only on government service shall be assimilated to warships.

Comment

The Commission discussed the question whether ships used on government service on the high seas could be assimilated to warships for purposes connected with the exercise of powers by other States, and decided that it must be answered in the affirmative. Although aware of the objections to the granting of immunity to merchant ships used on government service which led to the denial of this right in the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926, the Commission held that, as regards navigation on the high seas, there were no sufficient grounds for not granting to state ships used on commercial government service the same immunity as other state ships. The Commission thinks it worth while to point out that the assimilation referred to in article 8 concerns only the immunity of ships for the purposes of the exercise of powers by other States, so that there is no question of granting policing rights over other ships to ships which are not warships, such rights applying in international law only to warships.

Signals and rules for the prevention of collisions

Article 9

States shall issue for their ships regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not be inconsistent with those concerning the safety of life at sea internationally accepted for the vessels forming the greater part of the tonnage of sea-going ships.

Comment

This is a technical question which the Commission cannot settle in detail. The Commission's sole aim was to lay down a general principle. States issuing regulations concerning the use of signals and the prevention of collisions should refrain from prescribing signals and rules which are at variance with those generally adopted, and hence likely to lead to confusion. Where

there was no danger of confusion, certain departures might be admissible if the occasion arose.

The Commission used the expression "the vessels forming the greater part of the tonnage of sea-going ships". Certain members of the Commission preferred to use the expression "the majority of maritime States" or "the majority of vessels", on the ground that the size was of no moment in this respect, since also a small vessel could do a considerable amount of damage. The majority of the Commission, however, was of the opinion that, in the matter of safety of human life at sea, the interest of each State may be judged by the number of persons on board its ships. Hence, the tonnage of the vessels appears to be the best criterion.

In using the expression "internationally accepted" the Commission wished to indicate that the rules in question are a product of international co-operation and have not necessarily been confirmed by formal treaties. This is particularly true of signals.

Penal jurisdiction in matters of collision

Article 10

1. 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 involved in the collision, proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship on which they were serving was flying the flag or of the State of which such persons are nationals.

2. No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying.

Comment

The Commission thought that no account should be taken for the moment of private international law problems arising out of the question of collision, but considered it essential to determine what tribunal was competent to deal with any criminal proceedings arising out of a collision. In view of the judgment rendered by the Permanent Court of International Justice on 7 September 1927 in the "Lotus" case, the Commission felt obliged to take a decision on the subject. This judgment, which was carried by the President's casting vote after an equal vote of 6 to 6, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference which met in Brussels in 1952 disagreed with the conclusions of the judgment. The Commission concurred with the decisions of the conference, which were embodied in the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions and other Incidents of Navigation, signed at Brussels on 10 May 1952. Its aim in so doing was to spare vessels and their crews the risk of criminal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation. In such a case, proceedings may take place only before

the judicial or administrative authorities of the State whose flag was flown by the vessel on which the persons in question were serving or of the State of which such persons are nationals. In making this latter addition, the Commission adopted the findings of the Brussels conference in order to enable States to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions, since in such cases some States wish to be able to prosecute their nationals with a view to withdrawing the certificates issued to them.

The Commission is of the opinion that this article confirms a rule which should be preserved.

Damage to a submarine telegraph or telephone cable or to a pipeline (see article 35) may be regarded as an "incident of navigation", as referred to in paragraph 1 of this article.

Duty to render assistance

Article 11

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. After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers.

Comment

The Commission deems it advisable to include in its regulations a provision to the effect that vessels must render assistance to all persons on the high seas in danger of being lost. The Commission borrowed the terms of article XI of the Brussels Convention of 23 September 1910 for the unification of certain rules of law respecting assistance and salvage at sea, and of article 8 of the Convention of the same date for the unification of certain rules of law with respect to collisions between vessels. In the opinion of the Commission, the article as worded above states the existing international law.

Slave trade

Article 12

Every State shall adopt effective measures to prevent and punish the transport of slaves in vessels authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave who takes refuge on board a warship or a merchant vessel shall ipso facto be free.

Comment

The duty of States to prevent and punish the transport of slaves on vessels authorized to fly their colours is generally recognized in international law. The stipulation that any slave who takes refuge on board a warship or a merchant vessel shall be free is taken from article XXVIII of the General Act of Brussels of 2 July 1890.

Piracy

Article 13

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas.

Comment

In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.

Article 13 lays down a sound principle. Any State having an opportunity of taking measures against piracy and neglecting to do so would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual instance.

Article 14

Piracy is any of the following acts:

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

(a) Against a vessel on the high seas other than that on which the act is committed, or

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

2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft.

3. Any act of incitement or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

Comment

The Commission had to consider certain controversial points as to the essential features of piracy. It reached the conclusion that:

1. The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.

2. The acts must be committed for private ends.

3. Save in the case provided for in article 15, piracy can be committed only by merchant vessels, not by warships.

4. Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea.

5. Acts of piracy can be committed not only by vessels on the high seas, but also by aircraft, if such acts are committed against vessels on the high seas.

6. 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.

With regard to point 3 the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with acts committed by warships in the service of rival Governments engaged in civil war are too complex to make it seem necessary for the safeguarding of public order on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement endorsed a new right in the process of development.

As regards point 4, the Commission considers, despite certain dissenting opinions, that where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory. In this the Commission is also following the line taken by most writers on the subject.

With regard to point 5, the Commission feels that acts committed in the air by one aircraft against another aircraft cannot be regarded as acts of piracy. In any case such acts are outside the scope of these draft articles. However, acts committed by a pirate aircraft against a vessel on the high seas might, in the Commission's view, be assimilated to acts committed by a pirate vessel.

The view adopted by the Commission in regard to point 6 tallies with the opinions of most writers. Even where the purpose of the mutineers is to seize the vessel, their acts do not constitute acts of piracy.

Article 15

The acts of piracy committed by a warship or a military aircraft whose crew mutinies are assimilated to acts committed by a private vessel.

Comment

A warship whose crew has mutinied and taken control of the ship must be assimilated to a private vessel, so that acts committed against another vessel can assume the character of acts of piracy.

Article 16

A ship or aircraft is considered a pirate ship or aircraft when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 14, paragraph 1.

Comment

The purpose of this article is to define the terms "pirate ship" and "pirate aircraft" as used in the following articles.

Article 17

A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which it was originally derived.

Comment

It has been argued that a vessel loses its national character by the fact of committing acts of piracy. The Commission cannot share this view. Such acts involve the consequences referred to in article 18; even though the rule under which a vessel on the high seas is subject only to the authority of the flag State no longer applies, the vessel keeps the nationality of the State in question, and subject to the provisions of article 18, that State can apply its law in the same way as to other vessels flying its flag. A pirate ship should only be regarded as a ship without nationality where the national laws of the State in question regard piracy as grounds for loss of nationality.

Article 18

On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that state may decide upon the penalties to be imposed, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith.

Comment

This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them tried by its courts.

Before this article becomes applicable to a vessel, it must have committed acts of piracy. A ship which has no right to fly any flag but has not committed acts of piracy cannot be assimilated to a pirate vessel.

Article 19

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any damage caused by the seizure.

Comment

This article penalizes the unjustified seizure of vessels suspected of piracy. The penalty applies to seizure in the circumstances described in article 18 and to all acts of interference committed on the grounds of suspicion of piracy referred to in article 21. (See the comment on article 21).

Article 20

A seizure because of piracy may be made only by warships or military aircraft.

Comment

State action against ships suspected of engaging in piracy should be exercised with great circumspection so as to avoid friction between States. Hence it is important that the right to take action should be confined to warships, since other state-owned vessels do not provide the same safeguards against abuse.

*Right of visit**Article 21*

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the vessel is engaged in piracy; or

(b) That while in the maritime zones regarded as suspect in international treaties for the abolition of the slave trade, the vessel is engaged in that trade; or

(c) That while flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b), and (c) above, the warship may proceed to verify the vessel's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspect vessel. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the vessel, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded and provided that the vessel boarded has not committed any acts to justify them, it shall be compensated for the loss sustained.

Comment

The principle of freedom of the seas implies that, generally speaking, a merchant vessel can only be boarded on the high seas by a warship flying the same flag. International law, however, admits certain exceptions to this rule — namely, cases where there is reasonable ground for suspecting:

1. That the vessel is engaged in piracy;

2. That the vessel is engaged in the slave trade.

Right of visit was recognized in this latter case by the treaties for the repression of slavery, especially the Brussels Act of 2 July 1890. For purposes of repression this assimilated slavery to piracy, with the proviso that the right in question could only be exercised in certain zones clearly defined in the treaties. The Commission felt that it should follow this example so as to ensure that the exercise of the right of control would not be used as a pretext for exercising the right of visit in waters where the slave trade would not normally be expected to exist;

3. That the vessel is hiding its proper nationality and is in reality of the same nationality as the warship. In this case it can be presumed that the vessel has committed unlawful acts and the warship should be at liberty to verify whether its suspicions are justified.

In these three cases the warship is authorized to request a ship not flying a flag to show its colours. If the suspicion is not allayed the warship may proceed to check the ship's papers. To this end it must send a boat to the suspect vessel. As a general rule, the warship may not require the merchant vessel to put out a boat to the warship. That would be asking too much of a merchant ship, and a ship's papers must not be exposed unnecessarily to the risk of getting lost. If the examination of the merchant vessel's papers does not allay the suspicions, a further examination may be made on board the vessel. Such examination must in no circumstances be used for purposes other than those which warranted stopping the vessel. Hence the boarding party must be under the command of an officer responsible for the conduct of his men.

The State to which the warship belongs must compensate the merchant vessel for any delay caused by the warship's action, not only where the vessel was stopped without reasonable grounds, but in all cases where suspicion proves unfounded and the vessel committed no act calculated to give rise to suspicion.

The question arose whether the right to board a vessel should be recognized also in the event of a vessel being suspected of committing acts hostile to the State to which the warship belongs, at a time of imminent danger for the security of that State. The Commission did not deem it advisable to include such a provision, mainly because of the vagueness of terms like "imminent danger" and "hostile acts", which leaves them open to abuse.

Right of pursuit

Article 22

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

2. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the vessel pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The

commencement of the pursuit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities shall not be claimed solely on the ground that such vessel, in the course of its voyage, was escorted across a portion of the high seas, where the circumstances rendered this necessary.

Comment

In the main this article is taken from article 11 of the regulations adopted by the Second Committee of The Hague Codification Conference in 1930. The right in question is not contested in international law. Only certain details concerning the exercise of this right call for comment:

1. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. This rule applies in practice in the case of patrol vessels cruising for police purposes just outside the territorial sea. The essential point is that the vessel committing the infringement must be in the territorial sea when the pursuit begins.

2. Pursuit must be continuous. Once it is broken off it cannot be resumed. The right of pursuit in any case ceases as soon as the vessel pursued enters the territorial sea of its own country or of a third State.

3. Pursuit cannot be considered to have begun until the pursuing vessel has spotted the foreign vessel in the territorial sea and has ordered it to stop by hoisting the prescribed signal. To prevent abuse, the Commission declined to admit orders given by radio, as these could be given at any distance.

4. The article also applies to vessels which lie outside the territorial sea and cause their boats to commit unlawful acts in that sea. Some writers define such cases by using the expression "constructive presence" in the territorial sea. The Commission, however, refused to assimilate to such cases that of a vessel staying outside the territorial sea and using, not its own boats, but other craft.

The rules laid down above are all in conformity with those adopted by The Hague Conference. The article adopted by the Commission differs from that of 1930 on two points only:

1. The Commission was of the opinion that the right of pursuit should also be recognized when the vessel is in a zone contiguous to the territorial sea, provided pursuit is undertaken on the grounds of trespass against rights for the protection of which the zone was established. Thus, a State which has established a contiguous zone for the purposes of customs control cannot commence pursuit of a fishing boat accused of unlawful fishing in the territorial sea if the fishing boat is already in the contiguous zone.

2. The Commission included in this article a case which presents some analogy with the right of pursuit and which gave rise to differences of opinion, as it

arose after the 1930 Conference. The question was whether a vessel pursued and stopped in the territorial sea can be escorted to a port of the State of the pursuing vessel across the high seas, where there is no choice but to pass through the high seas. The Commission considered that it would be illogical to recognize the right of the pursuing vessel to seize a ship on the high seas and escort it to port across the high seas and at the same time to refuse the government vessel the right to escort a ship already apprehended in the territorial sea to port across the high seas, where special circumstances forced it to leave the territorial sea in order to reach the port.

Pollution of the high seas

Article 23

All States shall draw up regulations to prevent water pollution by fuel oils discharged from ships, taking account of existing treaty provisions on the subject.

Comment

Water pollution by fuel oils discharged from ships raises serious problems: danger to the life of certain marine species, fish and birds; pollution of ports and beaches; fire risks. Almost all maritime States have laid down regulations to prevent the pollution of their internal waters and their territorial sea by fuel oils. But these special regulations are clearly inadequate. Petroleum products discharged on the high seas may be washed towards the coasts by currents and wind. All States should therefore enact regulations to be observed, even on the high seas, by ships sailing under their flags, and the observance of these regulations should be controlled. It is obvious that only an international solution of the problem can be effective. A Conference held in London for the purpose drafted the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. This Convention has not yet come into force.

Article 23 merely stipulates that States shall draw up regulations which their ships must observe, even on the high seas. This, in the Commission's view, is as far as the present draft can go on the subject. Unification, although desirable, is less essential here than in the case of signals and rules for the prevention of collisions.

CHAPTER II. FISHING

Right to fish

Article 24

All States may claim for their nationals the right to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Comment

This article confirms the principle of the right to fish on the high seas. The Commission accepted no

exceptions to that principle in the parts of the high seas covering the continental shelf, save as regards sedentary fisheries.⁶ Nor did it recognize the right to establish a zone contiguous to the coasts where fishing could be exclusively reserved to the nationals of the coastal State.⁷ The principle of the freedom of the seas does not, however, preclude regulations governing the conservation of the living resources of the high seas, as recommended by the Commission in articles 25 to 33 of the present draft. Furthermore, States may still conclude conventions for the regulation of fishing, but the treaty obligations arising out of such conventions are of course binding only on the signatory States.

Conservation of the living resources of the high seas

At its third session, in 1951, the Commission provisionally adopted under the title of "Resources of the sea", articles relating to the conservation of the living resources of the seas.⁸ This question was discussed in conjunction with the continental shelf, because certain claims to sovereignty over the waters covering the continental shelf arise, at least in part, out of the coastal State's desire to give effective protection to the living resources of the sea adjacent to its shores.

At its fifth session, in 1953, the Commission reviewed the articles adopted in 1951 in the light of the comments made by certain Governments, and thereafter adopted a set of draft articles reproduced in its report on the work of its fifth session.⁹

In adopting these articles, the Commission adhered to the provisional draft of the articles formulated in 1951. It recognized that the existing law on the subject provides no adequate protection of marine fauna against waste or extermination. The above-mentioned report states that the resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, in so far as it renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it constitutes an inducement to the State or States in question to resort to unilateral measures of self-protection, which are sometimes at variance with the law as it stands at present, because they result in the total exclusion of foreign nationals.

The articles adopted by the Commission in 1953 were intended to provide the basis for a solution of the difficulties inherent in the existing situation. The system proposed by the Commission protected, in the first instance, the interest of the coastal State. If only the nationals of that State were engaged in fishing in the areas in question, it could fully achieve the desired object by adopting appropriate legislation and enforcing its observance by those concerned. If nationals of several States were engaged in fishing in a given area, the concur-

⁶ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456*, para. 71.

⁷ *Ibid.*, paras 105 et seq.

⁸ See *Official Records of the General Assembly, Sixth Session, Supplement No. 9, A/1858, Annex, part. II.*

⁹ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456*, paras. 92 et seq.

rence of those States was essential; article 1 of the Commission's draft provided therefore that the States concerned would prescribe the necessary measures by agreement. Article 3 of the draft was intended to provide effectively for the contingency of the interested States being unable to reach agreement. It provided that States would be under a duty to accept as binding any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, prescribed as being essential for the purpose of protecting the fishing resources of that area against waste or extermination.

The General Assembly, at its ninth session [resolution 900 (IX) of 14 December 1954], recognized the great importance of the question of the conservation of the living resources of the sea in connexion with the work of the International Law Commission on the régime of the high seas. It decided to convene an international technical conference at the headquarters of the United Nations Food and Agriculture Organization in Rome on 18 April 1955 to study the technical and scientific aspects of the problem of the international conservation of the living resources of the sea. The report of the conference was to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report which it is to prepare pursuant to resolution 899 (IX) of 14 December 1954".

The International Law Commission took note of the report of the conference (A/CONF.15/5/Rev.1) with great interest. The Vice-Chairman of the Commission, Mr. García Amador, who represented the Cuban Government and acted as Deputy-Chairman at the Rome Conference, submitted to the Commission a series of draft articles, prefaced by a preamble, on the subject, to replace the articles approved by the Commission in 1953.

The Commission made a careful study of these draft articles and found them generally acceptable, although it introduced certain amendments.

The draft articles, as amended, and the preamble are annexed to the present chapter of the report. The articles, as amended, are also included as articles 25 to 33 in the draft text on the régime of the high seas adopted by the Commission. In view of the technical nature of several of these articles, the Commission trusts that Governments will also include in their replies information on all points of a technical nature which might be of use to it in the final drafting of the articles.

Article 25

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

Comment

This article reproduces the principle enunciated in the first sentence of article 1 as adopted by the Commission at its fifth session in 1953.

Article 26

1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 31.

Comment

This article is based on the second sentence of article 1 of the draft prepared by the Commission in 1953.

As regards paragraph 2, see the comment on article 31.

Article 27

1. If, subsequent to the adoption of the measures referred to in articles 25 and 26, nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

2. If the States whose nationals take part in the fisheries do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 31. Subject to paragraph 2 of article 32, the measures adopted shall remain obligatory pending the arbitral decision.

Comment

It would appear desirable and consistent with general legal principles to require newcomers to comply with the regulations in force in the waters where they wish to engage in fishing. If States of which the newcomers are nationals are not prepared to apply the regulations, they can open negotiations for their amendment with the States concerned. Failing agreement, the procedure laid down in article 31 will have to be followed.

Article 28

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 31.

Comment

The right to take part in a system of regulation even though its nationals do not carry on fishing in the area concerned was granted, under article 2 of the draft prepared by the Commission in 1953, to any coastal State whose territorial sea was within 100 miles of the area. Under the present article this right is granted to any coastal State which has a special interest in the

conservation of resources in parts of the high seas adjacent to its coasts. The Commission did not deem it advisable to adopt a fixed limit, which might prove in practice to be either too wide or, in particular cases, too narrow. Should doubts arise as to a coastal State's right to claim, in areas far removed from its shores, a special interest which it pretends to have, the matter would have to be settled by the arbitral procedure envisaged in article 31.

Article 29

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 31. Subject to paragraph 2 of article 32, the measures adopted shall remain obligatory pending the arbitral decision.

Comment

As early as 1951, the Commission dealt with the question whether the special position of coastal States as regards measures for the conservation of the living resources in parts of the high seas adjacent to their coasts ought not to be further recognized from a standpoint other than that expressed in article 28. A proposal was submitted to the effect that a coastal State should be empowered to lay down conservatory regulations to be applied in such zones, provided any disputes arising out of the application of the regulations were submitted to arbitration. Votes being equally divided on this proposal, the Commission decided to mention it in its report without sponsoring it.¹⁰ The Commission did not include such a provision in its 1953 draft. At the 1955 Rome Conference, the tendency to make coastal States responsible for controlling zones adjacent to their coasts and applying in them measures of conservation consistent with the general technical principles adopted by the Conference was again in evidence.

