

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1956

*Volume II*

*Documents of the eighth session  
including the report of the Commission  
to the General Assembly*

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UNITED NATIONS





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# INTERNATIONAL LAW COMMISSION

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

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

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

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

[Original text: French]

[27 January 1956]

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#### Introduction

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

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

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

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

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

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

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

### I. Order of chapters of final report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General Fisheries Council for the Mediterranean;

Indo-Pacific Fisheries Council;

International Pacific Salmon Fisheries Commission;

International Pacific Halibut Commission;

International Commission for the Northwest Atlantic Fisheries;

International Council for the Exploration of the Sea;

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

Inter-American Tropical Tuna Commission;

International North Pacific Fisheries Commission;

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

International Whaling Commission.

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

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

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

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

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

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

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

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

### III. Settlement of disputes

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

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

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

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

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

The relevant comment reads as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### V. Regulation of fisheries

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

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

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

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

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

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

### VI. Sedentary fisheries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### B. INSTALLATIONS IN THE TERRITORIAL SEA

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

#### C. SEISMIC EXPLORATIONS

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

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

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

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

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

64. Mr. Scelle shares these misgivings:

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

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

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

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

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

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

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

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

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

#### E. SAFETY ZONES AROUND PIPELINES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Original text: French]

[1 May 1956]

## I. REGIME OF THE HIGH SEAS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. The Yugoslav Government proposes the following wording:

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

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

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

*Conclusion*

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

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

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

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

15. The Rapporteur supports this proposal.

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

16. The Government of India proposes the following wording:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Conclusion

26. The Rapporteur proposes the following text:

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

#### Article 3. Right of navigation

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

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

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

#### Conclusion

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

#### Article 4: Status of ships

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

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

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

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

32. The following text is proposed:

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

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

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

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

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

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

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

#### Conclusion

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

#### Article 5: Right to a flag

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

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

"Be owned or operated by the State concerned".

39. The Rapporteur supports this proposal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Article 5a

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

"Article 5b

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

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

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

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

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

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

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

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

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

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

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

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

54. The United Kingdom Government proposes the following text:

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

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

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

56. The Yugoslav Government proposes the following wording:

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

[No change in paragraphs 1 and 2.]

And an additional paragraph to be worded as follows:

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

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

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

58. Irish legislation makes no distinction between Irish

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

#### Conclusion

59. The Rapporteur reserves his conclusion concerning article 5.

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

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

60. The comments relate to drafting only.

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

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

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

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

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

63. The United Kingdom Government proposes the following wording:

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

64. This drafting amendment could be adopted.

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

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

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

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

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

#### Conclusion

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

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

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

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

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

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

70. The Rapporteur supports this proposal.

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

71. The proposed amendment relates to drafting only.

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

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

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

#### Conclusion

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

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

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

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

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

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

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

*Conclusion*

84. There is no need to amend the article.

*Article 10: Penal jurisdiction in matters of collision*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

92. The Rapporteur supports this proposal.

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

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

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

*Conclusion*

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

*Article 11: Duty to render assistance*

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

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

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

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

This proposal could be adopted.

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

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

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

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

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

99. The Rapporteur sees no need for this addition.

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

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

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

#### *Conclusion*

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

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

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

#### *Article 12: Slave trade*

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

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

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

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

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

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

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

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

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

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

This proposal could be adopted.

#### *Conclusion*

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

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

#### *Article 13: Piracy*

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

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

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

#### *Conclusion*

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

#### *Article 14*

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

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

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

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

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

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

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

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

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

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

119. Only drafting amendments are proposed.

#### *Conclusion*

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

"Piracy is any of the following acts:

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

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

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

[No change in paragraphs 2 and 3].

#### *Article 15*

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

121. The Belgian Government proposes the following wording:

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

122. The Rapporteur accepts this wording.

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

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

124. The Rapporteur supports this proposal.

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

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

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

#### *Conclusion*

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

#### *Article 16*

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

128. The Belgian Government proposes the following wording:

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

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

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

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

#### *Conclusion*

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

#### *Article 17*

132. No comment.

#### *Article 18*

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

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

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

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

#### *Conclusion*

135. The article can be maintained as it stands.

#### *Article 19*

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

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

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

137. The Norwegian Government comments to the same effect.

*Conclusion*

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

*Article 20*

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

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

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

*Conclusion*

141. The article could be maintained as it stands.

*Article 21: Right of visit*

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

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

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

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

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

145. The Rapporteur accepts this suggestion.

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

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

147. The Rapporteur agrees.

*Conclusion*

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

*Article 22: Right of pursuit*

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

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

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

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

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

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

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

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

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

154. The Rapporteur accepts this amendment.

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

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

156. The Rapporteur accepts this addition.

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

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

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

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

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

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

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

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

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

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

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

165. The Rapporteur has no objection to this addition.

*Conclusion*

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

*Article 23: Pollution of the high seas*

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

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

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

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

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

170. The Rapporteur agrees.

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

*" Article 23a*

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

*" Article 23b*

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

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

*Conclusion*

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

*Article 24: Right to fish*

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

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

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

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

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

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

*Conclusion*

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

*Articles 25 to 33*

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

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

*Article 34*

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

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

*Conclusion*

181. The article could be adopted with this amendment.

*Article 35*

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

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

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

*Conclusion*

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

*Article 36*

185. No comments.

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

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

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

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

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

189. The Rapporteur agrees.

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

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

191. The Rapporteur agrees.

*Conclusion*

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

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

[Original text: French]  
[4 May 1956]

## II. REGIME OF THE TERRITORIAL SEA

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

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

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

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

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

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

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

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

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

6. The Rapporteur believes that the Norwegian

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

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

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

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

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

*Conclusion*

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

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

10. Add the following paragraph:

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

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

*Conclusion*

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

*Article 3: Breadth of the territorial sea*

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

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

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

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

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

15. The Chinese Government reserves its position.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31. The three-mile limit is acceptable.

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

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

*Conclusion*

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

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

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

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

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

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

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

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

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

*Conclusion*

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

*Article 5: Straight baselines*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paragraph 2 then becomes paragraph 4.

*Conclusion*

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

*Article 6: Outer limit of the territorial sea*

48. No comments.

*Article 7: Bays*

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

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

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

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

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

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

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

53. The Chinese Government fully approves of this article.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Conclusion*

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

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

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

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

*Conclusion*

69. The article need not be amended.

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

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

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

*Conclusion*

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

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

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

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

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

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

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

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

#### *Conclusion*

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

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

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

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

77. The Government of Israel considers it unsatis-

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

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

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

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

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

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

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

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

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

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

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

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

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

85. The Rapporteur agrees, subject to drafting amendments.

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

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

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

#### *Conclusion*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

93. The United Kingdom Government agrees to the text.

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

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

*Conclusion*

95. The article could be adopted without amendment.

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

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

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

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

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

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

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

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

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

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

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

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

102. The Rapporteur has no objections.

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

103. Amend paragraph 3 to read as follows:

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

104. The Rapporteur prefers the present text.

*Conclusion*

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

*Article 17: Duties of the coastal State*

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

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

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

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

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

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

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

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

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

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

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

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

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

115. The Rapporteur agrees to this proposal.

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

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

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

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

118. The following text is proposed for paragraph 1:

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

119. The Rapporteur prefers the present text.

*Conclusion*

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

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

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

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

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

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

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

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

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

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

126. The Rapporteur has no objections.

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

127. Amend the article to read as follows:

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

"(a) Flying the national flag;

"(b) Following the fixed international navigation route;

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

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

128. The Rapporteur has no objections.

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

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

*Conclusion*

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

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

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

"The right of the coastal State to demand and obtain

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

132. The Rapporteur has no objections.

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

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

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

#### *Conclusion*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *Conclusion*

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

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

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

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

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

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

151. No comments.

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

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

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

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

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

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

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

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

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

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

155. The following text is proposed for paragraph 1:

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

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

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

#### *Conclusion*

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

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

158. No comments.

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

[Original text: French]  
[9 May 1956]

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

##### *Article 25*

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

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

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

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

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

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

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

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

5. The Rapporteur agrees [see article 25 proposed by

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

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

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

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

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

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

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

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

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

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

9. As regards paragraph 2, the drafts proposed by Mr. Edmonds and the United Kingdom will probably satisfy the Yugoslav Government. Paragraph 3 appears unnecessary, since the coastal State can proceed under article 29, while for other States article 30 is applicable.