The same idea underlay the proposal submitted to the Commission by Mr. García Amador, in which the

granting of special rights to coastal States was linked with the obligation to resort to arbitration if the exercise of those rights gave rise to objections by other interested States.

The Commission supported this proposal, on the ground that, in according rights on the high seas to coastal States, it could not merely rely on the smooth functioning of the general regulations observed between States for the peaceful settlement of disputes, and that acceptance of arbitration in the event of the legality of the measures taken by the coastal State being disputed was mandatory. Article 29 gives a coastal State the right to adopt conservatory measures unilaterally, if the negotiations with the other States concerned have not led to an agreement within a reasonable period of time. The article specifies the requirements which the measures must fulfil in order to be valid as to other States. Should the latter fail to agree, however, the disputes will be settled by arbitration. Pending the arbitral decision, the measures will remain applicable subject to paragraph 2 of article 32.

Article 30

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 31.

Comment

This article provides for the case of a State other than the coastal State whose nationals are not engaged in fishing in a given area but which has a special interest in the conservation of the living resources of the high seas in that area. This case may arise, for example, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area in which the nationals of the State concerned do engage in fishing. The Commission took the view that in such an event the State concerned could require the State whose nationals engage in fishing in the areas exposed to exhaustion to take the necessary steps to safeguard their threatened interests. Where no agreement can be reached, the question will be settled in accordance with the procedure envisaged in article 31.

Article 31

1. The differences between States contemplated in articles 26, 27, 28, 29 and 30 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties,

¹⁰ See *Official Records of the General Assembly, Sixth Session, Supplement No. 9, A/1858, Annex : Draft Articles on the Continental Shelf and Related Subjects, part II, para. 5 of comment to article 2.*

be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. In that case, the commission shall consist of four or six qualified experts in the matter of conservation of the living resources of the sea and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties.

3. The commission shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time-limit.

Comment

This article describes the procedure for the settlement of disputes arising between States in the cases referred to in the preceding articles. The draft text leaves the parties entirely free as regards the method of settlement. They may submit their differences to the International Court of Justice by agreement or in accordance with mutual treaty obligations; they may set up courts of arbitration; they may, if they so desire, seek to compose their differences through a commission set up for the purpose, before resorting to these procedures. It is only where the parties fail to agree on the method of settling a dispute that the draft text provides for arbitration, while leaving the parties an entirely free choice as to arrangements for arbitration. If, however, the parties fail to agree on this subject within three months from the date of the original request, the draft provides for the setting up of a commission without their co-operation. The commission will be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The Commission chose the Secretary-General in preference to the President of the International Court of Justice in view of the extreme technicality of the subject, which lies completely outside the President's routine functions. Furthermore, the Commission is convinced that the appointment of the arbitrators by the Secretary-General of the United Nations will give the best assurance of objectivity and impartiality.

The arbitral commission should be neither too small, in view of the complexity of the technical questions involved, nor too large, so that its proceedings may not be dilatory and that costs may be kept within reasonable bounds. The Commission felt that, if the number of members was fixed at four or six, the Secretary-General would be able to constitute the arbitral commission in such a way as to give due weight to all aspects of the question. While recognizing that the matters in dispute would be mainly of a technical nature, it considered that the legal questions inevitably linked with them would necessitate the presence of an expert in international law. The Secretary-General may, should he think fit, request the legal expert to act as chairman of the commission.

To ensure the continuity of the arbitral commission's work in all circumstances, it was necessary to authorize

the Secretary-General to fill any casual vacancies arising after the appointment of the arbitrators. Finally, it seemed fair to let the commission determine how the costs entailed by its proceedings should be divided between the parties. The third paragraph prescribes certain time limits for the purpose of preventing the arbitration procedure from being protracted.

Article 32

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 29. In other cases it shall apply these criteria according to the circumstances of each case.

2. The commission may decide that pending its award the measures in dispute shall not be applied.

Comment

Paragraph 1 recalls the criteria on which the commission's decision must be based. These criteria are primarily those specified in paragraphs 2 (b) and (c) of article 29. Paragraph 2 (a) will not apply in every case submitted to the arbitral commission. It will always apply in the case of measures adopted under paragraph 1 of article 29. In other cases, it was deemed advisable to leave the arbitral commission some latitude as regards the applicability of the criterion mentioned in paragraph 2 (a), especially if, in the case envisaged in paragraph 2 of article 26 and paragraph 2 of article 27, the State of which the newcomers are nationals disagrees on the procedure for applying certain measures, while acknowledging their necessity.

Under articles 27 and 29, the measures adopted by one or more States in a given area remain in force pending the arbitral decision. But the arbitral commission might deem it proper, in special circumstances, to suspend the application of these measures during its deliberations. Paragraph 2 of article 32 authorizes it to take a decision to that effect.

Article 33

The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

Comment

This article shows that the decision of the arbitral commission is intended to provide a final settlement of the dispute, not merely to serve as a recommendation to the parties. The commission might, however, wish to amplify its decision with certain recommendations concerning the way in which the parties should make use of their rights. This article allows it to do so.

CHAPTER III. SUBMARINE CABLES AND PIPELINES

Article 34

1. All States shall be entitled to lay telegraph or telephone cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables.

Comment

As regards the protection of telegraph and telephone cables beneath the high seas, there is a Convention dated 14 March 1884 to which a very large number of maritime States are parties. In 1913, a conference convened in London on the initiative of the British Government adopted a number of resolutions on the subject. The Institute of International Law has also considered the question on many occasions.

The Commission enunciated certain principles which, in its view, reflect the international law applying. It thought that the regulations concerning telegraph and telephone cables could be extended to include pipelines beneath the high seas.

Paragraph 1 of article 34 was taken from article I of the 1884 Convention. Paragraph 2 was added to make it quite clear that the coastal State is obliged to permit the laying of cables and pipelines on the floor of its continental shelf but that it can impose conditions as to the track to be followed, in order to prevent undue interference with the exploitation of the natural resources of the seabed and subsoil.

Article 35

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

Comment

This article is substantially the same as article II of the 1884 Convention, but extends the latter to include pipelines. Like the succeeding articles, it was so worded to require States to take the necessary legislative measures to ensure that their nationals comply with the regulations.

Article 36

Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

Comment

Cf. article IV of the 1884 Convention.

Article 37

Every State shall regulate trawling so as to ensure that all fishing gear shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

Comment

Cf. resolution I of the London Conference of 1913.

Article 38

Every State shall take the necessary legislative measures to ensure that the owners of vessels who can prove that they have sacrificed an anchor, a net or any other fishing gear in order to avoid injuring a submarine cable shall be indemnified by the owner of the cable.

Comment

Cf. article VII of the 1884 Convention.

Annex to Chapter II

DRAFT ARTICLES RELATING TO THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA

The International Law Commission,

Considering that

1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or exterminated,

2. It is necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination,

3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind,

4. When formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas contiguous to its coast,

5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international co-operation through the concerted action of all States concerned, and the study of the experience of the last fifty years and recognition of the great variety of conditions under which conservation programmes have to be applied clearly indicate that these programmes can be more effectively carried out for separate species or on a regional basis,

has adopted the following articles:¹¹

Article 1

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

Article 2

1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 3

1. If, subsequent to the adoption of the measures referred to in articles 1 and 2, nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

2. If the States whose nationals take part in the fisheries do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 of article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 4

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 5

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led

to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 of article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 6

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 7.

Article 7

1. The differences between States contemplated in articles 2, 3, 4, 5 and 6 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. In that case, the commission shall consist of four or six qualified experts in the matter of conservation of the living resources of the sea and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties.

3. The commission shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time-limit.

¹¹ These articles are identical with articles 25 to 33 of the provisional articles concerning the régime of the high seas contained in chapter II of the present report. For comments on the articles see chapter II.

Article 8

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 5. In other cases it shall apply these criteria according to the circumstances of each case.

2. The commission may decide that pending

its award the measures in dispute shall not be applied.

Article 9

The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

Chapter III

RÉGIME OF THE TERRITORIAL SEA

I. Introduction

19. At its sixth session, held in Paris from 3 June to 28 July 1954, the International Law Commission adopted a number of "provisional articles concerning the régime of the territorial sea", with comments.¹² In accordance with the provisions of its Statute, the Commission decided to request Governments to comment on these provisional articles. It also intimated that it would be greatly assisted in its task if Governments could state, in their comments, their attitude concerning the question of the breadth of the territorial sea.

20. In pursuance of this decision, the Secretary-General, in a circular letter of 31 August 1954, communicated the Commission's request to the Governments of all States Members of the United Nations, asking them to send him their comments by 1 February 1955. On 3 February, the Secretary-General sent telegrams to those Governments which had not yet forwarded their comments, requesting them to do so by 1 March.

21. The Secretary-General has received the comments of seventeen States Members of the United Nations, which are reproduced in documents A/CN.4/90 and Add. 1-5. In the course of its consideration of this subject, at its 295th, 299th, 306th to 320th, 324th, 325th, 328th to 330th meetings, the Commission examined these comments. It also had before it a memorandum from the Government of Ecuador, dated 5 June 1955 (A/CN.4/L.63).

22. Recognizing the cogency of many of the comments, the Commission amended several articles. The amended articles, which are included in the present report, are accompanied by comments giving the reasons for any changes in substance.

23. The Commission also examined the questions held over in its report of 1954, concerning the breadth of the territorial sea, bays, groups of islands and the delimitation of the territorial sea at the mouths of rivers. The relevant articles proposed are also included in the present report. The Commission submits them to Governments so that it may receive any comments the Governments see fit to make on these or any other articles of the draft before they are adopted at the eighth

session of the Commission and included in the final report to be submitted in accordance with resolution 899 (IX) of the General Assembly.

24. The text of the draft articles on the régime of the territorial sea as adopted¹³ by the Commission is reproduced below.

II. Draft articles on the régime of the territorial sea

CHAPTER I. GENERAL

Article 1

Juridical status of the territorial sea

1. The sovereignty of a State extends to a belt of sea adjacent to its coast and described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these articles and other rules of international law.

¹² See chapter IV of the Report of the Commission covering the work of its sixth session, *Official Records of the General Assembly, Ninth Session, Supplement No. 9, A/2693*.

¹³ Mr. Edmonds entered a reservation to article 3 (breadth of the territorial sea), article 5 (straight base lines), article 7 (bays), and article 25 (passage of warships) for the reasons stated in the course of the discussions. Sir Gerald Fitzmaurice recorded dissent from the first sentence of paragraph 1 of article 25 (passage of warships) and abstention on article 5 (straight base lines), and article 7 (bays), in each case for the reasons given in the summary record of the 330th meeting. Mr. Garcia Amador, for reasons stated in the course of the discussion, (A/CN.4/SR.308, 309, 310, 313, 317, 318 and 328), entered certain reservations in respect to articles 3 (breadth of the territorial sea) and 7 (bays) and to the comments on these articles. Mr. Krylov voted against article 3 (breadth of the territorial sea) and article 24 (government vessels operated for non-commercial purposes), and abstained in the votes on article 18, paragraph 4 (suspension of innocent passage through straits), article 23 (government vessels operated for commercial purposes), and article 25, paragraph 2 (passage of warships through straits), in each case for the reasons stated in the summary records of the 330th and other meetings. Mr. Salamanca voted against article 3 (breadth of the territorial sea) and the commentary thereto for the reasons stated in the summary records of the 312th, 313th and 328th meetings. Mr. Scelle, for reasons explained in the course of the discussions, expressed reservations on some points regarding the position taken by the Commission with respect to the innocent passage of ships through the territorial sea. Mr. Žourek explained that although he had voted for the draft articles on the régime of the territorial sea as a whole, for reasons which he had stated during the discussion he did not accept article 3 (breadth of the territorial sea), the provisions concerning straits (article 12, paragraph 4, article 18, paragraph 4, and article 25, paragraph 2), article 22 (arrest of vessels), and article 23 (government vessels operated for commercial purposes), or the comments on these articles. He also maintained his reservations regarding article 7, on bays.

Comment

The modification of the 1954 text does not affect the substance of the article.

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

The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil.

Comment

The 1954 text of this article was not modified.

CHAPTER II. LIMITS OF THE TERRITORIAL SEA

*Article 3****Breadth of the territorial sea***¹⁴

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 decisions 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.

Comment

In the first paragraph, the Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles. The Commission regards this as the statement of an incontrovertible fact.

In the second paragraph, the Commission states that international law does not justify the extension of the territorial sea beyond twelve miles, instances of which have been fairly rare up to the present. The Commission wished to state explicitly that, in its opinion, such extensions infringe the principle of freedom of the seas, and are therefore contrary to international law.

The Commission states that it takes no decision as to the breadth of the territorial sea within the limit of twelve miles. Some members held that as the rule fixing the breadth at three miles had been widely applied in the past and was still maintained by important maritime States, in the absence of any other rule of equal authority it must be regarded as recognized by international law and applicable to all States. This view was not supported by the majority of the members of the Commission, although the Commission did not reach agreement on the adoption of any other line of delimitation. The extension, by a State, of its territorial sea

to a breadth of between three and twelve miles is not characterized by the Commission as a violation of international law. Such an extension would be valid for any other State which did not object to it, and *a fortiori* for any State which has recognized it by treaty or tacitly or is a party to a judicial or arbitral decision recognizing the extension. 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. But, subject to such cases, the Commission by a small majority declined to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit, since by doing so it would implicitly grant all States the right to extend the breadth of their territorial sea to twelve miles. Some members of the Commission upheld the view that the breadth of six or twelve nautical miles fixed by certain States for their territorial sea had the same juridical validity from the point of view of international law as the breadth of three miles applied by other States. The Commission could not, however, accept their view.

The Commission is aware that it is offering only a partial solution of the problem of the breadth of the territorial sea. With regard to the zone between the three-mile and the twelve-mile limits, the Commission is not at present in a position to formulate any solution. Indeed, the different views held by States regarding the delimitation of the territorial sea between three and twelve miles make it impossible for the Commission to decide on any fixed limit. It feels that the task of harmonizing the different views, which often originate in different political or economic conditions, should rather be entrusted to a diplomatic conference. As long as no agreement has been reached on this subject, in the opinion of the majority of the Commission, there is no obligation to recognize the legal consequences of an extension of its sovereignty by a State over parts of the sea which other States are entitled to regard as belonging to the high seas.

Before drawing up a specific text on this subject, the Commission is anxious to have the comments of Governments, particularly on the view it puts forward in paragraph 3 of the article.

*Article 4****Normal base line***

Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State.

Comment

The final sentence of the article adopted in 1954 read: "If no detailed charts of the area have been drawn which show the low-water line, the shore-line (high-water line) shall be used." This sentence might lead to confusion, since it could be interpreted as meaning that not only a ship on the high seas but also the coastal State must take the high-water line as base line in the absence of detailed charts, which was not the Commission's intention. The Commission therefore decided to delete it.

¹⁴ Before drafting the final text of an article on the breadth of the territorial sea, the Commission wishes to have the comments of Governments, particularly on paragraph 3.

Article 5

Straight base lines

1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Base lines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal State shall give due publicity to the straight base lines drawn by it.

Comment

In drafting the first paragraph of this article at its fifth session, the Commission had used as a basis the judgment of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway.¹⁵ It felt, however, that certain rules advocated by the experts who met at The Hague in 1953¹⁶ might serve to round off the criteria adopted by the Court. It had therefore inserted these supplementary rules in the second paragraph of the article.

Some Governments raised objections to this second paragraph, arguing that the maximum distance of ten miles for base lines and the maximum distance from the coast of five miles seemed arbitrary and, moreover, not in conformity with the Court's decision. Against this certain members pointed out that the Commission had drafted these provisions for application "as a general rule", that it would always be possible to depart from them if special circumstances justified doing so, and that the criteria laid down by the Court were not sufficiently precise for general application. After further study of the question the Commission decided, by a majority vote, that the second paragraph should be deleted so as not to make the provisions of the first paragraph too mechanical. Only the final sentence was kept and added to the first paragraph.

Certain changes were made in the text of paragraph 1. The words "as an exception" were deleted as having no legal relevance in the context; the system advocated by the article would be applicable in all cases where the circumstances mentioned existed. Moreover, the Commission made a number of changes designed to bring the text even more closely into line with the Court's judgment in the above-mentioned Fisheries Case. In addition, the Commission cut out the words "on the coast" in the same paragraph so as not to rule out the possibility of straight base lines being drawn from the coast to islands or between the islands themselves.

¹⁵ *International Court of Justice Reports*, 1951.

¹⁶ Cf. A/CN.4/61/Add. 1.

Obviously, the general conditions laid down in paragraph 1 of the article for drawing the lines must always be observed. It would not be permissible to draw the lines from the sea itself where such landmarks do not exist.

The question arose whether in waters which become internal waters when the straight base-line system is applied the right of passage should not be granted in the same way as in the territorial sea. The Commission did not feel called upon to take a decision on this subject, and proposed to revert to it at a later date.

Article 6

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the base line equal to the breadth of the territorial sea.

Comment

The 1954 text of this article was not modified.

Article 7

Bays

1. For the purpose of these regulations, a bay is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as or larger than that of the semi-circle drawn on the entrance of that indentation.

2. If a bay has more than one entrance, this semi-circle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

3. The waters within a bay the coasts of which belong to a single State shall be considered internal waters if the line drawn across the opening does not exceed twenty-five miles measured from the low-water line.

4. Where the entrance of a bay exceeds twenty-five miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn, that line shall be chosen which encloses the maximum water area within the bay.

5. The provision laid down in paragraph 4 shall not apply to so-called "historical" bays or in cases where the straight base-line system provided for in article 5 is applicable.

Comment

The first paragraph, which is borrowed from the report of the Committee of Experts reproduced as an addendum to the second report by the special rapporteur on the régime of the territorial sea (A/CN.4/61/Add.1),

lays down the conditions that must be satisfied by an indentation or curve, if it is to be regarded as a bay. In adopting this provision, the Commission repaired the omission to which attention had already been drawn by The Hague Codification Conference of 1930. An indentation will be regarded as a bay provided it conforms to the criterion adopted by the Commission, namely, that the distance between the two extremities shall be twice the depth of the indentation, i.e., twice the distance between the closing line and the head of the bay.

If, as a result of the presence of islands, an indentation which has to be established as a "bay" has more than one entrance, the sum total of the length of the different entrances will be regarded as the length of the bay. Here, the Commission's intention was to indicate that the presence of islands at the entrance to an indentation links it more closely with the territory, which may justify some alteration of the proportion between the length and the depth of the indentation. In such a case an indentation which without islands at its entrance would not fulfil the necessary conditions is to be recognized as a bay.

The third paragraph states that the waters within a bay shall be considered internal waters if the line drawn across the opening does not exceed twenty-five miles measured from the low-water line.