10. The Yugoslav Government also proposes that the Commission should solve the question of the right of coastal States to regulate the protection of the living resources in that part of the sea which is adjacent to their territorial sea together with the solution of the question of the breadth of the territorial sea, the contiguous zone and the continental shelf.

11. In case the Commission does not accept the above-mentioned suggestion, the Yugoslav Government suggests that articles 28 and 29 should form one single article, to be article 31, and read as follows:

“1. A coastal State may in any part of the high sea, which is adjacent to its territorial sea, adopt unilaterally any measures for regulating and controlling the exploitation of living resources in that part of the sea up to a distance of twelve nautical miles, counting from the base line of its territorial sea. If a part of the high sea, adjacent to the territorial seas of two or more States whose coasts are opposite one another, is less than twenty-four nautical miles, the border of the part of the high sea, up to which a State may unilaterally adopt measures for regulating and controlling the ex-

ploitation of living resources of the sea, is, in the absence of an agreement between these States, the geometrical line every point of which is at an equal distance from the outside line of the territorial sea of every State concerned.

“2. Any disputes which might occur between the coastal States concerning the application of this paragraph, will be submitted to arbitration at the request of any of the coastal States if no settlement has been reached by diplomatic means.”

12. The proposal limiting the zone contiguous to the coast to twelve miles will probably find little support, as a much wider zone is contemplated.

13. The Executive Secretary of the International Commission for the Northwest Atlantic Fisheries points out that the word “conservation” might be an obstacle to the adoption of regulations for the development of fisheries (A/CN.4/100).

14. The Rapporteur considers that a remark on this subject could be included in the comment.

#### *Conclusion*

15. The article could be adopted with an addition on the lines suggested by the United States (see proposal by Mr. Edmonds) and the United Kingdom, the text of which would be studied by the Drafting Committee, the word “conservation” being explained in the comment.

#### *Article 26*

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

16. After the words “high seas” in line 2, insert the words “beyond the belt of 100 miles from the coast of a State”.

17. The Indian Government’s amendment can only be interpreted as meaning that in an area less than 100 miles from the coast, the coastal State will have the exclusive right to make conservation rules unilaterally, even if other States are engaged in fishing there. The coastal State has not even the duty to enter into negotiations on the matter with the other States: this duty is confined to cases where the fishing area is beyond the 100-mile belt.

18. In the opinion of the Rapporteur, it is not to be expected that those States which, under the existing rules of international law, freely engage in fishing at distances between three and 100 miles from the coast of another State will accept this restriction in the absence of any guarantee that the coastal State will not use the powers so conferred on it, for the purpose of unjustifiably furthering its own interests. The Rapporteur considers that this proposal has no chance of being adopted and put into effect. Moreover, the Commission’s draft affords coastal States effective protection of their interests. For this reason the Rapporteur cannot support the Indian Government’s proposal.

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

19. Although these articles recognize the special interests of coastal States it is quite clear that they do not

grant them exclusive fisheries jurisdiction. Within the limits of exclusive coastal jurisdiction, foreign fishing can, of course, be prohibited by the coastal State. This is an incontrovertible fact. What is called for is an appreciation by the coastal State of its own needs up to a reasonable distance. That distance may vary considerably in the different countries in view of economic, geographic, biological and other relevant considerations. The Government of Iceland does not consider that the conservation articles adopted by the Commission would reduce the importance of exclusive coastal fisheries jurisdiction.

20. The Rapporteur points out that as long as "exclusive fisheries jurisdiction" is claimed in areas extending 100 miles from the coast, no agreement seems possible.

*United States of America (A/CN.4/99/Add.1)*

21. The first paragraph of this article would enable a State operating only occasionally in a fishery to insist that a State with a substantial operation in the same fishery enter into negotiations with it for a conservation programme; failing such negotiations an arbitral procedure would be invoked. In order to remove the possibility of abuse, the United States suggests the insertion of the word "substantial" before "fishing" in paragraph 1.

22. Also under this paragraph, a State could request another State to enter into negotiations even though their nationals were not engaged in fishing the same stock of fish. In the view of the United States, the right of a State to request such negotiations, and consequently to initiate the arbitral procedure contemplated in the next paragraph, should be limited to instances where their nationals are engaged in fishing the same stock of fish. It is suggested, therefore, that the words "fishing in any area of the high seas" be replaced by the words "substantial fishing of the same stock or stocks of fish in any area or areas of the high seas", and that the words "conservation of the living resources of the high seas" be replaced by the words "conservation of such stock or stocks of fish".

23. Under paragraph 2 the scope of the authority of the arbitral body in making determinations under article 26 is not clear. For example, the role of the arbitral body with regard to conservation proposals that may have been made by one or more of the disagreeing States is not indicated. Nor is it indicated whether the arbitral body would be authorized to originate proposals for conservation measures. The United States is of the opinion that, so far as proposals are concerned, the authority of the arbitral body should be limited to consideration of conservation proposals of the parties to the dispute; and that the arbitral body should not be empowered to initiate conservation proposals or to enlarge upon any that originate with the parties. Moreover, it would seem advisable and appropriate to specify criteria for the guidance of the arbitral body in making determinations under this article.

24. In the view of the United States, the arbitral procedure contemplated by the second paragraph of

article 26 should be based on criteria specifically set forth in this article. These criteria should be:

"If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of conservation measures proposed by any of them, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations, depending upon the nature of the disagreement:

"(a) Whether conservation measures are necessary to make possible the maximum sustainable productivity of the concerned stock or stocks of fish;

"(b) Whether the specific measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly;

"(i) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

"(ii) The cost of their application and enforcement; and

"(iii) Their relative effectiveness and practicability;

"(c) Whether the specific measure or measures discriminate against the fishermen of any participating State as such.

"Measures considered by the arbitral commission under paragraph 2 (b) of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State as such."

25. The Rapporteur is not convinced of the need to insert the word "substantial"; he has no serious objections to this proposal, however.

26. The Rapporteur agrees to the other amendments [see text of article 26 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

*Union of South Africa (A/CN.4/99/Add.1)*

27. Add the words "in such area" at the end of paragraph 1.

28. The Rapporteur agrees.

*Yugoslavia (A/CN.4/99/Add.1)*

29. The Yugoslav Government proposes the addition of the following sentence at the end of paragraph 1:

"The measures adopted shall not be contrary to the provision of article 25, paragraph 2, of these rules".