The majority in the Commission took the view that the maximum length of the closing line must be stated in figures and that a limitation based on geographical or other considerations, which would be necessarily vague, would not suffice. It considered, however, that the limit must be more than ten miles. Although not prepared to establish a direct ratio between the length of the closing line and the width of the territorial sea—such a relationship was formally denied by certain members of the Commission—it felt bound to take some account of tendencies to extend the width of the territorial sea by prolonging the closing line in bays. As an experiment the Commission suggests a distance of twenty-five miles; thus, the length of the closing line will be slightly more than twice the permissible maximum width of the territorial sea as laid down in paragraph 2 of article 3. Since, firstly, historical bays, some of which are longer than twenty-five miles, do not come under this article and since, secondly, the provision contained in paragraph 1 of this article concerning the characteristics of a bay is calculated to prevent abuse, it is possible that some extension of the closing line will be more readily accepted than a widening of the territorial sea in general.

The majority in the Commission were opposed to a proposal that the length of the closing line should be set at twice the width of the territorial sea. The Commission rejected this proposal, particularly because it considers such a delimitation unacceptable to States that have adopted a width of three or four miles for their territorial sea. If the entrance to the bay is more than twenty-five miles wide, the closing line will be drawn within the bay at the point nearest to the territorial sea where the width does not exceed that distance. Where more than one line of twenty-five miles in length can be drawn, the closing line will be so selected as to enclose the maximum water area within the bay.

Paragraph 5 states that the foregoing provisions shall not apply to "historical" bays.

The Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single State. As to other bays, the Commission does not have sufficient data at its disposal concerning the frequency of such cases or the regulations at present applicable to them. The Commission would be grateful to Governments if they would inform it in their replies of any cases of this type occurring in their territory and supply it with any information which may be of use to it.

Article 8

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Comment

The 1954 text of this article was not modified.

Article 9

Roadsteads

Roadsteads which are normally used for the loading, unloading and anchoring of vessels and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea. The coastal State must give due publicity to the limits of such roadsteads.

Comment

The only modifications made in the 1954 text of this article are the insertion of the word "normally" in the first line and the substitution of the words "which would otherwise be situated" for the words "which are situated".

Article 10

Islands

Every island has its own territorial sea. An island is an area of land surrounded by water which in normal circumstances is permanently above high-water mark.

Comment

The 1954 text of this article was not modified.

The Commission had intended to follow up this article with a provision concerning groups of islands. Like The Hague Conference for the Codification of International Law of 1930, the Commission failed to overcome the difficulties in the way of carrying out this intention. It was therefore obliged to abandon for the moment the proposal to devote a special article to this subject. Before taking any final decision on this provision, it will await the relevant comments by Governments. Moreover, article 5 may be applicable to groups of islands situated off the coasts, while the general rules will normally apply to other islands forming a group.

Article 11

Drying rocks and drying shoals

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea.

Comment

The modifications made in the 1954 text of this article (article 12 of the 1954 draft) do not affect the substance of the article. The phrase "which are wholly or partly within the territorial sea" refers both to drying rocks and to drying shoals.

Article 12

Delimitation of the territorial sea in straits

1. In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on the other parts of the coast.

2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 14.

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

4. Paragraph 1 and the first sentence of paragraph 3 of this article shall be applicable to straits which join two parts of the high seas and which have only one coastal State in cases in which the breadth of the straits is greater than twice the breadth of that State's territorial sea. If, as a consequence of this delimitation, an area of sea not more than two miles across is entirely enclosed in the territorial sea, such area may be declared by the coastal State to form part of its territorial sea.

Comment

The 1954 text of this article (article 13 of the 1954 draft) was not modified.

Article 13

Delimitation of the territorial sea at the mouth of a river

1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn inter fauces terrarum across the mouth of the river.

2. If the river flows into an estuary the coasts of which belong to a single State, article 7 shall apply.

Comment

This article was in substance borrowed from the report of Sub-Committee II of the Second Committee of The Hague Conference for the Codification of International Law of 1930. So far as concerns paragraph 2, the Commission has not the necessary geographical data at its disposal to decide whether this provision is applicable to all existing estuaries. One member of the Commission drew attention to the special situation existing at the mouth of the River Plate. The Commission trusts that Governments will inform it in their replies of any special situation existing in their territory in this connexion, so that the Commission may take it into account when drafting this article at the next session.

Article 14

Delimitation of the territorial sea of two States, the coasts of which are opposite each other

1. The boundary of the territorial sea between two States the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the nearest points on the base line from which the width of the territorial sea of each country is measured.

2. Lines shall be marked on the largest-scale charts available which are officially recognized.

Comment

Apart from the addition of paragraph 2, the modifications made in the 1954 text of this article (article 15 of the 1954 draft) do not affect the substance of the article.

Article 15

Delimitation of the territorial sea of two adjacent States

1. The boundary of the territorial sea between two adjacent States is drawn, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, by application of the principle of equidistance from the nearest points on the base line from which the width of the territorial sea of each country is measured.

2. Lines shall be marked on the largest-scale charts available which are officially recognized.

Comment

Apart from the addition of paragraph 2, the modifications made in the 1954 text of this article (article 16 of the 1954 draft) do not affect the substance of the article.

CHAPTER III. RIGHT OF INNOCENT PASSAGE

The Commission recognized that in the 1954 draft the method of grouping the articles contained in this chapter laid itself open to criticism. It has tried to meet

the objections raised without altering the sense of the rules adopted.

The chapter now contains four sections:

Section A. General rules; Section B. Merchant vessels; Section C. Government vessels other than warships; Section D. Warships.

SECTION A. GENERAL RULES

Article 16

Meaning of the right of innocent passage

1. Subject to the provisions of the present rules, vessels of all States shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law.

4. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

Comment

The provisions of article 18 of the 1954 draft recognized the right of merchant vessels to innocent passage through the territorial sea. They now form paragraph 1 of article 16. For the right in question to be claimable, however, the passage must in fact be an *innocent* one. Passage will not be innocent if the vessel commits acts referred to in paragraph 3.

Article 17

Duties of the coastal State

1. The coastal State must not hamper innocent passage through the territorial sea. It is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other States.

2. The coastal State is bound to give due publicity to any dangers to navigation of which it has knowledge.

Comment

As regards the duties of the coastal State, the Commission has brought out more clearly than in its first draft the point that the duty of ensuring innocent passage to the fullest possible extent consists primarily in the duty not to hamper such passage.

Article 18

Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules.

2. In the case of vessels proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which the admission of those vessels to those waters is subject.

3. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. Should it take such action, it is bound to give due publicity to the suspension.

4. There must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas.

Comment

The term "public policy" used in article 20 of the 1954 draft being interpretable in different ways, the Commission preferred a text containing no mention of it. It also included a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas—a prohibition which in the previous draft applied to warships only. Although the expression "used for navigation between two parts of the high seas" was criticised by certain members, the Commission felt bound to retain it, particularly in view of its use by the International Court of Justice in the Corfu Channel case.¹⁷ The Commission, however, was of the opinion that it would be in conformity with the Court's decision to insert the word "normally" before the word "used".

Article 19

Duties of foreign vessels during their passage

Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with these rules and other rules of international law and, in particular, as regards:

(a) The safety of traffic and the protection of channels and buoys;

(b) The protection of the waters of the coastal State against pollution of any kind caused by vessels;

(c) The conservation of the living resources of the sea;

(d) The rights of fishing, hunting and analogous rights belonging to the coastal State.

(e) Any hydrographical survey.

¹⁷ *International Court of Justice Reports*, 1948 and 1949.

Comment

To the list, which is not exhaustive, of regulations enacted by the coastal State with which foreign vessels must comply during their passage, the Commission has added the rules concerning hydrographical surveys.

SECTION B. MERCHANT VESSELS

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

1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel.

Comment

The 1954 text of this article (article 22 of the 1954 draft) was not modified.

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

1. A coastal State may not take any steps on board a foreign merchant vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the vessel; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its territorial sea or passing through the territorial sea after leaving the internal waters.

3. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

Comment

The text of paragraph 3 in the present draft brings out more clearly than the corresponding paragraph in article 23 of the 1954 draft the need for taking the utmost care not to hamper navigation by making arrests unless absolutely necessary.

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

1. A coastal State may not arrest or divert a foreign vessel passing through the territorial sea

for the purpose of exercising civil jurisdiction in relation to a person on board the vessel.

2. A vessel may be arrested only in respect of a maritime claim arising from one of the causes listed in article 1 of the International Convention relating to the Arrest of Sea-going Ships concluded at Brussels on 10 May 1952.

3. A claimant may arrest either the particular vessel in respect of which the maritime claim arose or any other vessel owned by the person who at the time when the maritime claim arose was the owner of the particular vessel; but no vessel, other than the particular vessel in respect of which the claim arose, may be arrested in connexion with any maritime claim relating to:

(a) Disputes as to the title to or ownership of any vessel;

(b) Disputes between co-owners of any vessels as to the ownership, possession, employment or earnings of that vessel;

(c) The mortgage or hypothecation of any vessel.

4. The above provisions are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign vessel lying in the territorial sea or passing through the territorial sea after leaving the internal waters.

Comment

This article has been brought into line with the provisions of the Brussels Convention relating to the Arrest of Sea-going Ships dated 10 May 1952. This Convention gives a larger list of cases in which arrest is permitted than the Commission's 1954 draft, which had followed the example set by The Hague Conference of 1930 for the Codification of International Law. The Commission felt bound to adopt the rules of the Brussels Convention, not only because unification is essential on this point but also because the rules of the Convention, which are more recent than those drawn up in 1930, were prepared and framed with great care by the maritime law experts of a large number of maritime States.

SECTION C. GOVERNMENT VESSELS OTHER THAN WARSHIPS

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

The rules contained in the preceding articles of this chapter shall also apply to government vessels operated for commercial purposes.

Comment

The 1954 text of this article (article 25 of the 1954 draft) was not modified.

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

[The status of these vessels is left in abeyance.]

Comment

The Commission wished to bring out more clearly than it had in 1954 the fact that the question of the treatment of government vessels used solely for governmental and non-commercial purposes, with the exception of warships, which are dealt with in section D, remains in abeyance. The Commission felt bound to follow The Hague Conference of 1930 for the Codification of International Law in this matter.

SECTION D: WARSHIPS

*Article 25**Passage*

1. The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 18 and 19.

2. It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas.

3. Submarines shall navigate on the surface.

Comment

After noting comments by certain Governments and reviewing the question, the Commission felt obliged to amend this article (article 26 of the 1954 draft) so as to stress the right of the coastal State to make the right of passage of warships through the territorial sea subject to previous authorization or notification. Where

previous authorization is required, it should not normally be subject to conditions other than those laid down in articles 18 and 19. In certain parts of the territorial sea or in certain special circumstances, the coastal State may, however, deem it necessary to limit right of passage more strictly in the case of warships than in that of merchant vessels. The article provides a clearer recognition of this right than the 1954 text. But, 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 article does not affect the rights of States under a convention governing passage through the straits to which it refers.

The Commission expresses the hope that it will not normally be necessary to request a special authorization for each passage and that the authorization will be issued in general terms giving vessels the right of passage provided they comply with the regulations enacted by the coastal State.

*Article 26**Non-observance of the regulations*

If any warship does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.

Comment

Paragraph 1 of this article as adopted at the 1954 session (article 27 of the 1954 draft) has become superfluous, as the parallel provision in article 19 of the present draft applies to all vessels, including warships.

Chapter IV

OTHER DECISIONS OF THE COMMISSION

I. Amendments to the Statute of the Commission

TRANSFER OF THE COMMISSION'S SEAT FROM
NEW YORK TO GENEVA

25. On the proposal of Mr. García Amador, the Commission unanimously decided to recommend to the General Assembly an amendment to article 12 of its Statute transferring its seat from New York to Geneva. The text of the amended article would be as follows:

“ Article 12

“ The Commission shall sit at the *European Office of the United Nations at Geneva*. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.”

26. In support of this proposal, the members affirmed that the European Office affords the best conditions for their work; that the atmosphere of Geneva

is more favourable than that of New York for the studies of a body of technical experts called upon to solve legal problems, setting aside the political contingencies of the moment as far as possible; that Geneva has an exceptionally well planned law library which is more complete than that at United Nations Headquarters and contains, *inter alia*, a remarkable collection of legal works in European languages. The members also stressed that, in their view, the transfer of the Commission's seat from New York to Geneva was calculated to simplify arrangements for its sessions by the United Nations Secretariat.

TERM OF OFFICE OF MEMBERS OF THE COMMISSION

27. The Commission decided to recommend to the General Assembly an amendment to article 10 of its Statute, providing that members should be elected for a period of five years. It considers that this amendment should take effect from 1 January 1957, the date on which members elected at the eleventh session of the

General Assembly will take up their duties. The text of the amended article would be as follows:

“Article 10

“The members of the Commission shall be elected for *five* years. They shall be eligible for re-election.”

28. The Commission considers that the change of the term of office from three years to five years would be beneficial to the continuity of the work of the Commission, in particular with respect to the preparation and consideration of the reports of the special rapporteurs.

II. Date and place of the eighth session

29. After consulting the Secretary-General, in accordance with the provisions of article 12 of its Statute, and being informed of his views, the Commission decided to hold its next session at Geneva, Switzerland, for a period of ten weeks beginning on 23 April 1956.

30. With regard to the duration of the session, the Commission wishes to emphasise that ten weeks is the indispensable minimum period it would require to carry out the work entrusted to it under General Assembly resolution 899 (IX), namely, to complete its study of the régime of the high seas, the régime of the territorial sea and of related topics, and to submit its final report on these subjects in time for the General Assembly to consider them in 1956; and to begin consideration of the items of its agenda held over from the seventh session.

III. Planning of future work of the Commission

31. The Commission decided to begin the study of two topics—namely, “State responsibility” and “Consular intercourse and immunities”.

IV. Appointment of three special rapporteurs

32. The Commission appointed Sir Gerald Fitzmaurice Special Rapporteur on the “Law of treaties”.

33. The Commission appointed Mr. F. V. García Amador Special Rapporteur on “State responsibility”.

34. The Commission appointed Mr. Jaroslav Zourek Special Rapporteur on “Consular intercourse and immunities”.

V. Publication of documents of the International Law Commission

35. The Commission adopted a draft resolution submitted by Mr. S. B. Krylov (A/CN.4/L.62/Rev.1) concerning the publication of documents of the Commission. The text of this resolution reads as follows:

“The International Law Commission,

“Recalling that in its resolution 176 (II) of 21 November 1947 on the teaching of international law, the General Assembly stated that ‘one of the most effective means of furthering the development of international law consists in promoting public interest in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations’,

“Considering that the Commission is the organ established by the General Assembly for the promotion of the progressive development of international law and its codification, and that it is highly desirable that the records of its proceedings be made easily available both to educational institutions and to the general public,

“Considering that, for various reasons, it has been difficult for interested persons and institutions to acquire the studies, special reports and summary records of the Commission,

“Recalling that the General Assembly, in its resolution 686 (VII) of 5 December 1952, requested the Secretary-General to prepare a report concerning, inter alia, the contents of a Juridical Yearbook as a possible publication of the United Nations,

“1. Requests the Secretary-General, in preparing the above-mentioned report, to take into consideration the possibility of printing the studies, special reports and summary records of the Commission;

“2. Recommends to the General Assembly, in connexion with its consideration of the report of the Commission on the work of its seventh session, to examine the possibilities of printing the studies, special reports and summary records of the Commission, including the possibility of publishing them in the United Nations Juridical Yearbook contemplated in General Assembly resolution 686 (VII).”

VI. Co-operation with Inter-American bodies

36. On the proposal of Mr. F. V. García Amador, the Commission adopted a draft resolution (A/CN.4/L.60) on co-operation with Inter-American bodies. The text of this resolution is as follows:

“The International Law Commission,

“Recalling the resolution¹⁸ adopted at its sixth session regarding closer co-operation with Inter-American bodies,

“Noting the oral report of the representative of the Secretary-General of the United Nations concerning the steps so far taken to carry out the terms of this resolution,

“Considering that further contacts should be established between the Commission and the Inter-American Council of Jurists through the participation of their respective secretaries in the sessions of these bodies,

“DECIDES

“1. To request the Secretary-General to authorize the Secretary of the International Law Commission to attend, in the capacity of an observer for the Commission, the third meeting of the Inter-American Council of Jurists, to be held in Mexico City in the beginning of 1956, and to report to the Commission at its next session concerning such matters discussed by the Council as are also on the agenda of the Commission;

“2. To communicate this decision to the Inter-American Council of Jurists and to express the hope

¹⁸ See *Official Records of the General Assembly, Ninth Session, Supplement No. 9, A/2693, p. 21.*

that the Council may be able, for a similar purpose, to request its Secretary to attend the next session of the Commission”.

VII. Question of stating dissenting opinions

37. The Commission considered a draft resolution submitted by Mr. Jaroslav Zourek (A/CN.4/L61) on the question of stating dissenting opinions. The draft resolution reads as follows :

“ *The International Law Commission,*

“ *Considering* that it was created with the object of promoting the progressive development of international law and its codification (article 1 of the Statute of the Commission),

Considering that it is required under article 20 of its Statute, in preparing its drafts with a view to the codification of international law and in submitting them to the General Assembly, to specify the extent of agreement on each point in the practice of States and in doctrine’, and the ‘divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution’,

Considering that the final report on the work of each session which the International Law Commission submits annually to the General Assembly should therefore record all the views expressed in the Commission and the main arguments invoked in favour of the various solutions,

Considering that the best method of achieving this is to allow the members of the Commission to express their dissenting opinions in an annex to the final report,

DECIDES that any member of the International Law Commission shall have the right to add a short statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if the said decision does not in whole or in part express the unanimous opinion of the members of the Commission.”

38. However, the Commission reaffirmed the existing rule adopted at the third session, that detailed explanations of dissenting opinions should not be inserted in the report, but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report.¹⁹

VIII. Representation at the General Assembly

39. The Commission decided that its Chairman, Mr. Jean Spiropoulos, should represent it at the tenth session of the General Assembly for purposes of consultation.

¹⁹ Faris Bey el-Khoury, for the reasons set forth in the summary record of the 330th meeting, declared that he was opposed to any statement in the report of a dissenting opinion.

Annex

Comments by Governments on the provisional articles concerning the régime of the territorial sea adopted by the International Law Commission at its sixth session in 1954

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1. AUSTRALIA

Letter dated 18 April 1959 from the Australian Mission to the United Nations

[Original : English]

The permanent representative of Australia to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the Secretary-General's telegram LEG. 292/9/01 dated 3 February 1955, inviting comments

from individual Governments on draft articles on the régime of the territorial sea as provisionally adopted by the International Law Commission.

It would be appreciated if the International Law Commission could be informed that the Government of Australia has, in view of the existing pending dispute between the Governments of Japan and Australia for the solution of which an approach to the International Court of Justice is under discussion, preferred to furnish no comments upon the Commission's Provisional Articles.

2. BELGIUM

Transmitted by a letter dated 5 March 1955 from the Permanent delegation of Belgium to the United Nations

[Original : French]

The Belgian Government wishes to make the following comments on the provisional articles concerning the régime of the territorial sea adopted by the International Law Commission at its sixth session.

Article 3. Breadth of the territorial sea

It will be very difficult, not to say impossible, to arrive at an agreement if no country is prepared to make concessions.

The draft article as given in Mr. François' third report (A/CN.4/77 of 4 February 1954, article 4) may reconcile the different points of view. That draft lays down the principle of a breadth of three miles, while authorizing coastal States to extend it up to a limit of twelve miles, subject to two conditions. The principle of delimitation by international agreement should, however, be expressly recognized in the text. The last sentence of Mr. François' draft does not offer adequate guarantees in that respect. It read as follows :

"Any dispute concerning the validity of measures adopted for the aforementioned purpose shall be submitted to an international conciliation procedure or, if no agreement is reached, to arbitration."

It is of course wise to provide for some recourse against unilateral measures already adopted. Preferably, however, disputes should be forestalled and a third stipulation added authorizing a State to extend the territorial sea, and so to limit the zone of the high sea, on the condition that agreement has first been reached with the States interested in the fishing zones proposed to be restricted.

In this respect, the question of the territorial sea impinges on the régime governing fishing on the high seas, for which a system of international regulation is contemplated.

Article 12. Drying rocks and shoals

In article 5, paragraph 2, it is stated that base lines shall not be drawn to and from drying rocks and shoals, whereas article 12 provides that drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea.

At first glance, these two articles seem to contradict each other. The comment given on page 43 of document A/CN.4/88 does not make it entirely plain what reasoning led the Commission to state that the provisions of these two articles are compatible.

The summary record of the Commission's discussion (A/CN.4/SR.260, page 13) sheds more light on the subject : article 13 [12] states a general principle which applies to the equally general rule concerning the normal base line, namely the low water line (article 4), whereas article 5 is concerned only with exceptional cases.

As regards the difference in the terminology used in the two articles, it would seem preferable to make the terminology uniform by replacing in article 5, paragraph 2, the words *fonds affleurant à basse mer* by the words *rochers ou fonds couvrants et découvrants* which occur in article 12. Moreover, the summary record of the Commission's debate (A/CN.4/SR.260, page 14) suggests that the latter expression corresponds more closely to the phrase "drying rocks and shoals" which is used in the English text and which is taken from the (English) report of the Committee of Experts.

The Belgian Government understands the words "shoals . . . wholly or partly within the territorial sea" to mean, as defined in Mr. Lauterpacht's amendment (A/CN.4/SR.261, page 3) "shoals . . . if within the territorial sea as measured from the mainland or from an island" (*cf. ibid.* page 6).

Article 16. Delimitation of the territorial sea of two adjacent States

The text of article 16 as given in the report (A/CN.4/88) does not, in this Government's view, take Belgium's earlier suggestions into account.

According to the text of article 16, there are only two possible ways of drawing the boundary :

(a) By agreement between adjacent States; or,

(b) In the absence of such agreement, by application of the principle of equidistance from the base lines.

What will happen in a case in which special circumstances justify a boundary line drawn otherwise than as described in (b) and the two parties do not agree on a such boundary line? Is it to be inferred, particularly in view of what is said in the last paragraph of the comment on article 16, that in this event the matter will be submitted to arbitration? If that is the intention, the text does not make it sufficiently plain.

The text as it now stands fails to indicate clearly whether a State can ask for the revision of an agreement existing between it and an adjacent State.

The Belgian Government suggests the following text :

"Article 16

"1. The boundary of the territorial sea between two adjacent States is drawn by application of the principle of equidistance from the base lines from which the width of the territorial sea of the two countries is measured.

"2. Nevertheless, a boundary drawn by agreement between two adjacent States shall remain in effect.

"3. In the absence of an agreement and if a boundary drawn otherwise than as described in paragraph 1 is justified by special circumstances, the boundary shall be drawn by agreement between the two adjacent States."

This leaves unsettled what is meant by the expression "special circumstances". Does it mean circumstances in which, owing to the configuration of the coasts, it would be impossible or difficult to apply the principle of equidistance? Or would the expression "special circumstances" also cover the case where a country invokes historical arguments?

Article 26. Passage of warships

The drafts submitted earlier did not contain the provision which now appears in paragraph 2 of this article, to wit, that a State may prohibit passage in the circumstances envisaged in article 20. The purpose of this addition would seem to be to limit the "exceptional circumstances" of which paragraph 1 speaks to those mentioned in article 20 with reference to vessels other than warships. The Belgian Government is inclined rather to associate itself with the comments which accompanied article 12 of the draft prepared by the Conference of The Hague, 1930 :

"To state that a coastal State will not forbid the innocent passage of foreign warships through its territorial sea is but to recognize existing practice. That practice also, without laying down any strict and absolute rule, leaves to the State the power, in exceptional cases, to prohibit the passage of foreign warships in its territorial sea."

3. BRAZIL

Note verbale dated 28 February 1955 from the permanent delegation of Brazil to the United Nations

[Original : English]

The alternate delegate of Brazil to the United Nations presents his compliments to the Secretary-General of the United Nations and with reference to note LEG. 292/9/01 of 31 August 1954, regarding the provisional articles on the "Régime of territorial sea", has the honour to present the following comments of the Government of Brazil on chapter 4 of Document A/CN.4/88, "Régime of territorial sea".

2. With regard to article 9 thereof, the Brazilian Government are of the opinion that the outer limit of roadsteads should be included in the base line for measuring the width of the territorial sea instead of having such roadsteads merely included in the territorial sea. It would of course be necessary, in keeping with the above

suggestion, that States should previously delimit such roadsteads. Working Paper No. 11, drawn up by the Preparatory Commission for The Hague Conference for the Codification of International Law, adopts a similar point of view. In accordance with the Brazilian Government's suggestion, article 9 would then read as follows :

"Article 9. *Roadsteads*. Roadsteads which are used for the loading, unloading and anchoring of vessels and which are situated wholly or partly outside the outer limit of the territorial sea shall have their outer limits included in the base line from which the width of the territorial sea will be measured. The coastal State must give due publicity to the limits of such roadsteads."

3. As to article 12, Brazil favours adding *islands* to the points of departure for delimiting the territorial sea, perhaps by inserting the word "island" before "dry rocks and shoals". If a rock or shoal totally or partially situated within the territorial sea can be taken as a point of departure for delimiting the territorial sea, it is even more reasonable that an island in the same case be also taken as a point of departure. This does not involve attributing to an island in this situation its own territorial sea, but provides for its inclusion in the base line.

4. The Brazilian Government are in full agreement with the remaining provisional articles drafted by the International Law Commission.

4. EGYPT

Transmitted by a letter dated 4 May 1955 from the permanent delegation of Egypt to the United Nations

[Original: English]

At its third session in 1951, the International Law Commission decided to initiate work on the topic "Régime of territorial waters" which was previously selected for codification.

At its sixth session, the Commission, after considering the last report submitted by M. J. P. A. François, appointed Special Rapporteur on this topic, adopted a number of draft articles with comments, and submitted them to the Governments in conformity with the provisions of its Statute.

Accordingly, the Government of the Republic of Egypt has carefully studied the above-mentioned draft articles, and by comparing them at the same time with the corresponding articles forming the Egyptian internal law regarding the same question, considers that, except for certain details, the principles they contain are in accordance with both the common international law and the Egyptian internal law.

However, the Egyptian Government finds it necessary to give its own point of view on the following articles.

Article 3

This article, which concerns the breadth of the territorial sea, has been postponed pending the reception of the replies and proposals of Governments concerning this matter.

It appears from the introduction to chapter IV of the International Law Commission's report covering the work of its sixth session, that the question of the breadth of the territorial sea was the object of different divergent opinions which were expressed during the debate at the various sessions of the Commission, and during which different suggestions were made.

However, the Egyptian Government is particularly in favour of adopting the suggestion according to which the breadth of the territorial sea may be fixed by each coastal State in accordance with its needs; provided that it does not exceed the limit of six miles, and this for the following reasons :

1. That, as was stressed in the Commission's report, the breadth of the territorial sea actually depends on different factors which vary from case to case.

2. That the three-mile belt of sea adopted by some Governments may no longer be sufficient for securing the State's security necessities especially if it was taken into consideration that the three-mile

limit was originally based on the maximum range of the cannon-shot from the shore, which is much greater nowadays.

3. That it is suitable, on the other hand, not to allow the extension of the territorial sea beyond the six-mile limit so as to safeguard the principle of the freedom of the open sea, over which the international law forbids the acquisition of sovereignty.

Article 5, paragraph 2

This paragraph declares that the straight base line, mentioned in paragraph 1, may be drawn between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands; while the corresponding article in the Egyptian internal law allows the drawing of such a base line if the island is situated at a distance not further than twelve miles from the coast.

The Egyptian Government, therefore, reserves the right of giving its final opinion on this paragraph until a definite solution has been given to both the questions of the breadth of the territorial sea, and groups of islands.

Article 7. Bays

This article has also been postponed due to its connexion with the question of the breadth of the territorial sea.

It is generally admitted that the maritime territory of every State extends to the bays and adjacent parts of the sea enclosed by headlands belonging to the same State. Nevertheless, it has been claimed by some jurists that inlets having an entrance more than ten miles wide cannot be held to be territorial. There is, in fact, no unanimity of opinion on the question, but it might be convenient to adopt the solution which was taken by the Institute of International Law in 1894 in favour of the twelve-mile width, subject to greater extent of jurisdiction established by long-continued usage.

Article 26

This article declares the right of foreign warships to innocent passage through the territorial sea or through the straits used for international navigation between two parts of the high seas.

The Egyptian Government has no objection on this principle, but would, nevertheless, be in favour of according each State the right of putting a certain limitation to the number of warships belonging to the same foreign country and passing through at the same time.

5. EL SALVADOR

Letter dated 20 December 1954 from the Ministry of Foreign Affairs of El Salvador

[Original: Spanish]

I have pleasure in referring to your communication LEG./292/9/01, dated 31 August 1954, with which you sent a copy of the report of the International Law Commission on the work of its sixth session, held in Paris from 3 June to 28 July 1954, at which the topic "Régime of the territorial sea" was discussed.

In your note you state that the Commission would like to receive comments from Governments on the subject of the breadth of the territorial sea, and you add that it would be appreciated if the Salvadorian Government would communicate its comments before 1 February 1955.

I have pleasure in informing you that this Ministry is now engaged in studying chapter IV of the Commission's report, concerning the régime of the territorial sea. The Ministry is deeply interested in the question, for article 7 of the Political Constitution now in force provides that "the adjacent seas to a distance of two hundred sea miles from the low water line", and also the corresponding air space, subsoil and continental shelf, form part of national territory.

As you will gather, in conformity with the aforementioned constitutional provision, the sovereignty of El Salvador extends to two hundred sea miles of territorial sea and to the corresponding continental shelf, and it is wholly unacceptable for this country that in

any international convention relating to the territorial sea principles should be adopted which conflict with its legitimate rights. Accordingly, this Ministry is prepared to endorse suggestion 7 (page 13 of the report), which says that the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf, subject always to the proviso that the term "continental shelf" is understood to mean the submarine platform extending to two hundred sea miles from the coast, reckoned from the low-water line.

I shall be pleased to amplify these comments in due time.

6. HAITI

Letter dated 22 March 1955 from the Department of State for Foreign Affairs of Haiti

[Original : French]

The Secretary of State has noted that the Secretary-General of the United Nations would like to receive the comments of the Haitian Government on chapter IV of the report [of the International Law Commission on the work of its sixth session, document A/2693], containing provisional articles concerning the régime of the territorial sea.

With a view to enabling the Secretary-General to act as requested by the International Law Commission, I have pleasure in communicating to you the following comments on the draft articles in question.

It should be explained first of all that the Republic of Haiti has no legislation relating to the territorial sea. In practice, the Government of Haiti has adopted the distance of six sea miles as the breadth of the Haitian territorial sea, and has so notified a number of Governments, including those of the United States of America and Italy, which had requested information concerning the limits of the territorial sea.

This breadth of six sea miles, measured from the low-water mark as base line, seems indeed to be the most suitable for Haiti.

Draft article 12 lays down a rule according to which drying rocks and shoals may be taken as points of departure for delimiting the territorial sea.

This Department considers that this provision should be deleted, as it might lead to an excessive extension of the territorial sea; it is, in any case, incompatible with the provisions of the last paragraph of draft article 5.

Under draft article 26 warships are to have the right of passage through the territorial sea without previous authorization or notification.

This Department considers that, in conformity with the most generally accepted international practice, foreign warships should not have the right of passage through the territorial sea except with the consent of the coastal State, to which the ship concerned must address a request.

Clearly, by reason of their special characteristics, it is desirable that the coastal State should be able at all times to control or even to prohibit the passage of warships.

This Department reserves the right to submit, if the occasion arises and at the appropriate time, any other comments it may consider necessary.

7. ICELAND

Note verbale dated 26 March 1955 from the Ministry of Foreign Affairs of Iceland

[Original : English]

The Government of Iceland has studied the provisional articles concerning the regime of the territorial sea drafted by the International Law Commission [at its sixth session, document A/2693] and has the honour to submit the following comments:

1. Preliminary remarks

The Government of Iceland has already stated its views regarding certain aspects of coastal jurisdiction in an earlier communication. That communication is reproduced in the report of the

International Law Commission covering the work of its fifth session (*General Assembly, Official Records, Eighth Session, Supplement No. 9, document A/2456, pp. 52-58*).

2. Base-lines

Articles 4 and 5 of the provisional articles must be read together. The principle should be that the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries case*²⁰ must be followed. Indeed, there is no reason why the judgment of the Court should not be fully respected.

According to the judgment it is necessary to distinguish between two categories (types) of coasts and two different régimes which are applicable to them. On the one hand there is the coast which is "not too broken". On the other there is the coast which is "deeply indented and cut into" or "is bordered by an archipelago". The second category is not at all an exception to the former. The two types of coasts are juridically on the same level. For the first, the rules laid down in article 4 are applicable, but for the second "the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction" (pp. 128-129 of the judgment). Consequently, the drafting of articles 4 and 5 has to be changed. In article 4 it is necessary to delete the words "Subject to the provisions of article 5" and in paragraph 1 of article 5 the words "As an exception" should be deleted.

Paragraph 1 of article 5 states that the régime in question should be justified by historical or geographical reasons. Economic and other reasons seem to be ignored or excluded. This is not in conformity with the judgment of the Court which clearly states that economic reasons can—and must—also be taken into account (p. 133). The Icelandic Government firmly believes that the economic factor may be important for determining the link existing between a sea area and the land domain. There is another point which does not appear in the draft but which was also recognized by the Court, i.e., that "a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements" (p. 133 of the judgment).

Of course, this latitude is limited by two principles of international law: First, the drawing of base-lines "must not depart to any appreciable extent from the general direction of the coast" (p. 133). Second, "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" (p. 133). Each of these principles is very important and should be clearly laid down in the proposed convention. According to the judgment, the connexion between the sea area in question and the land domain must be clear from the factual situation (geographical, economic, etc.). But the adaptation of these principles to concrete situations clearly requires the possibility of appreciation, and it is important to state explicitly that this power of appreciation rests with the coastal State.

Paragraph 2 of article 5 is quite incompatible with the judgment of the Court. The limitations used in the paragraph regarding the maximum length of straight base-lines, the distance of base-lines from the coast and the use of drying rocks and shoals have no foundation whatsoever in the judgment. Indeed, the adoption of the paragraph in its present form would be tantamount to asserting that the judgment of the Court was wrong and that many of the base-lines approved by the Court should be considered to be contrary to international law. When considering the Norwegian system the Court said, *inter alia*, the following:

"The 1869 Statement of Reasons brings out all the elements which go to make up what the Norwegian Government describes as its traditional system of delimitation: base-points provided by the islands or islets farthest from the mainland, the use of straight lines joining up these points, the lack of any maximum length for such lines." (p. 135)

These were the characteristics of the system which was approved by the Court.

The experts who were consulted in connexion with the drafting of paragraph 2 of article 5 were experts in geography and not in

²⁰ *International Court of Justice Reports, 1951, pages 116 et seq.*

international law and were, moreover, drawn almost entirely from countries in western Europe who have been in favour of the most limited extent of coastal jurisdiction. The paragraph is absolutely unacceptable to the Icelandic Government and should, in its view, be deleted.

3. Bays

In the opinion of the Icelandic Government the question of bays does not call for special rules in the case of coastlines which are indented. The drawing of base-lines in that case would be governed by the general principle laid down in paragraph 1 of article 5 (revised). It would perhaps be necessary to provide for a rule applicable to bays in the case of a coast belonging to the other category (covered by article 4). The Icelandic Government has no special proposal to make on that point but it seems that the solution of the question should be inspired by the same considerations as those expounded in the comments above concerning article 5.

4. Groups of islands

Same observations as for the bays. If a certain group of islands is sufficiently close to the coast so as to be covered by the general criteria formulated by the International Court of Justice the group would be covered by the general base-lines system applicable to the coast. If not, the group would have an independent base-lines system in conformity with the same principles.

5. Breadth of the territorial sea

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 judgment 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." (p. 131)

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 proposed varying from three miles to twelve miles. In the report of the International Law Commission it is stated that on this question twelve different suggestions were made during the debates of the Commission [A/2693, paragraph 68].

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 the earlier statement by the Icelandic Government, referred to under 1 above 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)²¹ 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 condition *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."

6. Freedom of navigation

It is the opinion of the Icelandic Government that the problem of freedom of navigation should be considered separately and that the principles thereof are compatible with the above considerations. An illustration of this may be found in President Truman's "Proclamation with respect to Coastal Fisheries in certain areas of the High Seas, dated September 28, 1945" (*American Journal of International Law*, Vol. 40, 1946, Official Documents, p. 46) where it is stated as follows:

"The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

8. INDIA

Transmitted by a letter dated 20 May 1955 from the Ministry of External Affairs of India

[Original: English]

Article 1

At the end of sub-paragraph 2 of article 1, add the following proviso :

"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."

²¹ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456, p. 54.*

Article 3

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

Article 4

The Government of India agree to the provisions of article 4 subject to clear stipulations being made in article 7 that "bays should be considered internal waters and that the base line for measuring territorial waters should be drawn from the mouths of bays/gulfs".

Article 5

In sub-paragraph 1 of article 5 delete the words "for historical reasons or" occurring in lines 1-2.

Articles 7, 11 and 14

The Government of India are interested in these articles and would like to be consulted at the proper time.

Article 9

After the first sentence ending "in the territorial sea", add the following sentence:

"The base line should be drawn outside the roadsteads which should be included in internal waters."

Article 15

Substitute the following for the existing article 15:

"When the territorial sea of two States, the coasts of which are opposite each other, overlap, then in the absence of agreement of those States, the median line should be so drawn every point of which is equidistant from the outer limit of the width of the territorial sea of each country."

Article 18

(i) At the end of the existing sentence add:

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

(ii) Add the following as sub-paragraph 2 to article 18:

"Each State reserves the right for reasons of safety of navigation to require ships to follow prescribed routes."

Article 20

(i) After the words "to protect" in line 5 of subparagraph 1, add the words "e.g., conservation of resources".

(ii) In sub-paragraph 2, delete the words "on the grounds that that is necessary for the maintenance of public order and security" in lines 3-5 and substitute the following:

"for the security of the State and the maintenance of public order".