30. If the Commission decides not to adopt the Yugoslav proposal for article 25, paragraph 2, the question of this addition will not arise.

*Conclusion*

31. The article could be adopted with the amendments proposed by the United States and the Union of South Africa.

*Article 27**United States of America (A/CN.4/99/Add.1)*

32. The comment of the United States on paragraph 1 of article 26, in so far as it relates to identifying the fishing with stocks of fish as against areas, applies also to paragraph 1 of article 27. Likewise, the comment on paragraph 2 of article 26, that the scope of the authority of the arbitral body should be limited and that specific criteria should be set forth, applies to paragraph 2 of article 27. The criteria suggested for article 26 should be incorporated in article 27.

33. Furthermore, the United States believes that the operation of article 27 should be subject to an important qualification, the principle of abstention. The proposition of the United States Government relates to situations where States have, through the expenditure of time, effort and money on research and management, and through restraints on their fishermen, increased and maintained the productivity of stocks of fish, which without such action would not exist or would exist at far below their most productive level. Under such conditions and when the stocks are being fully utilized, that is, under such exploitation that an increase in the amount of fishing would not be expected to result in any substantial increase in the sustainable yield, then States not participating, or which have not in recent years participated in exploitation of such stocks of fish, excepting the coastal State adjacent to the waters in which the stocks occur, should be required to abstain from participation.

34. This proposed rule takes into account the fact that under the stated conditions the continuing and increasing productivity of the stocks of fish is the result of and dependent on past and current action of the participating States and that the participation of additional States would result in no increase in the amount of useful products. Rather than increasing production the advent of additional States is almost sure to stimulate the abandonment of such conservation activities through removing the incentive for maintaining expensive and restrictive conservation programmes. In fact, such advent very probably would encourage the idea that if the resource declined to a less productive level, it would offer less inducement to distant States. In recognition of a "special interest" on the part of a coastal State, the adjacent coastal State could be excepted from the operation of the rule. Strict and precise criteria should be laid down in the qualifications of a fishery for the rule, and questions arising as to qualifications made arbitrative. These criteria should include (a) whether the stock is subject to reasonably adequate scientific investigation with the object of establishing and taking the measures required to make possible the maximum sustainable yield; (b) whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and (c) whether the stock is under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

35. The Rapporteur agrees; this is a question which

was discussed at the Rome Conference and for which a solution was proposed on the lines indicated by the United States Government [see the proposal submitted by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

*Article 28**India (A/CN.4/99)*

36. The Government of India proposes that the article be deleted.

37. The Rapporteur points out that this deletion is subject to acceptance of the Indian proposal concerning the previous articles.

*Netherlands (A/CN.4/99/Add.1)*

38. The Netherlands Government is uncertain of the relationship between articles 28 and 29: is it possible to proceed under article 29 if the negotiations referred to in article 28 have been unsuccessful?

39. In the opinion of the Rapporteur the answer is that the coastal State may proceed either under article 28 (arbitration) or under article 29 (unilateral regulation). It will take the latter course if the urgency of the measures in question precludes the delay entailed in proceeding under article 28.

*United States of America (A/CN.4/99/Add.1)*

40. The United States understands the special interests of the non-fishing contiguous coastal State to be of two principal types.

41. First, the coastal State is interested in seeing that the living resources in high seas near to its coast are maintained in a productive condition, since its nationals might at some future time desire to participate in these resources. Such an interest would be protected by assurance that an adequate conservation programme is being carried forward.

42. Second, the coastal State has an interest in conservation measures applied to high seas contiguous to its territorial waters in so far as these specific measures affect, directly or indirectly, resources lying inside territorial waters. Furthermore, in most instances, a fishery resource occurring in contiguous high seas will extend into the territorial waters. For these reasons the non-participating coastal State may have an interest in the specific conservation programme referred to above. The interests described in this paragraph can be safeguarded by giving the coastal State, upon satisfactory showing of a special interest, a right to participate fully in the conservation programme.

[The text of article 28 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3) is the same as that adopted by the Commission].

*Yugoslavia (A/CN.4/99/Add.1)*

[See under article 25, paragraph 11 above].

*United Kingdom (A/CN.4/99/Add.5)*

43. The United Kingdom Government proposes the following text for paragraph 1.

"A coastal State whose nationals are not actively engaged in a high seas fishery but which is able to demonstrate a latent or potential interest in the maintenance of the productivity of that fishery is entitled to take part on an equal footing in any plan of research or system of regulation in regard to that fishery."

44. The Rapporteur agrees to this text.

#### *Conclusion*

45. The article could be adopted with the amendment to paragraph 1 proposed by the United Kingdom Government.

#### *Article 29*

##### *Belgium (A/CN.4/99)*

46. Serious doubts arise concerning paragraph 2, sub-paragraphs (a) and (b) under which the measures are valid only if certain requirements are fulfilled. No State will ever be able to produce scientific evidence showing that there is an imperative and urgent need for measures of conservation or to prove that the measures are based on appropriate scientific findings.

47. If there is no possibility of having the whole of article 29 deleted, it would at least be better to omit the second sentence of paragraph 3 which provides that "the measures adopted shall remain obligatory pending the arbitral decision".

##### *India (A/CN.4/99)*

48. In paragraph 1, delete the comma after the words "this interest exists" and substitute a semi-colon; delete the remainder of the paragraph and substitute the following text:

"provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures".

In paragraph 2, sub-paragraph (a), omit the word "scientific"; in sub-paragraph (b) replace the existing clause by the following words: "That the measures adopted are reasonable"; in sub-paragraph (c) add the words "as such" at the end of the sentence.

49. The Rapporteur observes that, as already pointed out by Mr. Padilla Nervo at the 338th meeting of the Commission A/CN.4/SR.338, para. 15), the addition to paragraph 1 proposed by the Indian Government seems unnecessary. Every Government will always have the right to request another State to enter into negotiations. It is only necessary to mention such a right where, in case of refusal, the dispute may be submitted to arbitration. But on this point the Indian Government has reserved its position.

##### *Sweden (A/CN.4/99)*

50. Article 29 calls for most serious reservations. How will it be possible to prove that there are fully appropriate scientific findings to show that certain measures are necessary or advisable? The provision in article 29 should be deleted.

##### *Norway (A/CN.4/99/Add.1)*

51. Measures of conservation cannot be adopted on the basis of scientific evidence alone. Account must also be taken of the technical and economic conditions of the fishing industries of the countries concerned. The Norwegian Government is not convinced that it will be possible to establish satisfactory general criteria. It must reserve its position on the proposal. In the opinion of the Norwegian Government, it is not clear whether the arbitration procedure also applies when the parties to an existing convention for the regulation of fisheries fail to agree. Application of a general convention to whaling and seal-catching would give rise to particular problems.

##### *United Kingdom (A/CN.4/99/Add.5)*

[See comments in paragraphs 5-15].

##### *United States of America (A/CN.4/99/Add.1)*

52. No comments [the text proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3) is the same as that adopted by the Commission].

#### *Conclusion*

53. While recognizing the justice of several of the comments made on this article, the Rapporteur considers that it should be retained in its present form. It is the outcome of long discussions at the seventh session and forms an essential part of the set of rules proposed by the Commission on this subject; it may perhaps to some extent reconcile the different interests involved. Its omission would destroy the structure of the system adopted. The Drafting Committee could examine various drafting amendments proposed by the United Kingdom Government. The question of existing treaties, raised by the Government of Norway, merits the Commission's attention; the Rapporteur thinks it could be agreed that existing treaties shall not be affected by the new rules but should be brought into harmony with them as soon as possible.

#### *Article 30*

##### *India (A/CN.4/99)*

54. The Government of India proposes that this article be deleted.

##### *United States of America (A/CN.4/99/Add.1)*

55. The United States understands that this article is intended to safeguard the interests of the non-fishing States whose nationals may depend on the products of the fishery or who might some day desire to participate in fishing the resource. Specifically, the interest is in the continued productivity of the resource and should be exercisable through assurance that such States have an opportunity to challenge the fishing States as to the adequacy of the over-all conservation programme for the resource, as distinguished from a voice in the specific conservation measures. In this connexion, specific criteria should be established for the guidance of the arbitral body, as well as language which would clearly except

from challenge the programmes of States within their own boundaries, for example, the erection of dams which might affect the runs of anadromous fish.

56. The United States suggests that the words "If no agreement is reached within a reasonable period, such State" in the second paragraph of article 30, be replaced by the words "If satisfactory action is not taken upon such request within a reasonable period, such requesting State...". The United States also suggests that the following criteria be incorporated in this article:

"The arbitral commission shall, in procedures initiated under this article, reach its decision and make its recommendations on the basis of the following criteria:

"(a) Whether scientific evidence shows that there is a need for measures of conservation to make possible the maximum sustainable productivity of the concerned stock or stocks of fish; and

"(b) Whether the conservation programme of the States fishing the resource is adequate for conservation requirements.

"Nothing in this article shall be construed as a limitation upon the action a State may take within its own boundaries."

57. As regards paragraph 2, the Rapporteur prefers the Commission's text; he agrees to the first paragraph of the proposed addition, but finds the second unnecessary. [See article 30 proposed by Mr. Edmonds at the 338th meeting of the Commission (A/CN.4/SR.338, para. 3)].

### Article 31

#### Brazil (A/CN.4/99)

58. The Government of Brazil recommends that instead of a mere arbitral Commission, a specialized agency should be set up in the form of a permanent international maritime body competent not only to settle differences of the type contemplated in articles 26 to 30, but also to carry out technical studies concerning problems of conservation and utilization of the living resources of the sea.

59. The Rapporteur considers that the proposal to set up a commission to study problems relating to the conservation of the resources of the sea should be carefully examined. But he does not think that such a commission should also be responsible for settling differences that arise between States. In view of the diversity of the interests which may be the subject of these differences, he thinks it preferable to set up *ad hoc* commissions.

#### Union of South Africa (A/CN.4/99/Add.1)

60. The Union Government asks what is to be done if the Secretary-General of the United Nations and the Director-General of the Food and Agriculture Organization do not agree on the choice of arbitrators. It proposes that the words "in consultation" be amended to read "after consultation".

61. The Rapporteur believes that this proposal is in fact in accordance with the Commission's intention.

#### Netherlands (A/CN.4/99/Add.1)

62. Since the arbitral commissions referred to in these

articles imply a kind of legislative arbitration, it would be preferable for the International Law Commission to bring out more clearly in its report that these commissions are free to make any regulations they think justified and effective, even though they depart from the existing regulations. Consequently, it would probably be better to drop the terms "parties" and "differences to be settled".

63. The Rapporteur does not think that the task of the arbitral commissions can be regarded as "legislative arbitration" in all cases. He would prefer to leave the text as it stands.

#### United Kingdom (A/CN.4/99/Add.5)

64. The United Kingdom Government is not in favour of the provision for extending the period within which the arbitral commission must give its decision. The United Kingdom Government fears that the period of three months might easily become three years. It is particularly dangerous where measures remain in force pending the decision of the arbitral commission.

65. The Rapporteur does not share these fears. A commission in which the two parties place sufficient trust to allow it to settle the substance of their dispute should also be able to extend the prescribed period if it considers this to be in the interests of its work.

#### United States of America (A/CN.4/99/Add.1)

66. With respect to the appointment of an arbitral commission when the parties have not agreed upon a method of settlement, the United States would suggest the following modifications: (a) the commission should be composed, in any combination, of seven members well qualified in the legal, administrative or scientific fields of fisheries, depending upon the nature of the dispute; (b) three of these members should be from countries neutral to the dispute and might be appointed, at the request of any State party to the dispute, either by the Secretary-General of the United Nations or as follows: one, who shall act as chairman, by the Secretary-General of the United Nations; one by the President of the International Court of Justice; and one by the Director-General of the Food and Agriculture Organization. If the dispute involves only two States, each should appoint two members of the arbitral commission. If there is more than one State on either side of the dispute, each side, irrespective of the number of States on that side, should appoint a total of two members of the arbitral commission. If either side fails to appoint its members within three months of the date of the original request for settlement, these appointments should be made by the Secretary-General of the United Nations.

67. Under this proposal, a situation could conceivably arise, for example, under article 26, where the dispute would involve a divergence of views of three or more States thereby creating an issue not clearly divisible into two sides. The opportunity to initiate an arbitral procedure should not be defeated by this fact. In the view of the United States, it is essential that any State should be enabled to challenge, bilaterally, in turn if necessary, any of the other States in disagreement.

68. The Rapporteur is not in favour of the changes

proposed. The Commission has endeavoured to suit the composition of the arbitral commission to the diversity of interests that will come in conflict before it. Frequently, it will not be a matter of deciding between two definitely opposed points of view, but of solving a variety of problems; hence the Commission has provided for a membership in which the different interests involved can be given the broadest possible representation. The United States proposal appears to narrow this possibility [see article 30 as proposed by Mr. Edmonds (A/CN.4/SR.338, para. 3) which does not seem to conform entirely to the proposal of the United States Government, but which the Rapporteur finds equally unacceptable.]

*India* (A/CN.4/99)

69. The Government of India reserves its opinion on articles 31, 32 and 33.

### Conclusion

70. The Rapporteur is in favour of retaining the article subject to drafting amendments.

#### Article 32

71. No comments.

[In the draft proposed by Mr. Edmonds (A/CN.4/SR.338, para. 3) article 32 is omitted. The first paragraph can in fact be regarded as unnecessary in view of the directives contained in Mr. Edmond's draft articles 25, 26, 27, 29 and 30. The second paragraph of article 32 forms the second paragraph of Mr. Edmonds' draft article 33.]

#### Article 33

72. No comments.

[This article forms the last paragraph of Mr. Edmonds' draft article 33 (A/CN.4/SR.338, para. 3).]

## DOCUMENT A/CN.4/99 and Add.1 to 9

### Comments by Governments on the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea adopted by the International Law Commission at its seventh session in 1955<sup>1</sup>

#### 1. Austria

##### *Document A/CN.4/99/Add.1*

LETTER DATED 14 MARCH 1956 FROM THE AUSTRIAN MISSION TO THE UNITED NATIONS

[*Original: English*]

With reference to your letter LEG 292/9/01 of 31 January 1956, concerning chapter II of the report of the seventh session of the International Law Commission and "provisional articles concerning the régime of the high seas", and chapter III "Draft articles on the régime of the territorial sea", I have the honour to inform you upon instruction of my Government that Austria has no objection concerning the two drafts referred to.