9. MEXICO²²

Transmitted by a note verbale dated 27 July 1955 from the permanent delegation of Mexico to the United Nations

[Original: Spanish]

1. The Mexican Government notes that in chapter I (articles concerning the juridical status of the territorial sea, its superjacent airspace and its bed and subsoil), the Commission makes no mention of security considerations or of the conservation and utilization of the resources of the belt of sea adjacent to the coast; yet these are the essential premises of any attempt to determine the meaning and scope of the sovereign rights of a coastal State and, consequently, the breadth of the territorial sea. This omission leaves the concept of the territorial sea bereft of all substance, and makes it impossible to determine its breadth on the basis of any recognized juridical criteria. The Mexican Government considers, therefore, that, as

general as it is at present while the wording remains, articles 1 and 2 of the Commission's draft are not conducive to any juridical determination of the breadth of the territorial sea. In this connexion, it should be stressed that, in its draft articles on the continental shelf, the Commission unambiguously described (in draft article 2) the specific nature of a State's sovereign rights over the continental shelf and mentioned the purposes for which that sovereignty is exercisable.

2. Secondly, it is not possible to draft all the provisions of chapter II unless the breadth of the territorial sea has first been determined. For example, articles 5 and 6 (dealing with "straight base lines" and the "outer limit of the territorial sea") would have to be heavily amended if dimensions in excess of those which the Commission perhaps had in mind when drafting these articles were accepted for the purpose of the delimitation of the breadth of the territorial sea. The Mexican Government considers that so long as the breadth of the territorial sea is not determined (article 3 of the Commission's draft), the provisions of chapter II cannot be drafted.

3. Similarly chapter III, entitled "Rights of passage", depends on the definition of the breadth of the territorial sea, for all the suggested provisions may vary according to this fundamental rule. This is especially true in the case of the proposed provisions of article 21, under which foreign vessels exercising the right of passage must comply with the laws of the coastal State, in particular as regards such matters as fishing, hunting and analogous rights. It is also noteworthy that, in dealing with the related problem of the continental shelf, the Commission (rejecting the argument upheld by many States that the continental shelf and its superjacent airspace are contained in the territorial sea) included the question of the shelf under the topic "Régime of the high seas". Actually, it would have seemed more logical if the problem of the continental shelf had been included in the chapter on the régime of the territorial sea, in the same manner as the "Rights of passage".

To sum up, the Mexican Government considers that the provisional articles 1 and 2 rule out a definition of the breadth of the territorial sea that would be based on juridical principles; secondly, it considers that a number of articles in chapters II and III should be revised in the light of whatever may be the final version of article 3, for they are directly dependent on the terms of that article.

4. The Mexican Government holds that a valid and sound criterion regarding the problem of the breadth of the territorial sea which will yield a satisfactory solution of that problem cannot be adopted unless the historical development of the question has first been taken into consideration.

A historical survey shows us that the notion of the territorial sea originated on the continent of Europe, in consequence of the fall of the Roman Empire, when it became absolutely necessary for coastal States to protect their rights and interests and to meet certain emergencies. In the Mediterranean countries, the problem was defence against piracy, while the Nordic countries were also concerned with the exploitation of fisheries reserved for the use of nationals of the riparian States. An additional factor was the growing need for preventive measures against contagious diseases carried by vessels coming from the East. In order to meet those needs, the rulers of States issued orders to safeguard fishing rights and to protect shipping against piracy.

As time passed, those initial notions were confirmed and developed and received the unanimous approval of States. It was thus recognized that every State was entitled to a certain belt of the sea adjacent to its coast, for reasons of security and for the purpose of the exercise of other rights vested in the State. Nevertheless, despite this general agreement on the principle that a territorial sea existed, some differences arose regarding two subsidiary aspects of the question: the nature of the coastal State's rights in that sea and the breadth of the reserved belt.

5. As regards the nature of these rights, despite differences of opinion, most States soon tended to agree on the principle that the territorial sea constituted an integral part of the territory of the coastal State and was consequently under its territorial sovereignty, subject to no restrictions other than the right of other States to

²² The observations of the Government of Mexico were received after the end of the seventh session of the International Law Commission.

freedom of navigation or innocent passage, as natural consequences of their freedom to ply the high seas.

6. By contrast, on the question of the breadth of the territorial sea, opinion was seriously divided. Several tests, all equally arbitrary, were advocated for determining the distance, but the juridical aspects of the problem were always disregarded. Those tests included the "median line", the range of vision, the distance covered by a ship in two days and various distances measured in miles.

It is interesting to note that, even at so early a stage, Fra Paolo Sarpi, in his *Del Dominio del Mare Adriatico*, advanced the theory that the breadth of the territorial sea should correspond to the needs of the coastal State, provided that the result was not detrimental to other States.

Other authors reached the conclusion that, in view of the prevailing uncertainty, the breadth of the territorial sea should be determined by reference to the custom observed in each country.

Those differences of opinion disappeared for a while after the beginning of the eighteenth century, when Bynkershoek, in 1703 and 1737, advanced his famous principle: *ibi finitur territorium ubi finitur armorum vis*; the breadth of the territorial sea was consequently determined by the range of a cannon. The fundamental concepts underlying that principle were, first, the right of every State to self-defence, and, secondly, the fact that armed force was the best guarantee of possession, which, if accompanied by an intention to retain, constituted the basis of ownership.

This principle reflected the historical development of the concept of the territorial sea and legal thought at the time. In the first place, it confirmed the *raison d'être* of the territorial sea, in that the coastal State enjoyed exclusive dominion over a belt of sea adjacent to its coast in order to organize defence and security measures. Secondly, the principle indicated that the right of the riparian State extended as far as that right could be supported by force; and finally, it showed that, whereas the high seas were the common domain of all peoples because incapable of being occupied by any single State, and since occupation was the basis of the right of ownership, the territorial sea fell outside that common domain because capable of being occupied by the coastal State, in so far as it came within the range of that State's weapons, such occupation being the basis of ownership by that State.

Subsequently, in 1782, Galiani defined the range of cannon as a distance of three miles and so removed, for some time, the uncertainty then prevailing. The three-mile limit was generally accepted, and that acceptance gave rise to the contention that such a limit had become part of customary international law.

Nevertheless, later developments, and especially the results of the first Conference on the Codification of International Law, held at The Hague in 1930, led to a different conclusion. It became clear that although a number of States, representing approximately 80 per cent of the world's shipping tonnage, favoured the three-mile limit, many other States held contrary views. Their contention was that it was not possible to affirm that a rule of international law could derive from the mere will of a certain number of States and become binding on other States which were opposed to its application.

7. Furthermore, it should not be forgotten that the so-called three-mile rule is not actually a rule but a direct consequence of the principle advanced by Bynkershoek. That principle was doubtless of importance in its time, and differed from the other formulas then in vogue in that it had a juridical basis adapted to contemporary thought. It is impossible, however, to regard that principle as valid today, since the notion of security on which it was founded has undergone a radical metamorphosis by reason of technical developments in the manufacture of weapons, which now have a range so vastly different that the principle is no longer applicable. Moreover, it should be borne in mind that in modern juridical thought the existence and scope of a right are not contingent on the extent to which such a right can be exercised by means of force; nor is occupation the sole basis, or even a necessary condition, of a State's dominion over its territory. Consequently, as Bynkershoek's principle now has no practical value, it is wrong to affirm

the binding force of the three-mile rule, which can only be regarded as an extension of that principle.

It is equally impossible to contend that the three-mile limit is binding as a rule of customary international law. If we adopt the standpoint of the positivist school, we have to say that such a rule can only be binding on those States which accept it. If we follow the principles of the other schools, we must argue that a custom can only be transformed into a rule of law if its basis and purport are both of a juridical nature, which means that it must derive from the idea of justice and carry sufficient persuasive force to convince States of its binding character. As the three-mile limit and Bynkershoek's parent principle lack these characteristics in the modern age, it cannot be validly argued that the three-mile limit is a binding rule of international law for those States which do not accept it.

Nor does conventional law contain any other principle that has won universal approval. Consequently, the inevitable conclusion at the present time is that positive international law does not contain a rule that determines the breadth of the territorial sea.

8. Let us return to the basic idea underlying the notion of the territorial sea, the idea that, in order to be able to exercise certain of its rights, the State must possess a maritime coastal belt subject to its exclusive dominion. In the course of time, these rights evolved, the importance of some being altered, others being superseded by new rights; but this evolution has not affected the essence of the basic idea, which still remains the foundation, justification and *raison d'être* of the territorial sea. Thus, the original idea of protection against piracy developed, as described above, into the notion of defence and security against aggression by other States, the specific notion that Bynkershoek had in mind. The next stage came when the idea of the neutrality of the territorial sea, for the purposes of naval warfare, took hold. This brought in its train the need for supervision and control for fiscal or customs purposes, for the prevention of smuggling, and for measures to protect public health—in short, all that is comprised in the expression "policing of the sea".

A number of factors, including the considerable increase in the speed of ships, demonstrated to the States opposing a breadth of more than three miles that the three-mile limit was not enough to satisfy the requirements of the coastal States, with the consequence that the idea of the contiguous zone gained ground; but this idea merely confirms the inefficacy, in fact and in law, of the three-mile rule.

The outstanding development in recent years has been the preponderance of economic interests as compared with the other needs which have to be satisfied. Owing to technical advances in the manufacture of armaments, security is now a secondary preoccupation and questions relating to the exploitation of marine resources are uppermost—fisheries, and the continental shelf which has recently received much attention and which has come to be regarded as being within the exclusive dominion of the coastal State, the latter being consequently held entitled to conserve, develop and exploit the resources of the shelf.

9. So far as the continental shelf is concerned, it has been agreed, as a general proposition, that the sea-bed and the subsoil of the sea are not *res nullius*; that there is a physical continuity between the submerged territory and the land, which form a unity; that the sea-bed and the subsoil of the sea being an extension of the land domain, the resources thereof belong *ipso facto* to the coastal State; and that, consequently, there are sufficient grounds for supporting the State's sovereign rights over the continental shelf.

As against this agreement, the opinions of States differ regarding the status of the waters covering the shelf. While some States admit that these waters are subject to the sovereignty of the coastal State, others dispute the claim.

10. The Government of Mexico is of the opinion that the waters covering the continental shelf form a single physical and legal entity with, and should be subject to the same rules as, the submerged territory. If, therefore, the submerged territory forms an integral part of the land domain and hence is subject to the sovereignty of the coastal State, then the waters covering the same are like-

wise subject to its sovereignty. The Government of Mexico holds this opinion because it considers the continental shelf to be simply the object of one more of the rights vested in the coastal State by reason of the concept of the territorial sea, rights which constitute the *raison d'être* of that concept and of which exclusive fishing rights and the right to police the sea are typical examples. Furthermore, if it is accepted as a premise that the submerged territory is just as much part of the territory of the State as *terra firma*, then the former is governed by the unchallenged principles which govern the latter and under which the State exercises sovereignty not only over the soil and subsoil, but also over the whole of the territory's superjacent fluid element, that is to say, the water and the airspace.

11. If, then, it is admitted that the foundation of the principle of the territorial sea is its necessity for the exercise of certain rights vested in the coastal State, and that the passing of time has not impaired the validity of that principle, it cannot be doubted that the legal idea which should govern and provide the rational basis of the rule relating to the breadth of the territorial sea is that the territorial sea should extend so far as is necessary and sufficient for the purpose of the satisfaction of the needs of the coastal State which derive from the exercise of the rights vested in that State. Any other notion is a departure from the principles which constitute the basis and justification of the institution of the territorial sea, affects its intrinsic quality, and prejudices and diminishes the exercise of the coastal State's rights.

Accordingly, and since, at the present time, the needs of States and their corresponding rights consist mainly of interests in the continental shelf, exclusive fishing rights, the policing of the sea, and security generally, it may be categorically stated that the territorial sea should extend so far as is necessary and sufficient for the purpose of the satisfaction of these specific needs.

12. The Government of Mexico is of the opinion that the actual determination of the breadth of the territorial sea, in the light of the principle enunciated above, is not a legal, but a technical problem. Thus, where the continental shelf is wide enough sufficiently to ensure the satisfaction of the other interests described, the outer limits of the territorial sea will be fixed by technical processes to coincide with the limits of the shelf; while in those areas where the shelf is too narrow to ensure the satisfaction of those interests, the breadth of the territorial sea will have to be determined by technical processes in such a way as to make it wide enough to satisfy the rights of exclusive fishing, policing of the sea and security.

13. On the other hand, the Government of Mexico recognizes that all States have a common interest in the conservation, development and rational exploitation of the resources of the sea, both on the high seas and in the territorial sea; and it considers, therefore, that it is necessary and desirable to conclude agreements which will promote scientific research and the introduction of methods of exploitation that will protect that common interest.

14. In the absence of a rule of international law determining the breadth of the territorial sea, the Government of Mexico has been faced with the immediate and unavoidable necessity of fixing the breadth of the territorial sea at nine nautical miles, and has embodied this decision in its municipal legislation. This decision, which in the absence of an international rule, was dictated solely by the practical necessities of the moment, must not be construed as anything other than a minimum claim to be maintained until, with the development of international law, a rule is promulgated which is binding on all States and which provides a legal and complete solution of the problem. The Government of Mexico therefore advocates the adoption of this rule as being in conformity with the general considerations herein expressed.

10. NETHERLANDS

Note verbale dated 21 March 1955 from the permanent delegation of the Netherlands to the United Nations

[Original: English]

The permanent representative of the Netherlands to the United Nations presents his compliments to the Secretary-General of the United Nations and with reference to the latter's note dated 21 Aug-

ust 1954 (LEG./292/9/01) has the honour to submit the following comments of the Netherlands Government concerning the draft articles on the régime of the territorial sea contained in the report of the International Law Commission, 1954.

I. General remarks on the breadth of the territorial sea and its base-line

Netherlands laws and regulations on the matter are based on the principle of a three-mile limit to the territorial sea and on a method of delimitation from the low-water line and through bays as recorded, *inter alia*, in the report C.230.M.117.1930.V, of the League of Nations Codification Conference 1930. No extension of the breadth of the territorial sea beyond the three-mile limit has received an unquestioned acceptance as being allowed by the rules of international law.

The freedom of the seas is a universal and fundamental rule; derogations from this rule, such as the sovereignty of the coastal State over territorial waters, could only result from another generally accepted rule.

As has been rightly pointed out in the United States and the United Kingdom comments on the draft articles now under review, no such rule exists beyond the principle that three miles is the breadth of the territorial sea.

The Netherlands Government have noted with concern that the International Law Commission has not been able to reach agreement on the problem of formulating a rule concerning the breadth of the territorial sea.

Obviously "the basic principle of the free availability of the seas for the common use of all mankind" does not *a priori* exclude the taking into account of the legitimate needs of coastal States with regard to the exploitation of the sea-soil, the conservation of fish resources, the control of customs, fiscal and sanitary regulations and other subjects.

In order to satisfy these special needs, the Commission made several proposals in respect of the continental shelf, the fisheries, the "contiguous zone", etc., which in the opinion of the Netherlands Government may pave the way to a codification of the régime of the high seas, providing satisfactory solutions to the problems indicated and affording an acceptable balance of all interests concerned.

It would seem to the Netherlands Government that this approach is more in line with the concepts of international law than the extension of the territorial belt under the sovereignty of the coastal State.

The Netherlands Government deplore the unilateral delimitation by various nations of the extent of their territorial waters in disregard of the existing rules of international law and of the interests common to all nations.

The problem of striking a balance between the special interests of coastal States and the general interest of all seafaring peoples is one that concerns all nations. A general, universally acceptable agreement should be arrived at, which would be the only means to put an end to present unilateral practices.

No effort should be spared to arrive at such a solution and the Netherlands Government would therefore welcome further efforts of the International Law Commission to create order in the present rather chaotic situation by formulating proposals acceptable to all nations.

If in the course of these efforts the Commission might think fit to include in its proposals the extension of certain particular rights of coastal States to a small area beyond the three-mile limit, the Netherlands Government would be prepared to examine such proposal, provided that discrimination against foreign subjects and foreign shipping is expressly excluded and that the exercise of these rights is supervised by some machinery of obligatory international jurisdiction.

II. Comments on the draft articles

The Netherlands Government are grateful to the International Law Commission for its efforts to bring more precision and clearness to the different rules governing the régime of the territorial sea. Basing itself on the work achieved in 1930 and making good use

of the report of a team of experts consulted by the Special Rapporteur, Professor François, the Commission is now carrying the problems much nearer to a precise codification acceptable to all nations concerned.

Only a few draft articles appear to call for comment:

Article 2

This article should be more closely linked to article 1, thereby indicating that the qualification laid down in paragraph 2 of article 1 also applies to article 2.

Article 5

For the same general reasons as indicated under I above, the Netherlands Government could only accept the proposed use of "straight base-lines" if it is clearly understood that the governing clause of the rule proposed in article 5 is embodied in the qualification: "As an exception".

Article 9

The meaning of this article would be more clearly expressed if the words "which are situated wholly or partly outside the outer limit of the territorial sea" were amended to read: "which would otherwise be situated wholly or partly . . .".

Article 12

For the same purpose it is suggested to amend the first part of this article to read: "Drying rocks and drying shoals which would otherwise be wholly or partly . . .".

Articles 15 and 16

The third paragraph of the draft, proposed by the Special Rapporteur and accepted by a great majority of the Commission (*vide* A/CN.4/77), has not been printed in the Commission's report. It seems appropriate to restore it in the final draft.

(The paragraph reads: "The line shall be marked on the largest-scale charts available which are officially recognized.")

Article 17

It does not seem a good solution to the problem of defining the rights of "innocent passage", belonging to other nations by qualifying their definition by a reference to "such other . . . interests [of the coastal State] as the territorial sea is intended to protect". This wording leaves too much to the uncontrolled judgment of the coastal State of its undefined "interests" to ensure an even balance with the interests which the right of innocent passage is meant to serve. The following wording for paragraph 2 of article 17 is therefore suggested:

"Passage is innocent as long as the vessel uses the territorial sea without committing any act contrary to the laws and provisions enacted by the coastal State in conformity with these regulations and with other rules of international law."

This entails some modifications in articles 18 and 20.

Article 18

The modification suggested for article 17, if accepted, would make superfluous the first seven words of this article.

Article 19

This article appears to be somewhat narrowly conceived. It should be broadened to include a provision on the general duty of coastal States themselves to respect the principle of freedom of passage. It would furthermore be useful to define more clearly the scope of the article in such a way as to exclude any interpretation implying a specific responsibility of coastal States for the presence of obstacles, not of their own making, in their territorial waters.

Article 20

For reasons indicated in article 17, paragraph 2, above, it is suggested to replace the words "such other of its interests as the territorial sea is intended to protect" by: "such other of its interests as it is authorized to protect under these regulations and other rules of international law".

Moreover, a third paragraph, parallel to the fourth paragraph of article 26, seems appropriate—e.g.:

"There must be no interference with the passage of foreign vessels through straits used for international navigation between two parts of the high seas."

Article 21

Though presumably the enumeration is not exhaustive (*vide* the words "in particular"), it is suggested to add under (e): "any hydrographical survey".

Article 24

As the same subject-matter has been taken up in the Brussels Convention of 10 May 1952, relating to the arrest of sea-going ships, it seems advisable to reconcile both systems.

The words "in the inland waters of the State or" seem not in place in a draft convention on the territorial sea. (These words are, rightly, not used in article 23, paragraph 2.)

Article 27

It is suggested that the provisions of article 21 should also apply to warships.

In general it is suggested to re-word the various titles and definitions concerning the right of innocent passage, as there appears to be some incongruity between, for example, "the right of passage" in the title of article 17, "rights of innocent passage" in that of article 18, which article, in its turn, mentions "the right of innocent passage" as against "the right of passage" in article 21. Moreover, "Meaning of the right of passage" seems a misnomer for the title of article 17 which only defines "passage", the "right" being defined in articles 18 ff.