#### 2. Belgium

##### *Document A/CN.4/99*

TRANSMITTED BY A NOTE VERBALE DATED 9 JANUARY 1956 FROM THE PERMANENT MISSION OF BELGIUM TO THE UNITED NATIONS

[*Original: French*]

#### A. REGIME OF THE HIGH SEAS

##### *Article 2. Freedom of the high seas*

1. On several occasions, the exact scope of the term

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, chaps. II and III.* The Governments of Italy and the United Kingdom of Great Britain and Northern Ireland transmitted comments also on the draft articles relating to the continental shelf and the contiguous zone, adopted by the International Law Commission at its fifth session and reproduced in *Official Records of the General Assembly, Eighth Session, Supplement No. 9, chap. III.*

"jurisdiction" was the subject of discussion in the Commission. The present report states that the term is used in article 2 in a broad sense, including not merely the judicial function but any kind of sovereignty or authority.

Perhaps it would be advisable to define the scope of the term in the body of article 2, especially as in chapter III of the report (Régime of the territorial sea) article 1 speaks of the "sovereignty" of a State over the territorial sea.

Consequently, the first sentence of article 2 might read as follows:

"The high seas being open to all nations, no State may subject them to its jurisdiction, sovereignty or any authority whatsoever. Freedom...".

##### *Article 5. Right to a flag*

2. This article lays down certain conditions for purposes of recognition of the national character of a ship.

One of these conditions is that the ship must be the "property" (in French: *appartenant*) of the State concerned. It is not clear whether this term should be interpreted in the strict sense of "absolute ownership", or whether it is implied that a ship chartered by a State (e.g., for a special mission) is also State "property". Whichever of these interpretations is correct, it seems that the text should be clarified.

It is pertinent to compare this text with that of article 8, which confers immunity on ships "owned or operated by a State and used only on government service".

Article 5. 1 might be redrafted to read:

"Be owned or operated by the State concerned."

3. As regards the condition to be satisfied in the case of private ownership, it would probably be difficult to insist, in every instance, that a particular person must fulfil the twin conditions of being "legally domiciled"

and "actually resident" in the territory of the State. In some States the civil law draws a distinction between "domicile" and "residence", whereas in other countries the distinction is non-existent. That being so, there would be no uniformity in the fundamental conditions.

In Belgian law, the Act of 20 September 1903 concerning certificates of registry takes the distinction into account and requires either residence or domicile (article 3 (c)).

Article 5.2 (a) and (b) might therefore be worded as follows:

"... persons legally domiciled... or actually resident..."

4. It seems to have been the International Law Commission's intention to require, as the basic condition for the right to fly a flag, that the person owning the ship should be physically present in the flag State.

Belgian legislation establishes the same requirement. The Act of 1903 makes physical presence a condition not only in the case of individuals but also in that of bodies corporate, which must have their registered office in Belgium.

5. Despite its apparent intention, the Commission's draft provisions respecting bodies corporate introduce a distinction, inasmuch as a partnership is not required, by article 5, to be formed under the laws of the State concerned or to have its registered office in the country of the flag under which it wishes its ships to sail; only the individual partners with personal liability must be domiciled and reside in that country.

6. Under the provisions of a bill now before Parliament for the amendment of the Act of 20 September 1903 concerning certificates of registry (Senate document No. 153; meeting of 2 February 1954), such a certificate would henceforth no longer be regarded as an instrument conferring nationality but as *prima facie* evidence of nationality. The ship's national character will depend on the nationality of its owners, for which purpose the compulsory registration statement is to be conclusive evidence. (See the bill concerning the introduction of compulsory registration for ships and boats; Senate document No. 155; meeting of 2 February 1954).

As far as individuals are concerned, the last-mentioned bill does not introduce any changes in the rules laid down by the 1903 Act. There is, however, a change which affects bodies corporate; a ship shall be deemed to have Belgian nationality if more than half the ownership thereof is vested in: (a) a commercial company or partnership formed under Belgian law and having its principal seat of business in Belgium; or (b) a foreign commercial company or partnership formed under foreign law if it has its principal seat of business in Belgium or is represented in Belgium by not less than one director and two other responsible officers of Belgian nationality who are domiciled in Belgium.

7. Perhaps the wording of the International Law Commission's draft of article 5 should be revised so as to specify that the distinction between the two types of bodies corporate referred to, respectively, in paragraphs (b) and (c) is the distinction between an association of persons and an association of capital.

8. When the Commission discussed the suggestion by Mr. Stavropoulos, the Legal Counsel of the United Nations, that it might consider the problem of ships under the United Nations flag (A/CN.4/SR.320, paras. 68 *et seq.*) it was stated that article 5 did not exclude the registration of ships owned by "legal entities".

Article 5, however, confines itself to stating what conditions have to be fulfilled by individuals or by certain expressly specified bodies corporate, namely, partnerships and joint stock companies. What is the position of a body operating in the public interest, or of a non-profit association, that wishes a ship engaged on, say, a humanitarian or scientific mission, to fly a particular flag?

#### Article 8. Immunity of State ships other than warships

9. This article may, *prima facie*, apply to several categories of ships:

(1) State-owned ships used on commercial or non-commercial government service;

(2) Privately owned ships used on:

(a) Non-commercial government service;

(b) Commercial government service.

10. It is uncertain whether article 8 applies to all these categories or whether ships covered by 2 (a) are excluded. The relevant comment in the Commission's report seems to suggest the former, as it states that "there were no sufficient grounds for not granting to State ships used on commercial government service the same immunity as other State ships".

This interpretation is, however, only possible if it is agreed that article 5.1 should be construed in the manner suggested in paragraph 2 above.

11. Under The Hague Declaration of 3 June 1955, signed by Belgium, Denmark, France, the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany, which refers to the international Convention for Regulating the Police of the North Sea Fisheries, signed on 6 May 1882, police functions over the North Sea fisheries may be exercised increasingly by ships other than warships.

12. Moreover, if fishing vessels owned or operated by the State are to enjoy complete immunity from the jurisdiction of any State other than the flag State, in the same manner as warships, that fact will have to be borne in mind in devising the appropriate international machinery to ensure due compliance with the "Overfishing" convention. Some States might even escape the control machinery of the convention by operating their national fishing vessels as State ships.

#### Piracy

##### Article 15. Act of piracy

13. As this article constitutes an exception to article 14, it is hardly logical to say that "acts of piracy" are assimilated to "acts committed by a private vessel". The following wording would seem preferable:

"If the acts referred to in article 14 are committed by a warship or a military aircraft whose crew has mutinied, then the acts in question are assimilated to acts of piracy."

*Article 16. Pirate ship*

14. The article defines a pirate ship as a ship which is *devoted* to the purpose of committing acts of piracy.

The comment on article 18, however, states that before the ship can be seized it must *actually have committed* acts of piracy.

Furthermore, the terms of article 15 suggest that a warship, which cannot in principle be regarded as *devoted* to acts of piracy, might nevertheless become a pirate ship.

Some amendment is surely necessary, so that the definition should read as follows:

“A ship or aircraft is considered a pirate ship or aircraft if it has committed, or is used or is intended to be used by the persons in dominant control for the purpose of committing, one of the acts referred to in article 14, paragraph 1.”

*Article 18. Seizure of a pirate ship*

15. If the modification suggested in paragraph 14 above is introduced, article 18 will be fully consistent with the relevant comment in the Commission's report. If the change is not made, the operative provision itself should state that the vessel can only be seized if it has committed acts of piracy. If such a clause were introduced, then the subsequent reference, in article 19, to seizure on *suspicion* of piracy, would also be more logical.

## B. REGIME OF THE HIGH SEAS. FISHING

*Article 29. Measures unilaterally adopted by a State*

16. This article is somewhat vague in its reference to the “area . . . contiguous” to the coast.

The International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome from 18 April to 10 May 1955, did not express any opinion on the question of the contiguous zone.

Furthermore, a serious query arises regarding subparagraphs (a) and (b) of paragraph 2, which state that the measures adopted “shall be valid . . . only if [certain] requirements are fulfilled”. No State will ever be able to produce scientific evidence showing that there is an imperative and urgent need for measures of conservation or to prove that the measures are based on appropriate scientific findings.

Again, paragraph 3 provides for the possible application of measures which are still controversial. In such cases, however, the source of the controversy will be precisely the insufficiency of the evidence produced. It may be somewhat rash, therefore, to say that the country concerned may nevertheless proceed with those measures.

Nor is it a very reassuring feature that the coastal State would have exclusive discretion in deciding what is the “reasonable” period within which its negotiations with the other States must lead to an agreement (paragraph 7). The very term “reasonable” leaves too much scope for interpretation.

If the Commission persists in the view that, notwithstanding a reference to arbitration, measures which evoke criticism should nevertheless remain in effect, then

inevitably the negotiations will be protracted. If in consequence of arbitration proceedings the measures in question are declared to be inconsistent with the rules of international law, these measures will then have to be rescinded *ex post facto*. Such a procedure is hardly likely to prevent such measures from being adopted in the first place.

Accordingly, if there is no possibility of having the whole of article 29 deleted, at least the second sentence of paragraph 3 should be deleted; this paragraph states that “the measures adopted shall remain obligatory pending the arbitral decision”. It would be preferable if controversial measures remained in abeyance so long as the arbitral commission has not rendered its award.

## C. REGIME OF THE TERRITORIAL SEA

*Article 3. Breadth of the territorial sea*

17. The breadth of the territorial sea was the subject of prolonged and lively discussions, during which the Commission made praiseworthy efforts to agree on a concrete proposal. The text now reproduced in the report calls for the following comments:

18. It would be welcome if all countries could be induced to subscribe to the principle, which the Commission admits, that international law does not justify an extension of the territorial sea beyond twelve miles. Universal acceptance of that principle would at least put a halt to the ever-growing pretensions of certain countries.

19. Furthermore, the statement that international law does not require States to recognize a breadth beyond three miles (paragraph 3) implicitly confirms that it is necessary to conclude an international agreement concerning the limits of the territorial sea. Belgium has always maintained precisely that position.

The Commission reaffirms the right of a State to refuse to recognize any extension of another State's limits beyond twelve miles. If, however, the nationals of the former State are not to remain in uncertainty about the law, some agreement must be reached with the State which so extends its limits. Let us take, for example, the case of Iceland: it would be useless to say that the United Kingdom, Belgium and other countries have the right to dispute the new Icelandic limits if it is simultaneously conceded that Iceland has the right to fix those limits. The Commission's statement, while correct in international law (A/CN.4/SR.328, paras. 22 ff.), does not resolve the practical difficulties.

20. In view of the possibilities (of exercising fishing rights) opened up by the scope of draft articles 24 to 33 concerning the régime of the high seas, and especially in view of the terms of article 29, it is very probable that the principle of the twelve-mile maximum limit, as stated in article 3, would be acceptable to the majority of States.

21. It will then be possible, by means of international agreements, to arrive at the solution of fixing a limit other than the three-mile limit, provided that it is less than twelve miles.

*Article 5. Straight base lines*

22. This article provides that the base line, for the

purpose of measuring the breadth of the territorial sea, may be independent of the low-water mark if circumstances necessitate a special régime (deep indentations of the coast, islands in its immediate vicinity, economic interests).

Although paragraph 1 of this article was adopted by the Commission by 10 votes to 3, there seems to be little justification for the inclusion of the criterion of "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage". Nowhere does the judgement of the International Court of Justice in the Fisheries Case state that mere "economic interests" constitute sufficient grounds for the adoption of straight base lines.

#### *Article 7. Bays*

23. In this connexion, it should be noted that The Hague Convention of 6 May 1882 fixed the maximum length of the closing line across the opening of a bay at ten miles.

#### *Article 13. Delimitation of the territorial sea at the mouth of a river*

24. See paragraph 23 above.

#### *Article 15. Delimitation of the territorial sea of two adjacent States*

25. Belgium's earlier suggestion regarding this article (formerly article 16) was not adopted.

#### *Article 23. Government vessels operated for commercial purposes*

26. Cf. the comments in paragraphs 2 and 9 above concerning the definition of "State ship".

#### *Article 25. Warships*

27. The corresponding article in the previous draft (article 26) had laid down the principle that there existed a right of innocent passage without previous authorization or notification. Some members of the Commission wished the text to stress that such passage was in fact merely a concession, which is contingent on the consent of the coastal State. That point of view was shared by Belgium.

The majority concurred with that view and the amended wording of the present article 25 was adopted. As the text now stands, the State will have the right to refuse passage even where, in like circumstances, a merchant vessel would be entitled to pass unhampered.

### 3. Brazil

#### *Document A/CN.4/99*

TRANSMITTED BY A NOTE VERBALE DATED 19 DECEMBER 1955 FROM THE PERMANENT MISSION OF BRAZIL TO THE UNITED NATIONS

[*Original: Portuguese*]

#### *1. With regard to the régime of the high seas*

(a) It is suggested that article 5 should contain a clause providing that, for purposes of recognition of its national character, it shall suffice if the ship can prove

its nationality readily, not only by means of the ship's name and port of registry clearly marked in a visible place, but also by means of the ship's papers.

(b) It is recommended, with reference to the question of hot pursuit (article 22), that it should be stipulated that for the purpose of the exercise of the *right of pursuit* it shall suffice if the coastal State, in the defence of its lawful interests, has good reason to believe that an offence against its laws or regulations has been or is about to be committed; a similar provision is contained in article 9 of the Convention concluded between Finland and various other countries at Helsingfors on 19 August 1925.

(c) It is recommended that the United Nations should establish, instead of a mere arbitral commission as provided by article 31, a specialized agency in the form of a permanent international maritime body competent not only to settle differences of the type contemplated in articles 26 to 30 but also to carry out technical studies concerning the problems of the conservation and utilization of the living resources of the sea.

#### *II. With regard to the territorial sea*

(a) It is noted that the draft articles do not contain any provision relating to the contiguous zone although a reference to this zone occurs in article 22 [of the provisional articles concerning the régime of the high seas]. In our view it would be desirable to allow for such a zone, extending up to twelve miles from the coast, in the case of States whose territorial sea does not exceed six miles in breadth; such States to have jurisdiction in the said zone purely for certain specific purposes or, preferably, for the purposes indicated in the relevant article adopted by the Commission at its fifth session (1953); with, perhaps, the addition of exclusive fishing rights — or at least the right to regulate and control fishing — with a view to the conservation of the living resources of the zone.