III

A final remark may be allowed concerning disputes arising from the interpretation of the articles. As has been pointed out above in relation with article 17—but the same remark applies to many other provisions of the draft—the various and often conflicting rights of coastal States and other users of the seas could only be formulated in general terms or by reference to customary rules of international law.

It would therefore seem essential to provide for a general obligation to submit any dispute on questions arising from the exercise of alleged rights under these articles on the territorial sea, to arbitration and other means of peaceful settlement.

11. NORWAY

Transmitted by a note verbale dated 2 May 1955 from the permanent delegation of Norway to the United Nations

[Original: English]

The Norwegian Government would like to express its appreciation of the very thorough and useful study which has been made by the International Law Commission of the difficult and controversial topic of the régime of the territorial sea.

The Norwegian authorities concerned have studied the draft articles and comments with great interest and profit. They do not, however, find it possible to accept all the proposed rules.

In their opinion it is necessary to maintain as a guiding principle that, if general agreement is to be reached in regard to rules governing the delimitation of the territorial sea, these rules will have to be so drafted that they do not curtail the territorial rights which are already possessed by the interested States by virtue of general recognition by other States, prescriptive title or otherwise in accordance with the obtaining rules of international law. The objective must be to create clarity and certainty where there has been doubt and disagreement, not to confuse the legal situation in fields where it is now clear and incontrovertible.

Similar considerations would seem to militate against any departure from rules and principles which have been sanctioned by international judicial precedents.

In the light of these general considerations, the Norwegian Government would like to submit the following specific comments relating to some of the most important points at issue.

1. The Norwegian Government has not as yet adopted any precise and definite position in regard to the question of the breadth of the territorial sea which is discussed at some length in paragraphs 68-70 of the Commission's report. The guiding principles sketched in the introductory paragraphs above should have made it reasonably clear, however, that the Norwegian Government would consider it futile to seek general agreement to a uniform breadth of the territorial sea which would deprive any country of territorial sea over which, at present, it enjoys uncontested jurisdiction. The Norwegian Government, for its part, would find it impossible to accept a uniform breadth of less than four miles.

As for the various breadths mentioned in paragraph 68 (1) of the Commission's report, the Norwegian Government considers it unlikely that general acceptance would be obtainable for a uniform breadth of as much as twelve miles.

2. The International Law Commission has provisionally left article 3, headed: "Breadth of the territorial sea", without content. This lacuna makes it extremely difficult to appreciate other related articles of the draft. Article 13, for instance, would certainly have to be redrafted if general agreement to a uniform breadth of the territorial sea should prove unobtainable.

There is also a close connexion between the problem relating to the breadth of the territorial sea and those relating to the contiguous zones and the continental shelf. For this reason it hardly seems possible to dispose finally of any one of these subjects as long as it is treated separately and without consideration of the solutions proposed for the others.

3. In so far as article 4 provides that the breadth of the territorial sea is to be measured from low-water marks, as opposed to high-water marks, it is in accordance with accepted rules of international law. The second paragraph of the article, however, is an innovation and constitutes no improvement on or simplification of the existing rules of international law.

4. In its comments to article 5, the International Law Commission states that it interprets the judgment in the Fisheries case between Norway and the United Kingdom as expressing the law in force and that, accordingly, it has taken this judgment as the basis in drafting the article. In view of its opinion to the effect that the rules recommended by the experts who met at The Hague in 1953 "add certain desirable particulars to the general method advised by the Court" it has nevertheless "endorsed the experts' recommendations in a slightly modified form". The Commission considers these "additions" to represent a progressive development of international law.

The Norwegian Government would have found it easier to form an opinion about article 5 if the International Law Commission had specified the parts of the article which are intended to fall within the category of existing law and those which fall within the category of progressive development of the law. The two kinds of proposals must of course be judged by entirely different criteria. And it would seem natural to require very strong reasons in support of any departure from the existing law. No such reasons are given in support of the rules in article 5, paragraph 2, which on all points seem to constitute innovations unwarranted by the practice of States.

In its judgment in the Anglo-Norwegian Fisheries case, the International Court of Justice stated specifically in regard to the contention that the maximum permissible length of a straight base line was ten miles, that "the ten-mile rule has not acquired the authority of a general rule of international law" and it refused to invalidate a number of straight base lines which by far exceeded ten miles in length, and had long stretches which were more than five miles removed from the coast.

The Court further stated:

"The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."

In the same judgment the Court also approved the method employed for the delimitation of the Norwegian territorial sea in

spite of the fact that this delimitation in several cases was based on straight base lines which had drying rocks and shoals for points of departure.

5. The formulation of article 12 is far from clear. In the first place it seems unnatural, not to say illogical, to use the expression "the territorial sea" in two entirely distinct and different senses in one sentence. The expression seems first to be used to denote the maritime belt which would have constituted the territorial sea if the drying rocks and shoals had been disregarded, and is then, immediately afterwards, used in the normal and proper sense of the word.

It is moreover open to doubt whether it is the intention of the draft article to allow straight base lines to provide points of departure for delimiting "the territorial sea" in the first sense of the expression.

The formulation further gives rise to the following question: If the seaward protuberance of the territorial sea, which is caused by one drying rock, encloses another drying rock, will this latter rock in its turn cause the territorial limit to jut farther out off the coast?

According to its comments, the International Law Commission considers article 12 to express "the international law in force". The Norwegian authorities, for their part, find it difficult to agree that any one of the various constructions to which article 12 is open could be considered an expression of the international law in force.

6. It is difficult to understand why the provisions of article 15 are not incorporated in article 13 under paragraph 2.

The phraseologies of articles 13 and 15 seem inconsistent. Article 13 speaks of straits the breadths of which "is less than the extent of the belt of territorial sea adjacent to the two coasts", while article 15 uses the expression "a distance less than twice the breadth of the territorial sea". In the former case the draft seems to presuppose the persistence of varying territorial breadths, whereas the latter phraseology seems based on the adoption of a uniform breadth.

7. In its comments to chapter III of the draft, concerning the right of innocent passage of foreign vessels through the territorial sea, the International Law Commission states that the provisions are intended to apply only in time of peace. This reservation ought to be clearly expressed in the text of article 17.

The Government of Norway reserves its opinion in regard to the proposals set forth in article 20, paragraph 2. In this connexion attention is drawn to the provisions of article 6, paragraph 5, in the draft proposal "Régime of the high seas" (Report of the International Law Commission 1953, *Official Records of the General Assembly, Eighth Session, Supplement No. 9, A/2456*, page 13).

As for articles 26 and 27 of the draft, relating to the right of innocent passage of warships, it is especially important and necessary that the text itself should make clear that the rules are not applicable in time of war.

12. PHILIPPINES

Note verbale dated 7 March 1955 from the permanent delegation 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 telegram LEG.292/9/01, dated 3 February 1955, which made reference to a previous invitation to the Philippine Government to comment on the draft articles on the régime of the territorial sea formulated by the International Law Commission.

The policy of the Philippine Government as regards the extent of its territorial waters may be summarized as follows:

"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 2 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.

"With respect to the high seas adjacent to Philippine maritime territorial waters, the Philippine Government holds the view that the exercise of fishing rights should be regulated by an agreement or convention to be entered into by the States concerned."

13. SWEDEN

Letter dated 12 April 1955 from the Ministry of Foreign Affairs of Sweden

[Original: French]

In a letter dated 31 August 1954, you requested the Swedish Government, in accordance with the desire expressed by the International Law Commission, to let you have its comments on the provisional articles concerning the régime of the territorial sea, adopted by the Commission at its sixth session, as set forth in chapter IV of the Commission's report on the work of its sixth session. The Swedish Government, which has studied the provisional articles with the greatest interest, would like, in reply to your request, to draw attention to the following points.

In chapter I (articles 1 and 2 of the provisional articles) it is stipulated that the coastal State has sovereignty over the territorial sea, that this sovereignty is exercised subject to the conditions prescribed in the rules of international law, and that the sovereignty of that State extends to the airspace over the territorial sea as well as to its bed and subsoil. The Swedish Government has no objection to these articles which it considers to be in conformity with existing law.

Chapter II of the provisional articles concerns the breadth of the territorial sea.

The Swedish Government would like to point out, in the first place, that the outer limit of the territorial sea is determined by two factors: the breadth of the territorial sea and the base line from which it is measured.

As regards the first point, no text was proposed by the Commission. It is clear from the report that a large number of divergent opinions were voiced during the Commission's discussions, and the Commission expressed the hope that the Governments would state, in their comments on the draft articles, what was their attitude concerning the question of the breadth of the territorial sea and suggest how it could be resolved. To meet that desire, the Swedish Government would like to make the following comments:

The Swedish standpoint was formulated at The Hague Conference for the Codification of International Law as follows: "For its part the Swedish Government claims a four-mile belt; but at the same time it recognizes as legitimate the other historical distances applied by a certain number of States—those of three or six nautical miles, for example."

This standpoint, which has always been upheld by Swedish representatives in international exchanges of views, implies that there is no uniform measurement of the territorial sea applying equally

to all States but that certain territorial limits are established by custom and cannot be exceeded without violating the freedom of the seas. The main argument in favour of this view is that it is supported by facts which show that different territorial limits, and especially the three referred to above, are applied in different places, and that no rule of international law can be discovered providing for the exclusive application of one or other of these measurements of the territorial sea. The Swedish four-mile limit was originally laid down in the neutrality clauses promulgated on 26 May 1779 since when it has been uninterruptedly maintained down to the present day in a long series of enactments concerning neutrality, customs control, fisheries, etc. The Swedish Government sees no reason to abandon the standpoint formulated above. In more general terms, it might be taken to mean that the breadth of the territorial sea of States varies within certain relatively narrow limits, mainly determined on historical grounds. This concept, in the Swedish Government's view, reflects existing law. A rule of law strictly formulated in accordance with the above principle would read as follows: "Any State has the right to retain, but not to exceed, the breadth of the territorial sea which it had in the past." Since not all States have territorial limits which can be said to be historically established, and since, on the other hand, it can hardly be insisted that States which have, for instance, a three-mile limit, should be bound for the rest of time to that limit when other States have a six-mile limit, the possibility might perhaps be considered of granting States a certain freedom in establishing the breadth of their territorial sea themselves, up to a certain maximum. Some of the proposals made at the Commission's session were, in fact, directed to that end.

To the proposal that the territorial limit should be fixed at three miles subject to the right of the coastal State to exercise certain rights in a "contiguous zone" of twelve miles, it may be objected that the exercise of various powers by the coastal State (customs control, regulation of fisheries or other measures taken beyond the limit of the territorial sea) has no support in existing international law. One argument in support of that view is that States wishing to exercise control over foreign vessels beyond their territorial limits have felt obliged to conclude treaties with the foreign States concerned in order to obtain the right to exercise control over vessels flying their flags (e.g., the so-called United States Liquor Treaties or the Helsingfors Treaty of 1925 between the Baltic States).

As regards the limit for fisheries, it cannot extend beyond, but may certainly come within, the territorial limit. There is nothing to prevent a coastal State, in fact, from granting foreigners the right to fish within its territorial sea. A State which has a four- or six-mile limit to its territorial sea may thus authorize foreigners to fish up to a distance of three miles, say, from the coast, or may by means of a treaty authorize the nationals of certain foreign States to fish in certain delimited parts of its territorial sea. Treaties of this kind have been concluded between Sweden and the neighbouring countries of Denmark and Norway on a basis of reciprocity; but it is clear that treaty provisions of this kind have no bearing on the breadth of the territorial sea.

To link the territorial sea with the continental shelf would result in certain States receiving a vast territorial sea and others none at all. The International Law Commission's draft seeks to ensure, so far as the sea situated over the continental shelf is concerned, the maintenance of the principle of freedom of the seas.

A suggestion which appears to correspond fairly closely with the Swedish view is that set forth in the first report by Mr. François, i.e., that each State should be entitled to fix its own territorial limit up to a maximum of six miles.

However, the territorial limit depends not only on the breadth of the territorial sea but also on the base line used to measure it. In this connexion, the Commission, in articles 4 and 5, has adopted an idea already put forward in the rapporteur's proposals whereby the low-water mark along the coast should, following the general rule, constitute the base line, thus enabling the limit of the territorial sea to be obtained by means of arc of circles drawn with a radius corresponding to the breadth of the territorial sea from all points on the coastline. In exceptional cases, however, where this is justified for historical reasons or where circumstances necessitate a special régime, the base line should be independent of the low-water mark.

In special cases of this kind, the method of straight base lines joining appropriate points on the coast might be employed. As a general rule, the maximum permissible length for a straight base line should, according to the Commission's proposed text, be ten nautical miles. The Commission came to no decision on the question of the measurement of the territorial sea in bays and gulfs, mouths of rivers and groups of islands.

According to the Swedish view, which has been given legislative form in a long series of regulations, the Swedish territorial sea extends to four nautical miles from the straight lines joining the headlands of the coast or of islands along the coast and reefs not permanently covered by the sea. In bays and gulfs, the base line for measuring the territorial sea is across their mouth.

The base lines which form the starting point for measuring the territorial sea coincide with the outer limits of internal waters—a principle which has, moreover, been expressly laid down in the Swedish regulations.

The Swedish system of measuring the territorial sea is thus based on the fact that bays and gulfs, waters in archipelagoes and the waters on the landward side of off-shore islands are internal waters. They assume this character for purely geographical reasons. Although connected with the sea, they are surrounded by land in such a way as to belong to the land domain. Since internal waters are subject, from the standpoint of international law, to the same régime as the mainland, they are thus treated as part of the mainland from a geographical and legal standpoint alike. It follows *ipso facto* that the territorial sea is measured from the outer limits of internal waters. Any other method would lead to inadmissible consequences not only because the territorial limit would be too extensive for practical purposes but also because of the fact that, if the starting point for measuring the territorial sea were situated within the limits of the internal waters, an expanse of water would be obtained consisting both of internal waters and of territorial sea and hence subject to conflicting rules of international law.

In point of fact, the International Law Commission's draft text appears, in article 5, to be based on the same idea as that expressed in Swedish law, inasmuch as the waters lying within the straight lines mentioned in the article would be treated as internal waters. The same is undoubtedly true of waters in bays, groups of islands, etc., which have not been mentioned in the Commission's draft. It is because of the "internal water" character of these expanses of water that the territorial sea in those areas is measured from lines constituting their outer limits. As a bay, from a geographical standpoint, does not form part of internal waters, this method of measuring the territorial sea cannot be employed.

The Swedish Government considers the method of measurement adopted in Swedish law an appropriate one. It embodies a uniform principle: since internal waters are treated from a geographical and legal standpoint as part of the land domain, their outer limits should be taken, like the coastline of the mainland, as the base line for measuring the territorial sea. This principle is, moreover, universally accepted. In certain countries, like the Scandinavian countries, where the coasts are nearly everywhere cut up into bays and gulfs or fringed with islands and archipelagoes, this principle is applied for natural reasons over almost the entire stretch of the very long coast.

It thus appears that the provision concerning the starting point for measuring territorial seas can be reduced to a single simple rule: the starting point is the low-water mark along the coast or, where internal waters exist along the coast, the lines which constitute the seaward limit of those internal waters. It might be noted, too, that in its judgment on the Fisheries case between the United Kingdom and Norway the International Court of Justice made it clear that the measurement of territorial waters from straight lines in places where the coast was indented, as in the case of the Norwegian coast, could in no sense be characterized as exceptions.

Hence the problem comes down to the question of which expanses of water should be regarded as internal waters. The fact that "internal waters" are actually a geographical concept has already been referred to. The criterion in the matter should be that the expanse of water in question is so surrounded by land, including

the islands along the coast, that it seems natural to treat it as part of the land domain. The International Law Commission appears to have adopted the same principle when it refers to "sea areas. . . sufficiently closely linked to the land domain to be subject to the régime of internal waters". Since this criterion is thus purely geographical, the Swedish Government is unable to find any justification for fixing maximum lengths for the lines which, in bays, groups of islands, etc., constitute the limit between internal waters and the territorial sea. For example, in the case of a sea area which is clearly in the nature of a bay, the line should obviously be drawn across the mouth of the bay irrespective of its width. The Swedish Government was somewhat surprised to see that the cartographic experts who met at The Hague in 1953 had invented the term "juridical bay". In the Swedish Government's opinion, this term has no foundation in international law, still less in cartography. A bay does not cease to be one at the point where a line ten nautical miles long is drawn across it. The proportion between the width of the bay at its mouth and the depth of the indentation of the coastline which it produces is a better criterion. There is no need to fear exaggerated claims if the principle is simply adhered to that the areas of water to be delimited seawards must clearly possess the character of internal waters. In any case, the maximum distances of ten miles along the coast and five miles between islands, as proposed by the cartographic experts, have no support in international law, as is clear from the practice of the various States and important international judgments, such as the arbitral award of 1910 on fisheries in the north Atlantic, and the judgment of the International Court rendered in 1951 in the Fisheries case between the United Kingdom and Norway. The fact that the ten-mile line has been used in certain fishery conventions as a starting point for measuring fishing limits proves nothing as regards the territorial sea.

The above statement represents the Swedish Government's view on the main questions relating to the area of the territorial sea, including the questions which the Commission left outstanding, such as that of the base line for measuring the territorial sea in bays and groups of islands and particularly in archipelagos along coasts. As regards the other articles of chapter II of the Commission's draft, the Swedish Government has no comments to make at present, but reserves its final position should it be proposed to draw up provisions on the subject in a convention on the régime of the territorial sea.

The Swedish Government would merely like to draw attention to one point of detail in this connexion. In article 15, the Commission takes up the question of the delimitation of the territorial sea of two States the coasts of which are opposite each other. It provides that the boundary of the territorial sea between two States so situated, where the distance between the coasts is less than twice the breadth of the territorial sea, is, in the absence of an agreement to the contrary between those States, or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured. For Sweden, this provision is of little practical importance, since her boundaries with neighbouring countries are laid down by conventions. But how, it may be asked, is the territorial limit to be measured in cases where the coastal States have different breadths for their territorial seas—for instance three and six miles respectively—while the distance between their coasts is seven miles?

Chapter III of the Commission's draft is headed "Rights of Passage", and contains several articles which broadly correspond to the provisions on which agreement was reached at The Hague Conference in 1930.

Apart from the reservations already made, the Swedish Government has only one reflection to add concerning the Commission's view that, under existing international law, warships have the right of passage through the territorial sea of a foreign State. The coastal State being entitled, according to the Commission's draft, to prohibit passage on the ground that this is necessary for the maintenance of public order and security, and each State naturally being empowered to decide for itself what is necessary for its security, the right of passage of warships appears to rest on a somewhat precarious basis. This being so, the Swedish Government wonders whether

it would not be preferable to make no provision for the right of passage for warships in a future convention.

14. THAILAND

Letter dated 18 April 1955 from the Ministry of Foreign Affairs of Thailand

[Original: English]

In continuation of this Ministry's Note No. 33728/2497 dated 23 November B.E. 2497 (1954), concerning your invitation to the Thai Government to communicate any comments they may wish to make upon the draft articles on the "régime of the territorial sea", I have the honour to inform you that I have now received a reply from the competent authorities who consider that the said draft is acceptable in principle and express the regret that it has not been possible to communicate their reply sooner.