(b) With regard to article 7 we would state: (i) that the definition of the term "bay" given therein seems to us unnecessary and complicated. If, however, a definition is desired we would prefer that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Conference, namely, for the purpose of determination of the base line a bay "must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width" (League of Nations, *Conference for the Codification of International Law, Bases of Discussion, Volume II, page 163*); and (ii) that we consider the limit of twenty-five miles for the closing line at the entrance of or within a bay to be frankly excessive — especially since (except of course in the case of *historical bays*) this width has not, as a rule, exceeded twelve miles in practice.

(c) With regard to roadsteads (the subject of article 9) we maintain the view which we previously communicated to the International Law Commission. We might now cite in support of our case passages from the books of the leading authorities on the public international law of the sea; for example, Gilbert Gidel says: "*Every roadstead should be subject to the régime of internal*

waters" (Gidel, *Le droit international public de la mer*, II, pages 22 ff.). To the same effect see also: C. John Colombos, *The International Law of the Sea*, third edition, 1954, page 66, paragraph 78; and J. L. de Azcárraga, *Régimen jurídico de los espacios marítimos*, page 109. Cf. Oppenheim-Lauterpacht, seventh edition, page 455, paragraph 190c.

(d) With regard to islands, drying rocks and drying shoals, with which the draft articles 10 and 11 are concerned: if mere drying rocks and drying shoals may be taken as points of departure for extending the territorial sea, with the result that the waters between them and the coast become internal waters, it seems to us unreasonable that the same should not apply to islands in precisely the same situation. In our view it would be desirable to set a limit on the use of such drying rocks or drying shoals — as well as islands in the same situation — as points of departure for extending the territorial sea. Thus, instead of specifying that this applies to drying rocks, etc. "which are wholly or partly within the territorial sea", the provision should be made applicable, for example, to those which lie within three miles. This would obviate the exaggerated widening of a State's territorial waters at particular points.

#### 4. Cambodia

##### *Document A/CN.4/99/Add.2*

LETTER DATED 2 APRIL 1956 FROM THE MINISTER FOR FOREIGN AFFAIRS OF CAMBODIA

[Original: French]

Referring to your letter LEG 292/9/01 LEG 292/8/01, dated 31 January 1956, in which you drew my attention to the report of the International Law Commission covering the work of its seventh session, I have the honour to transmit to you the following comments on the drafts.

I. Cambodia has no legislation of its own on maritime law drafted since gaining its independence.

At present it applies the principles of French law.

The draft submitted for our consideration is, however, of great value and the fullest account will be taken of it when a Maritime Code for Cambodia is drafted later, since the principles enunciated in it are in conformity with both universal international law and Cambodian domestic law.

We have no comment to make on the chapter of the draft devoted to the régime of the high seas.

II. With regard to chapter III, concerning the "territorial sea", Cambodia has adopted the rules of French law, under which the territorial sea has a breadth of three miles, with a wider contiguous zone for the purposes of police or customs jurisdiction. The three-mile formula seems to be the one most in harmony with the principle of freedom of the seas.

The Government of Cambodia would accordingly like to see it adopted by all States; for it would be contrary to the principle of equality between States if all were not subject to the same rules on this point of international law.

Moreover, the three-mile limit is no bar to the exercise by the State of sovereign rights over the continental shelf (article 2 of the draft contained in the report of the International Law Commission covering the work of its fifth session).<sup>2</sup>

III. Cambodia would therefore be happy to support the efforts of the General Assembly of the United Nations in that field to achieve uniform maritime legislation.

#### 5. Canada

##### *Document A/CN.4/99/Add.7*

NOTE VERBALE DATED 7 MAY 1956 FROM THE DEPARTMENT OF EXTERNAL AFFAIRS OF CANADA

[Original: English]

The Secretary of State for External Affairs presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the Legal Counsel's letter Leg. 292/9/01 of August 24, 1955, inviting the comments of the Government of Canada on the International Law Commission's provisional articles concerning the régime of the high seas adopted by the Commission at its seventh session.

The Secretary of State for External Affairs would be grateful if it would still be possible to have forwarded to the International Law Commission a copy of the comments set out below on chapter II of the International Law Commission's draft articles on the régime of the high seas, entitled "Fishing".

##### *Article 26*

Since nationals of two or more States may be fishing in any area but not necessarily for the same stock of fish, or the fishing activities of one or more States may be on a very small scale, it would seem reasonable to provide that fishing must be on a substantial scale and that the measures to be prescribed relate to the stock of fish in which the States concerned are jointly interested.

##### *Article 27*

The comment made with regard to the aforementioned article also applies to paragraph 1 of this article, that is, fishing must not only be in the same area but on a substantial scale and for the same stocks of fish.

This article should be subject to the "abstention principle" as hereinafter mentioned.

##### *Article 28*

A coastal State always has an interest in the resources of the high seas contiguous to its coast by the mere fact of contiguity. This interest should be recognized without question. The "special interest" of the coastal State is recognized in the *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* held in Rome in 1955.<sup>3</sup> It is considered that

<sup>2</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

<sup>3</sup> United Nations publication, Sales No. 1955.II.B.2, para. 18.

the phrase "having a special interest in the maintenance of the productivity of the living resources" in paragraph 1 should be deleted.

*Article 29*

It is considered that a similar criticism applies to this article.

*Article 30*

Although there may be, in certain circumstances, some justification for a State not engaged in fishing in an area not contiguous to its coast to request a fishing State to take certain conservation measures, care should be taken that this request would not extend to measures necessarily having to be taken within the boundaries of the fishing State. This article, therefore, should be qualified to indicate that the fishing State would be under no obligation to take measures within its boundaries.

*Article 31*

In the event that there is disagreement concerning the composition of the arbitral Commission it is considered that all parties to the dispute should have the right to be represented on the arbitral Commission as finally constituted.

The Government of Canada is of the opinion that these articles should be subject to the "abstention principle", which was considered at the International Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in 1955 and which is stated in the report of the Conference as follows:

"A special case exists where countries, through research, regulation of their own fishermen and other activities, have restored or developed or maintained stocks of fish so that their productivity is being maintained and utilized at levels reasonably approximating their maximum sustainable productivity, and where the continuance of this level of productivity depends upon such sustained research and regulation. Under these conditions, the participation of additional States in the exploitation of the resource will yield no increase in food to mankind, but will threaten the success of the conservation programme. Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action.

"Existing procedures. The International North Pacific Fishery Commission provides a method for handling the special case mentioned above. It was recognized that new entrants in such fisheries threatened the continued success of the conservation programme. Under these circumstances the State or States not participating in fishing the stocks in question agreed to abstain from such fishing when the Commission determines that the stock reasonably satisfies all the following conditions:

"(a) Evidence based upon scientific research indicates that more extensive exploitation of the stock will not provide a substantial increase in yield;

"(b) The exploitation of the stock is limited or

otherwise regulated for conservation purposes by each party substantially engaging in its exploitation; and

"(c) The stock is the subject of extensive scientific study designed to discover whether it is being fully utilized, and what conditions are necessary for maintaining its maximum sustained productivity. The Convention provides that, when these conditions are satisfied, the States which have not engaged in substantial exploitation of the stock will be recommended to abstain from fishing such stock, while the States engaged in substantial exploitation will continue to carry out the necessary conservation measures. Meanwhile, the abstaining States may participate in fishing other stocks of fish in the same area."<sup>4</sup>

## 6. Chile

### *Document A/CN.4/99/Add.1*

LETTER DATED 16 MARCH 1956 FROM THE PERMANENT MISSION OF CHILE TO THE UNITED NATIONS

[Original: Spanish]

With reference to Your Excellency's note No. LEG 292/9/01 dated 24 August 1955, inviting my Government to comment on the provisional articles concerning the régime of the sea adopted during the seventh session of the International Law Commission, I have the honour to transmit the following reply:

The position of the Chilean Government in the matter of the provisional articles concerning the régime of the sea has been determined by domestic legislation, by the international agreements signed with Ecuador and Peru and by Chile's attitude in the international organizations concerned.