15. UNION OF SOUTH AFRICA

Transmitted by a letter dated 29 March 1955 from the permanent delegation of the Union of South Africa to the United Nations

[Original: English]

1. General

In the second paragraph of his circular letter No. LEG.292/9/01 of 31 August 1954, the Director of the Legal Department draws attention to the Commission's statement that it would be greatly assisted in its task if Governments would define their attitude concerning the problem of the breadth of the territorial sea.

The Union Government has hitherto defined her territorial waters in terms of the three-mile limit which is accepted by a large number of maritime States. In view of the technical advances made in the last years, however, the Union Government recognizes that the historical reasons for the three-mile limit no longer apply to the same extent, and would not be averse to a limited extension of the territorial sea—say to five or six miles—provided that the necessary agreement among States were forthcoming.

Article 1

The Union Government agrees that the term "territorial sea" is preferable to "territorial waters".

Article 4

The Union Government agrees that the line from which the belt of territorial sea should be measured should normally be the low-water line or, if this is not accurately shown on the available charts, the shoreline. It is urged, however, that serious consideration should also be given to framing the article in such a way as to enable States whose coastlines contain long sandy stretches to measure their territorial waters from the "surf-line" or the normal outer (seaward) edge of the surf. The reasons for this suggestion are largely practical ones; the belt of surf may, in some cases, extend far out to sea but only those waters which lie to seaward of the surf-line are of importance to navigation. It is possible that the adoption of the surf-line as the point of departure in suitable cases might be justified by the principle that the shoal waters which are normally covered by surf are of so little importance to other States that they could be assimilated to the régime of internal waters.

Article 5

The Union Government feels that the use of straight base lines may be justified in certain circumstances but it is not clear why the limitations in paragraph 2 regarding the maximum length of a base line and the maximum distance from the shore should be imposed, as any such limitations must necessarily be arbitrary.

A detailed consideration of straight base lines is, however, inseparable from a study of the conditions under which bays may be enclosed. As the Commission has postponed its study of the régime of bays, the Union Government prefers to reserve further comment on article 5 until such time as the draft of article 7 is available.

Article 10

In the hypothetical case of a small island lying 2T miles off a comparatively straight shore-line (T being the breadth of the territorial sea) the belt of territorial sea surrounding the island would just touch the outer edge of the territorial sea of the mainland. This might result in very narrow wedges of the high seas lying between the territorial sea of the mainland and that of the island, which would be of no value for purposes of navigation and which would be difficult to follow on a chart. It might be advisable to provide that where an island lies within approximately 2T miles of the coast, the territorial sea of the mainland may be drawn so as to bulge outward in a smooth curve to the outer limit of the territorial waters of the island, thus eliminating the narrow enclaves of high seas.

Article 12

The Union Government agrees with the main tenor of the new draft. In the circumstances envisaged in the second sentence of the Union Government's comment on article 4, however, it is felt that the surf-line to seaward of a drying rock or shoal which lies within the territorial sea should be taken as the point of departure for delimiting the territorial sea, rather than the rock of shoal itself.

Article 19

It is assumed that paragraph 2 of this article will apply in peacetime only.

Article 21

The Union Government agrees with this article, as read with the third paragraph of the Commission's comments.

16. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Transmitted by a note verbale dated 1 February 1955 from the permanent delegation of the United Kingdom to the United Nations

[Original: English]

Introduction

In their comments of 2 June 1952, on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951, Her Majesty's Government in the United Kingdom stated that they would await with very great interest the Commission's report on the régime of territorial waters. Her Majesty's Government have now received this report and wish to say what a valuable contribution they feel it to be towards the codification of the law of the sea.

In their previous comments Her Majesty's Government stated that they understood the Commission's task to be the "codification" of the régime of the high seas in the sense of "the more precise formulation and systematization of the law in areas where there has been extensive State practice, precedent and doctrine", but that they did not propose to criticize any of the rules adumbrated by the Commission solely on the ground that these rules were not at present rules of customary international law. In the view of Her Majesty's Government the Commission's work should be regarded as a whole, as forming part of the preparatory work of a possible international convention regarding the law of the sea. At the same time, Her Majesty's Government feel obliged to state that they do not regard themselves finally committed by any opinion which they may happen to express in these comments.

Article 1. Juridical status of the territorial sea

Her Majesty's Government approve this article.

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

Her Majesty's Government approve this article.

Article 3. *Breadth of the territorial sea*

1. Her Majesty's Government consider that the proper starting-point from which to approach the very difficult problem of the breadth of the territorial sea is the consideration of the question whether the breadth of the territorial sea is or is not a matter governed by international law. The answer to this question, in the view of Her Majesty's Government, admits of no doubt. That the breadth of the territorial sea is a matter governed by international law is clear from the following passage in the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* case (*I.C.J. Reports* 1951, p. 116) where the Court said (at p. 132):

"The delimitation of sea areas has always an international aspect: it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."

It is clear, therefore, that neither as regards the breadth of the territorial sea, nor as regards the manner of its delimitation, are States entitled to act entirely at their own discretion. The breadth of the territorial sea is not a matter "essentially within the domestic jurisdiction" of States; it is a matter regulated by international law.

2. The next question which arises is the manner in which international law regulates the breadth of the territorial sea. Theoretically, three solutions are possible—e.g.:

- (i) Save in exceptional cases, every State should have the same breadth of territorial sea (*uniform solution*);
- (ii) States in particular regions should have a territorial sea of different breadth from that of States elsewhere (*regional solution*);
- (iii) Each State should have a territorial sea of a particular breadth depending upon its own local circumstances (*local solution*).

3. There is always a superficial attractiveness about regional solutions of international problems. The effectiveness of such solutions depends, however, upon the character of the problems which have to be solved. Where the problems themselves have a universal or global character, it becomes necessary *ex hypothesi* to exclude regional solutions. This appears to be true of the present case—the seas encircle the globe. In theory, States in a particular region might agree by treaty to apply between themselves different territorial limits from those required by general international law, but it is questionable how far a group of States would be entitled by these means to apply amongst one another narrower limits than those applied to the rest of the world. States outside the regional system would certainly not be bound to accept wider limits than those applied to the States belonging to the group. In any case, from the point of view of the States within the regional system, the practical difficulty of having to apply two different limits, one to the States within the system and the other to the States outside the system, would appear to be very great. Moreover, past practice has shown that a regional solution provides no real answer. For example, countries bordering the Mediterranean have claimed widely differing limits for their territorial sea, e.g., 3, 6, 12 miles, 20 km. Then again certain countries within the region concerned might have coastlines bordering other seas, where other limits might apply. The practical and political difficulties of drawing the line between one region and another are obvious. On all grounds, therefore, practical as well as theoretical and juridical, it seems reasonable to conclude that there is no place for a regional solution of the problem.

4. If that be so, it is necessary to consider the respective merits of a uniform and of a local solution of the problem. It has been argued in favour of the local solution that each State has a separate history, that its geographical circumstances differ from those of other States, and that it has economic and social needs different from those of other States. All these factors, it is said, dictate a local solution of the problem. In the opinion of Her Majesty's Government, this argument needs to be approached with great

caution. Even if the premises be correct (itself a matter of some doubt) does the conclusion necessarily follow? Is not a uniform solution in principle desirable? Is it not possible to accommodate all local factors within the framework of a uniform solution? These are large questions to which, it is suggested, the Commission should give earnest consideration.

5. For their part, Her Majesty's Government have no doubt that a uniform solution is not only preferable to a local one but is also dictated by the very necessity of the case. As has already been said, the seas encircle the globe. It would be contrary to the fundamental doctrine of the quality of States, if all States were not, in principle, governed by the same rules of international law in the matter of the definition of the boundary between the area of the high seas, which is available for use for lawful purposes to all States, on the one hand, and the area subject to the territorial sovereignty of the State, on the other hand.

6. The large number of accessions to such international marine conventions as the 1930 Load-Line Convention and 1948 Convention for the Safety of Life at Sea serve to show that, from the very circumstances, there is in maritime matters a natural trend towards uniformity.

7. In the view of Her Majesty's Government, therefore, the real problem of the territorial sea is not that of deciding as between a uniform and a local solution of the problem but rather that of devising a framework in which a uniform solution, without losing its essential feature of uniformity, can be adapted to meet a variety of local factors.

8. The local factors which might rank for consideration are essentially (i) historical; (ii) geographical; and (iii) economic factors. So far as rules of law are concerned, historical and geographical considerations would seem, by virtue of their greater permanence, to stand on a different plane from economic considerations. In support of this conclusion may be cited the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* case. In that case the Court gave clear recognition to the doctrine of "historic waters" which it defined as "waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title." (*I.C.J. Reports* 1951, p. 130)—the essential element of an historic title being "the general toleration of foreign States" for a sufficiently long period (*Ibid.*, p. 138). The Court also certainly considered that geographical factors could affect "the application of general international law to a specific case" (*Ibid.*, p. 131). But when it came to economic factors the Court said: "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*Ibid.*, p. 133). In other words, while paying due attention to economic factors, the Court seems to have considered that these factors alone were not sufficient to cause the rules of general international law to be modified, unless they were also supported by historical or geographical considerations.

9. Historical factors are clearly provided for within the framework of a uniform rule for the breadth of the territorial sea by the doctrine of "historic waters". Indeed, the very existence of this doctrine and its recent affirmation by the Court are cogent evidence that international law recognizes the existence of a uniform solution for the question of the territorial sea. If the "local" solution were the correct one, with each country entirely at liberty to define its own limits for territorial waters, the need for the concept of "historic waters", involving a claim to a limit different from an implicitly accepted norm, could never have arisen.

10. Similarly, geographical factors are clearly provided for within the framework of a uniform rule for the breadth of the territorial sea by the principle, laid down in the *Anglo-Norwegian Fisheries* case and followed by the Commission in articles 4 and 5 of its report, that although, as a general rule, "the breadth of the territorial sea is measured from the low-water line along the coast . . .", nevertheless "where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be inde-

pendent of the low-water mark". Her Majesty's Government are not aware, however, that there is any authority—or indeed any necessity—for the proposition that the rule of international law concerning the actual breadth of the territorial sea as measured from the base lines is in any way affected by geographical factors.

11. There remain the economic factors. In the opinion of Her Majesty's Government these factors, like the geographical factors, do not affect the actual breadth of the territorial sea. In so far as they have any bearing upon the matter, they relate not to the breadth of the territorial sea at all, but to questions falling under the régime of the high seas.

12. Thus, Her Majesty's Government agree that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources" (article 2 of the draft articles on the continental shelf adopted by the Commission in 1953), the continental shelf being "the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres" (article 1 of the same draft articles). There are also the rights of some States in respect of sedentary fisheries, which may or may not exist independently of the continental shelf. These are economic rights of the greatest importance. The existence of these rights also shows that the way international law makes provision for special economic factors is not by qualifying the uniformity of the rules which apply to the breadth of the territorial sea but by taking them into account in the rules which relate to the régime of the high seas.

13. The question of high seas fisheries has been advanced in some cases as a reason for the extension of territorial waters. In the view of Her Majesty's Government, this economic factor, like other economic factors, is not, and can never be, an adequate reason for disrupting a uniform solution of the problems of the territorial sea. Like the other economic factors it is a question which relates to the régime of the high seas rather than to the breadth of the territorial sea. That it may be a peculiarly difficult question in no way affects this basic principle.

14. In the opinion of Her Majesty's Government, questions relating to the problem of high seas fisheries, as well as to the equally difficult problem of oil pollution, are eminently susceptible of regulation by international agreement.

15. If it be accepted that a uniform solution of the problem of the territorial sea is the only possible one on all grounds, theoretical, practical, juridical and historical, Her Majesty's Government believe there can equally be no doubt that the three-mile limit is the only one which commands enough support to be acceptable as a general uniform limit. No other limit which has been suggested commands sufficient support in the practice of States, the decisions of international tribunals or the opinions of other authorities. There is, moreover, the practical difficulty which faces mariners of fixing positions at sea with precision at a distance much greater than three miles from the coastline. Whichever criterion one adopts, whether it be the length of the coastlines involved or the size of the merchant navies of the countries involved, the three-mile limit appears to be the limit which the Commission should place in the forefront of its deliberations. The Commission has stated that agreement on the breadth of the territorial sea "will be impossible unless States are prepared to make concessions". Her Majesty's Government believe that this statement gives too much the impression that a uniform breadth can be arrived at by concessions both from those who claim more and from those who claim less. Her Majesty's Government suggest that no valid arguments have been put forward for claims for more than a three-mile limit, which are not in fact related rather to the exercise of certain limited and particular rights on the high seas beyond the territorial sea than to the basic question of the breadth of the territorial sea itself.

16. As Her Majesty's Government have already pointed out, the rules of the régime of the high seas already take account of the continental shelf and sedentary fisheries, while there are international conventions regarding oil pollution and high seas fisheries. Much has already been done to clarify the legal position in all these fields but Her Majesty's Government believe that more can

and will be done, either through the instrumentality of the Commission or independently of the Commission.

17. In addition, Her Majesty's Government have already made what they regard as a most valuable contribution to agreement on this subject—and which, if agreement were reached, would amount to a significant concession—when they stated in the annex to their letter of 2 June 1952, the following:

"Article 4

"It has hitherto been the policy of Her Majesty's Government to oppose any claim to the exercise of jurisdiction outside territorial waters. Many countries have, however, claimed to exercise jurisdiction for certain limited purposes beyond territorial limits. For the most part these purposes have related to the enforcements of customs, fiscal or sanitary regulations only and the jurisdiction has been exercised within modest limits, generally within a "contiguous zone" not more than twelve miles from the coast. Her Majesty's Government have not themselves found it necessary to claim a contiguous zone, and wish to place on record their emphatic opposition as a matter of principle to any increase, beyond limits already recognized, in the exercise of jurisdiction by coastal States over the waters off their coasts, whether such increase takes the form of the extension of territorial waters or the exercise of wider forms of jurisdiction outside territorial waters. Her Majesty's Government are satisfied, however, that on the basis of established practice, the article proposed by the Commission is acceptable provided that:

"(i) Jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations only,

"(ii) Such jurisdiction is not exercised more than twelve miles from the coast,

"(iii) This article is read in conjunction with another article stating that the territorial waters of a State shall not extend more than three miles from the coast unless in any particular case a State has an existing historic title to a wider belt."

18. In general, and in conclusion on the question of the breadth of the territorial sea, Her Majesty's Government feel that the present tendency to claim extended, and in many cases very extensive limits, covering great areas of the seas, is not a forward movement, and does not represent a true development of international law. It is a retrograde tendency, and a reversion to a state of things that existed some centuries ago, when many States laid claim to the entire seas near their coasts. These claims had to be abandoned in the course of time on account of the friction they engendered, the interference with freedom of movement and navigation involved, and the impossibility of effectively enforcing pretensions of so wide a character. To revive them now would be to go back to a situation that has long been held to be obsolete and undesirable, and would give rise to evils that no local advantages could justify. Her Majesty's Government recognize that the reasonable needs of States to exercise control over the waters in the immediate vicinity of their coasts must be met; but they believe that all such needs can in fact be met within the scope of the principle of the three-mile limit supplemented by a contiguous zone for special purposes. Wider claims impinge on the basic principle of the free availability of the seas for the common use of all mankind—a principle of greater importance today than ever, and one which Members of the United Nations should be the first to respect, since claims to appropriate or assert jurisdiction, or claim exclusive rights over the high seas or parts of them are difficult to reconcile with the spirit of the Charter.

19. Her Majesty's Government would draw attention to the resolution passed by the General Assembly on 17 December 1954, inviting the Governments of Member States to transmit to the International Law Commission their views concerning the principle of freedom of navigation on the high seas. Her Majesty's Government will be sending a separate statement of their views in response to this resolution, but meanwhile take the opportunity to suggest that the embodiment of the uniform three-mile limit in the articles of the International Law Commission will be a decisive factor in the maintenance of this principle.

*Article 4. Normal base line**Article 5. Straight base lines*

Her Majesty's Government approve these articles subject, however, to the following observations.

(i) It must be clearly understood that the only legitimate exceptions to the principle enunciated in article 4 are (a) historical reasons; and (b) where circumstances necessitate a special régime because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity. That this is so is implicit in the opening sentence of article 5, but it might be as well for the Commission to consider rendering it also explicit. In particular, it is not legitimate to resort to the use of base lines for economic reasons alone.

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

Article 6. Outer limit of the territorial sea

Her Majesty's Government approve this article.

Article 7. Bays

Her Majesty's Government approve the article on bays (article 8) in the third report of the rapporteur (A/CN.4/77), subject to the addition of the phrase "measured from low-water mark" after the words "ten miles".

Article 8. Ports

In view of modern developments Her Majesty's Government think that some qualification of this article is now necessary. Thus, in the Persian Gulf, for example, a pier seven miles long is under construction.

It would seem to be desirable that installations of the type just mentioned should be treated on the same basis as artificial installations on the continental shelf, i.e., they should be entitled to a relatively limited navigational safety zone rather than to a belt of territorial waters.

Article 9. Roadsteads

The insertion of, for example, "substantially", between the words "are" and "used" would help to prevent the undue extension of territorial waters by means of roadsteads that are used only rarely.

The sentence: "Such an extension to the territorial sea will not increase the area of inland waters" should be added to the article.

Article 10. Islands

Her Majesty's Government approve this article.

Article 11. Groups of islands

Her Majesty's Government will await the text of the new draft before giving their comments.

Article 12. Drying rocks and shoals

Her Majesty's Government approve this article subject to the insertion, after the words "territorial sea" in line 2, of "as measured from the low-water mark or from a base line" and the insertion, for the word "de-limiting", of the words "further extending". This amendment is intended to ensure that drying shoals are used only once to extend territorial waters and not in series with each extension bringing further rocks into range as points of departure for further extension.

In the interests of clarity, Her Majesty's Government suggest that this article should refer to "Drying rocks and drying shoals", as there is some confusion as to the precise meaning of the word "shoal".

Article 13. Delimitation of the territorial sea in straits

Her Majesty's Government approve this article.

Article 14. Delimitation of the territorial sea at the mouth of a river

Her Majesty's Government suggest that this article, when drafted, should make clear that the "mouth of a river" means the river proper and not an estuary or bay into which it may flow. The draft in the 1953 report (A/CN.4/61) needs more precise wording to this end.

Article 15. Delimitation of the territorial sea of two States the coasts of which are opposite each other

Her Majesty's Government approve this article, but suggest that the words "the nearest points on" be inserted before the words "the base lines" in the last line but one of the article. This would also apply in the last line but one of article 16.

Article 16. Delimitation of the territorial sea of two adjacent States

Her Majesty's Government approve this article.

In connexion with articles 15 and 16, Her Majesty's Government wish to state, however, that in their view, the question of the rules which should govern the delimitation of the contiguous zones of adjacent States and States whose coasts are opposite each other, requires consideration by the Commission, just as much as the question of the delimitation of the territorial sea of States so situated.

Her Majesty's Government consider that every State or territory with a seaboard should have direct access to the high seas without the necessity for shipping to pass through the contiguous zone of a neighbouring State or territory. It may be that, in general, principles similar to those contained in articles 15 and 16 would be satisfactory for this purpose, but in certain areas, where States or territories are situated in close proximity to one another, Her Majesty's Government consider that the application of these principles might preclude such direct access. In these areas, therefore, they consider that the principle of contiguous zones should not be applied at all unless all the parties concerned reach agreement on the delimitation of their respective zones.

Article 17. Meaning of the right of passage

Her Majesty's Government propose that the following provisions replace articles 17, 18, 19, 20, 26 and 27.

The right of innocent passage

1. All vessels²³ shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding from the high seas to internal waters or of making for the high seas from internal waters.

²³ Her Majesty's Government oppose the separate treatment of warships in these articles.

Sections 3 and 4 of article 26, referring to warships, are substantially embodied as Sections 7 and 8 of the new article 17 proposed by Her Majesty's Government.

3. Passage includes stopping and anchoring provided these acts are incidental to ordinary navigation or are rendered necessary by *force majeure*, by stress of weather or by distress.

4. Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of committing any act prejudicial to the security or to the fiscal interests of that State.⁴⁴

5. A coastal State is bound to use the means at its disposal to safeguard in the territorial sea the principle of the freedom of maritime communications and not to allow the territorial sea to be used for acts contrary to the rights of other States.⁴⁵

6. A coastal State may not interfere with the exercise of the right of innocent passage. It may, however, protect itself in the territorial sea against any act prejudicial to its security or to its fiscal interest. For this purpose it may issue regulations and take the necessary steps to enforce them.

7. Submarines, when passing through the territorial sea of another State, shall navigate on the surface.

8. Under no circumstances, however, may there be any interference with the innocent passage of any foreign vessels through straits used for international navigation between two parts of the high seas.

Article 21. Duties of foreign vessels during their passage

Her Majesty's Government approve this article.

Article 22. Charges to be levied upon foreign vessels

Her Majesty's Government approve this article.

Article 23. Arrest on board a foreign vessel

Her Majesty's Government approve this article in principle, but consider that section 3 should be made more precise and in particular that greater weight should be given in this section to the interests of navigation. The phrase "due regard" is not in itself a precise enough limitation of the freedom of action of the coastal State in connexion with international navigation.

Article 24. Arrest of vessels for the purpose of exercising civil jurisdiction

The question arises of the compatibility of this article with the provisions of the 1952 Brussels Convention on the Arrest of Sea-going Ships for the Purpose of Exercising Civil Jurisdiction. The Brussels Convention limits the right of arrest to a specified class of maritime claims enumerated in the Convention whereas the International Law Commission draft limits it in a different way (i.e., "obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State"). Thus it permits arrest for other than "maritime claims" as these are defined in the Brussels Convention but is narrower in not permitting the arrest of sister ships or arrest for causes of action arising on previous voyages.

Article 25. Government vessels operated for commercial purposes

Her Majesty's Government hold the view that the ships to which State immunity is applicable need to be very carefully defined. For this reason, Her Majesty's Government are not a party to the Brussels Convention of 1926 concerning the Immunity of State-

⁴⁴ Her Majesty's Government feel obliged to point out that the wording "any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect" is so worded as to work in favour of the coastal State, and may be open to abuse. It should be made clear that the burden of proving that the passage is "prejudicial, etc.", lies with the coastal State and that this burden is one which must be discharged according to the criteria of international law, rather than the law of the coastal State.

Her Majesty's Government therefore suggest that it would be better if the matters concerning which a ship may commit an offence, e.g., security, customs, immigration, could be specified. This method is already used in article 21.

⁴⁵ While this paragraph which largely follows paragraph 1 of the Commission's article 19 is probably satisfactory, there ought to be some elucidation of the obligation "to use the means at its disposal to safeguard in the territorial sea the principle of freedom of maritime communication". Is there, for instance, a legal obligation upon the coastal State to remove wrecks, or even to give adequate warning of their existence? To what extent is there a legal obligation upon the coastal State to provide lights and other navigational facilities? Care should be taken not to put the duty of the coastal State too high or to introduce any principle of "strict liability". (It is suggested that the Commission give further elucidation to these questions.)

owned Ships and have reserved the position of state-owned ships under the Brussels Convention of 1952 relating to the Arrest of Sea-going Ships. Her Majesty's Government cannot therefore accept the article in the terms proposed in article 25 and must reserve their position although, in principle, they have no objection to government ships employed on commercial service being covered by the provisions of articles 17 and 21-24.

Article 26. Warships

Article 27. Non-observance of the regulations

Both these articles would be absorbed in the new article 17 as proposed by her Majesty's Government.

17. UNITED STATES OF AMERICA

Note verbale dated 3 February 1955 from the permanent delegation of the United States to the United Nations

[Original: English]

The representative of the United States of America to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honor to refer to the note LEG.292/9/01, dated 31 August 1954, from the Principal Director in charge of the Legal Department, concerning the draft articles on the régime of the territorial sea of the International Law Commission set out in the report covering the work of its sixth session, 3 June - 28 July 1954.

The Commission prepared a provisional text for all but four of the articles of the proposed draft and requested the comments of Governments on these articles. Among the articles for which no text has yet been drafted is article 3 concerning the breadth of the territorial sea. With respect to this article, the Commission requested views and suggestions which might help it to formulate a concrete proposal.

So far as concerns the articles now drafted, the Government of the United States believes that they constitute, as a whole, a sound exposition of the principles applicable to the régime of the territorial sea in international law. The Government of the United States has, however, certain suggestions to make with respect to articles 5 and 19.

Article 5 provides, *inter alia*, that where circumstances necessitate a special régime because the coast is deeply indented or cut into "or because there are islands in its immediate vicinity", the base line may be independent from the low-water mark and may be a series of straight lines. The Government of the United States presumes from the comments which follow the article that it was not intended that the presence of a few isolated islands in front of the coast would justify *per se* the use of the straight line method. The islands, as the comments indicate, would have to be related to the coast in somewhat the same manner as the *skjaergaard* in Norway. In the view of the Government of the United States, the words "or because there are islands in its immediate vicinity" are too general and do not convey as accurately as desirable what the Commission apparently had in mind.

With respect to article 19, the Government of the United States is satisfied that the text incorporates principles upheld by the International Court of Justice in its judgment of 9 April 1949, in the Corfu Channel case, but it believes that the comments on this article should include a short statement of the factual circumstances upon which the Court was ruling, since such a statement would point up and illustrate the significance and meaning of the principles embodied in article 19.

So far as concerns the question of the breadth of the territorial sea and the various suggestions set out in paragraph 68 of the report, the guiding principle of the Government of the United States is that any proposal must be clearly consistent with the principle of freedom of the seas. Some of the proposals amount to a virtual abandonment or denial of that principle. In this connexion, it must be pointed out that the high seas are an area under a definite and established legal status which requires freedom of navigation

and use for all. They are not an area in which a legal vacuum exists free to be filled by individual States, strong or weak. History attests to the failure of that idea and to the evolution of the doctrine of the freedom of the seas as a principle fair to all. The régime of territorial waters itself is an encroachment on that doctrine and any breadth of territorial waters is in derogation of it, so the derogations must be kept to an absolute minimum, agreed to by all as in the interest of all.

That the breadth of the territorial sea should remain fixed at three miles is without any question the proposal most consistent with the principle of freedom of the seas. The three-mile limit is the greatest breadth of territorial waters on which there has ever been anything like common agreement. Everyone is now in agreement that the coastal State is entitled to a territorial sea to that distance from its shores. There is no agreement on anything more. If there is any limit which can safely be laid down as fully conforming to international law, it is the three-mile limit. This point, in the view of the Government of the United States, is often overlooked in discussions on this subject, where the tendency is to debate the respective merits of various limits as though they had the same sanction in history and in practice as the three-mile limit. But neither six nor nine nor twelve miles, much less other more extreme claims for territorial seas, has the same historical sanction and a record of acceptance in practice marred by no protest from other States. A codification of the international law applicable to the territorial sea must, in the opinion of the Government of the United States, incorporate this unique status of the three-mile limit and record its unquestioned acceptance as a lawful limit.

This being established, there remains the problem of ascertaining the status of claims to sovereignty beyond the three-mile limit. The diversity of the claims involved bears witness, in the opinion of the Government of the United States, to the inability of each to command the degree of acceptance which would qualify it for possible consideration as a principle of international law. Not only does each proposed limit fail to command the positive support of any great number of nations, but each has been strongly opposed by other nations. This defect is crucial and, in view of the positive rule of freedom of the sea now in effect in the waters where the claims are made, no such claim can be recognized in the absence of common agreement. A codification of the international law applicable to the territorial sea should, in the view of the Government of the United States, record the lack of legal status of these claims.

¹ While unilateral claims to sovereignty or other forms of exclusive control over waters heretofore recognized as high seas cannot be regarded as valid, this is not to say that the reasons, legitimate or otherwise, which motivate such claims should be ignored. In some cases, at least, these attempts of the coastal State to appropriate to its exclusive use large areas of the high seas seem to be based on a real concern for the conservation of the resources of the sea found in such waters. Efforts of the Commission and of the nations to settle such problems should be unceasing. But the remedy is not unilateral action in defiance of long-established and sound principles of law applicable to other matters. In many cases the nations taking such action would seem to have little to gain from abandonment of such principles and reversion to a condition of anarchy on the high seas. The sounder approach would appear to be an effort to reach agreement on the principles applicable to the real matters at issue, such as conservation of natural resources and rights to fish.

18. YUGOSLAVIA

Transmitted by a letter dated 15 March 1955 from the permanent delegation of Yugoslavia to the United Nations

[Original: English]

The Secretariat of State for Foreign Affairs of the Federal People's Republic of Yugoslavia wishes to confirm the receipt of the letter of the Legal Department No. LEG.292/9/01 of 31 August 1954, and has the honour to inform that the Yugoslav Government has carefully studied the draft on the "Régime of the territorial sea", elaborated by the International Law Commission at its sixth session.

In reference to the above-mentioned letter, the Yugoslav Government wishes to point out the following :

I

In studying the draft on the régime of the territorial sea, the Yugoslav Government cannot but also review the draft submitted by the special rapporteur at the fourth session of the International Law Commission.²¹ From the formal point of view the draft on the régime of the territorial sea elaborated by the International Law Commission at its sixth session is in the main identical with the draft considered at the fourth session of the Commission with one great, basic difference (a negative one for the draft elaborated by the Commission), viz., that the final drafting of three articles concerning the three most important questions has been postponed until a later date. These articles deal with the breadth of the territorial sea, bays and groups of islands. For these reasons, the Yugoslav Government considers this draft to be a step backward in the matter of codification and development of international maritime law. The draft considered at the fourth session was in the main satisfactory and the Yugoslav Government wishes to express its regret over the fact that that draft has not been retained as a basis for discussion at the General Assembly of the United Nations.

II

As regards the draft on the régime of the territorial sea elaborated by the Commission at its sixth session (A/2693), the Yugoslav Government wishes to make the following remarks :

Sub article 1: No remarks.

Sub article 2: No remarks.

Sub article 3: The Yugoslav Government regrets that this most important question has not found its solution in the Commission's report. In its opinion the breadth of the territorial sea should amount to six miles for the reason, among other things, that the present technical development, and especially the speed of modern ships, has made such a great progress that, actually, the breadth of three miles (which is, by the way, over 100 years old) is today no longer satisfactory from the point of view of the security of a State. Today, a State must have a much wider belt of sea over which it is able to exercise control and sovereignty (if only limited sovereignty), if it is to be guaranteed at least some security against various violations and the presence of undesirable ships.

Furthermore, the economic interests of coastal States also speak in favour of a six-mile breadth. If it is kept in mind that the coastal State has the right to reserve the exploitation of the resources of the sea exclusively for its own citizens, then such a State cannot be indifferent as to whether it will extend this right to a narrow belt of sea of three miles or to a somewhat broader belt—i.e., to six miles. All the more so since the present modern fishing equipment requires wider spaces, if it is to be used effectively. This is especially important for the under-developed countries, which have no possibilities to send their citizens to far-off areas of open sea, where they could make up for what they do not find in their narrow territorial sea. Consequently, they have to rely only on their territorial sea which very often is not rich enough to satisfy the needs of the fishing industry of such a country.

Therefore, in the opinion of the Yugoslav Government, article 3 of the draft should read :

"The breadth of the belt of sea defined in article 1, paragraph 1, shall be fixed by the coastal State but may not exceed six marine miles."

Sub article 4: No remarks.

Sub article 5: Essentially, the Yugoslav Government has no remarks to make in connexion with paragraph 1 of this article, except, perhaps, that the meaning of the term "justified for historical reasons" should be explained. As regards paragraph 2, it is unacceptable from the Yugoslav point of view and contrary to the established practice of drawing straight base lines, when a very much indented coast or an archipelago is involved. The Yugoslav Govern-

²¹ See A/CN.4/53.

ment considers that the distance of straight base lines of ten miles from protruding points on the mainland or island is arbitrary. The essential thing in determining whether an island is "near" the mainland or not is whether such an island constitutes a geopolitical entity with the mainland and not whether the distance is ten, or fewer or more, miles. It goes without saying that it would be just as arbitrary to consider that an island which is situated too far from the mainland also belongs to the coast. Therefore, the best criterion would be to accept that the islands in front of the coast, if the distance is not more than twice the breadth of the territorial sea (for instance, twelve miles), should be considered as belonging to the coast and that the "base line" for the beginning of the inner, initial limit of the territorial sea should be counted from the outer edge of such islands. In accepting paragraph 1 of this article, the Yugoslav Government proposes that paragraph 2 should read as follows :

"As a general rule, the maximum permissible length for a straight base line shall be twelve miles. Such base lines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than twelve miles from the coast, or between such islands."

Paragraph 3 remains unchanged.

Sub article 6 : No remarks.

Sub article 7 : Here too, the Yugoslav Government wishes to make a remark and to express its regret that the question of bays has not been settled in the draft of the Commission. Therefore, the Yugoslav Government must refer to article 6 of the draft considered at the fourth session of the Commission and, commenting on it, wishes to present its viewpoint in regard to the question of determining the definition of a bay and the manner of counting the starting line in it. In that draft it was proposed that the base line in bays, from which the breadth of the territorial sea is to be counted, should be the line connecting two points on the coast at the entrance to the bay, the distance between them not exceeding ten miles. If we rely on the perfectly correct opinion of the International Court of Justice⁸⁷ that breadths of more, or even less, than ten miles also have an equal theoretical value since there is no generally adopted rule, then the proposed breadth of ten miles is unacceptable from the point of view of the Yugoslav Government. All the more so since this figure is arbitrary and has no support in every-day practice. If we have no generally accepted starting-point for determining this breadth, then it is most logical to start from the accepted breadth of the territorial sea (for instance six miles as in article 3 of the draft considered by the Commission at its fourth session), and to take a double breadth (i.e., twelve miles) for the entering breadth of the bay. Here it is regrettable that the Commission did not apply, in this article also, the principle mentioned in the second paragraph of article 11 of the draft submitted to the fourth session, which is not only acceptable and logical but also equitable from the point of view of the coastal State. Why could it not be accepted here also that if the breadth of the entrance of a bay is a little over twelve (or, according to the Commission, ten) miles—why should this excess not be ignored?

Sub article 8 : No remarks.

Sub article 9 : No remarks.

Sub article 10 : No remarks.

Sub article 11 : In the opinion of the Yugoslav Government the application of the principle mentioned in article 7 is particularly desirable and necessary when an archipelago is involved. This should have been discussed in article 11 of this draft that the Commission has also postponed. It is a known fact that all the States having such islands in front of their coast are deeply interested in the archipelago being included in the inland waters. For many justified reasons the Yugoslav Government considers the group of islands in front of its coast as forming a continental whole, as the peripheral distance between these islands does not exceed the double breadth of the territorial sea, wherefore the Yugoslav law on the Coastal Sea has adopted the principle that the breadth of the

territorial sea must be counted from the outer edge of these islands. It is interesting to mention here the opinion of K. Strupp,⁸⁸ who says : "If there is a string of islands in front of the coast, all the waters between them are considered to constitute a component part of the national territory, and the territorial sea must be counted from the outer edge of this string of islands." He does not even mention the distance between these islands. Therefore, the Yugoslav Government is of the opinion that article 11 should be elaborated along these lines, as any other wording would be unacceptable for the countries having a group of islands in front of their coast. Or, if we fail to agree on Strupp's opinion, then, at least, the principle mentioned in paragraph 2 of article 11 of the draft considered at the fourth session should also be inserted in the future article 11 rendering thereby the rigid conception concerning this matter more flexible.

Consequently, the Yugoslav Government proposes that article 11 should read as follows :

"1. With regard to a group of islands (archipelago) and islands situated along the coast, the twelve-mile line shall be adopted as the base line for measuring the territorial sea outward in the direction of the high sea. The waters included within the group shall constitute inland waters.

"2. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to inland waters."

Sub article 12 : No remarks.

Sub article 13 : No remarks.

Sub article 14 : The Yugoslav Government sees no difficulty in the solving of the problem of the mouth of a river. If the breadth of the mouth of a river does not exceed twelve miles, then the mouth is included in the internal waters. If, however, the breadth of the mouth exceeds twelve miles, then the principle of a bay, as provided for in article 7, is applied.

Sub article 15 : No remarks.

Sub article 16 : No remarks.

Sub article 17 : No remarks.

Sub article 18 : No remarks.

Sub article 19 : No remarks.

Sub article 20 : No remarks.

Sub article 21 : No remarks.

Sub article 22 : No remarks.

Sub article 23 : No remarks.

Sub article 24 : No remarks.

Sub article 25 : No remarks.

Sub article 26 : The Yugoslav Government wishes to make a remark concerning this item. Paragraph one of this article states that foreign warships shall have the right of innocent passage through the territorial sea without the obligation of previous request or at least notification. The Yugoslav Government believes that this article fails to pay due attention to the security of the coastal State and the peace of the coastal population and local authorities. A warship is not the same as a merchantman and, therefore, no State can remain indifferent to its unexpected presence in the territorial sea (particularly if there are several of them, which is most often the case). Hence, the notification is necessary, since the logic of things also imposes it. If the passage is innocent, and it must be so, then it is more than natural that the warship should previously notify its passage, as it has no need to conceal its presence, and the act of courtesy and respect of the sovereignty of the State impels it to carry out this notification. Unannounced it is suspicious, announced it is a friend, and no one will hamper it (and no permit is necessary, except in the case of paragraph 2 of this article, which is correct and provided for in the draft). Besides, if a generally recognized way for international navigation leads through a State's

⁸⁷ See the decision of the Court of 18 December 1951, in the controversy about fishing between England and Norway, in which it is underlined that the proposal according to which the distance between these two points should not be more than 10 miles has not gained the authority of a general rule in international law.

⁸⁸ K. Strupp : *Eléments du Droit International public*, I, p. 181. The American Institute for International Law is also in favour of this principle.

territorial sea, then, we admit, it is very difficult to refuse innocent passage to a warship. However, even in that case notification is necessary for the above-mentioned reasons. The Yugoslav Government considers that this matter should be discussed on an international plane, so that the so-called "inviolable right of passage of warships" be elucidated also from the standpoint of the security of small maritime States. Hence, the Yugoslav Government proposes that paragraph 1 of this article be amended to read as follows :

"1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification. However, the coastal

State is authorized to make by its legislation innocent passage through its territorial sea dependent on previous notification, and such notification shall be considered proper if given twenty-four hours prior to the passage."

The Yugoslav Government believes that the present international community has made sufficient progress in the concept of the indisputable necessity for a uniform solution of the régime in the territorial sea, and there is justified hope that, thanks to the endeavours of the General Assembly of the United Nations, this draft will not have the same fate as The Hague Codification Conference of 1930.