In this connexion we would draw attention to

The Presidential Declaration of Sovereignty, dated 3 June 1947;

The agreements signed at Santiago with Ecuador and Peru, in August 1952, and the supplementary agreements signed at Lima, in December 1954, with those countries;

The Chilean delegation's attitude at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome in 1955, under the auspices of FAO;

The position taken at the third meeting of the Inter-American Council of Jurists, held in Mexico in January 1956, and in particular the resolution approved by that international body, by a large majority, concerning the subjects under discussion.

Lastly, the views which Chile intends to uphold at the specialized inter-American conference to be held in the Dominican Republic will complete the series of precedents determining the Chilean Government's position on the provisional articles drafted by the International Law Commission concerning the régime on the high seas and of the territorial sea.

<sup>4</sup> *Ibid.*, paras. 61 and 62.

As the matter is one that is developing rapidly and as we intend to support the inter-American decision on these problems, the Chilean Government feels unable to give a more explicit reply to your note until the conclusion of the relevant debates at the meeting to be held at Ciudad Trujillo.

At the same time, I have pleasure in enclosing herewith a copy of the resolution approved on this matter at the Third Meeting of the Inter-American Council of Jurists, held in Mexico in January 1956.<sup>5</sup>

## 7. China

### *Document A/CN.4/99*

TRANSMITTED BY A LETTER DATED 9 FEBRUARY 1956 FROM THE PERMANENT MISSION OF CHINA TO THE UNITED NATIONS

[Original: Chinese]

#### *Comments on the provisional articles concerning the régime of the high seas*

1. Provisional article 10 provides that in the event of a collision on the high seas, criminal proceedings against persons responsible for the incident may be instituted only before the authorities of the State to which the ship on which such persons were serving belonged or of the State of which such persons are nationals. This provision is incompatible with articles 3 and 4 of the Chinese Criminal Code.

The Chinese Government believes that although criminal jurisdiction is primarily territorial, it does not follow that a State can assume jurisdiction only over offences which are committed wholly within its territory. An offence must be deemed to have been committed within the territory of a State if the overt act constituting the offence is committed within the territory of that State or if the offence produces its effect within the territory of that State. In either case, the offence is within the penal cognizance of that State. This is a principle generally accepted in modern penal legislation and incorporated in the Chinese Criminal Code.

In a collision case, if an unlawful, injurious act involving the criminal responsibility of the crew of one vessel produces its effect upon a vessel of a different nationality, the offence is of the same nature as a crime which produces its effect in the territory of the State to which the victim vessel belongs. Under the principle stated above, it cannot be doubted that such an offence is within the criminal jurisdiction of that State.

This rule was unequivocally affirmed in the judgement rendered in 1927 by the Permanent Court of International Justice in the "Lotus" case. It should be pointed out that the provisional article in question, in its attempt to alter this rule, has run counter to the notion of the territoriality of criminal jurisdiction now adopted by most States. For

this reason, the Chinese Government is unable to agree to provisional article 10.

It is stated in the report of the International Law Commission covering the work of its seventh session that the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, signed at Brussels in 1952, modified the rule affirmed in the judgement on the "Lotus" case. Since this convention has not yet won general acceptance, its provisions can have only limited application as rules of international law.

2. Piracy has been said to "consist in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons". (See the report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, 1927, page 116.) This is piracy in the restricted sense.

In a broad sense, any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel can also be regarded as having committed piracy. This interpretation is fully in accord with the views of writers and authorities on international law and is adopted in the Chinese Criminal Code, which provides for the punishment of both types of piracy. (See article 5, paragraph 8, and article 333, paragraphs 1 and 2, of the Chinese Criminal Code.)

Since provisional article 14 contains only the definition of piracy in its narrow sense, the Chinese Government believes that it should be amended to include also piracy in its broad sense as described in the preceding paragraph.

3. Provisional articles 25 and 26 on the regulation and control of fishing activities appear to favour States whose nationals are already engaged in fishing in any given area of the high seas and fail to take into account the possible interests of the States whose nationals may in future participate in the fishing activities in such areas. The Chinese Government considers it desirable to adopt appropriate supplementary provisions in this regard in order to safeguard such interests.

#### *II. Comments on the draft articles on the régime of the territorial sea*

1. In draft article 3, the International Law Commission has, in effect, recognized the right of each State to decide on the breadth of its own territorial sea within the limits of three to twelve miles. Although this formulation may be regarded as expedient under the prevailing circumstances, the Chinese Government wishes to reserve its position on this question for the time being.

2. The Chinese Government fully agrees with the provisions of draft article 7 that waters within a bay should be considered internal waters if the line drawn across the opening does not exceed twenty-five miles and that where the entrance of a bay exceeds twenty-five miles, a closing line of such length should be drawn within the bay.

<sup>5</sup> Not included in this document. The resolution is reproduced as annex I to document A/CN.4/102.

## ANNEX

TEXTS OF ARTICLES 3, 4, 5 and 333 OF THE  
CHINESE CRIMINAL CODE <sup>6</sup>

## 8. Denmark

*Document A/CN.4/99/Add.9**Article 3*

This Code shall apply to any offence committed within the territorial limits of the Republic of China. Offences committed on any Chinese vessel or aircraft beyond the territorial limits of the Republic of China shall be deemed to have been committed within the territorial limits of the Republic of China.

*Article 4*

An offence shall be deemed to have been committed within the territory of the Republic of China if the overt act constituting the offence is committed within the territory of the Republic of China, or if the offence produces its effect in the territory of the Republic of China.

*Article 5*

This Code shall apply to any one of the following offences committed beyond the territorial limits of the Republic of China:

1. Offences against the internal security of the State;
2. Offences against the external security of the State;
3. Offences relating to counterfeit currency;
4. Offences relating to counterfeiting of valuable securities, as specified in articles 201 and 202;
5. Offences relating to false documents and seals, as specified in articles 211, 214, 216 and 218;
6. Offences relating to opium,<sup>7</sup>
7. Offences against personal liberty, as specified in article 296;
8. Offences of piracy, as specified in articles 333 and 334.

*Article 333*

Whoever navigates any vessel not being commissioned by a belligerent State or not being part of the naval forces of any State, with intent to commit violence or employ threats against any other vessel or against any person or thing on board such other vessel, is said to commit piracy, and shall be punished with death, or imprisonment for life, or for not less than 7 years.

Whoever being a ship's officer<sup>8</sup> or a passenger on board a ship, with intent to plunder or rob, commits violence or employs threats against any other officer<sup>8</sup> or passenger and navigates or takes command of the ship shall be deemed to have committed piracy.

Where death results from the commission of piracy, the offender shall be punished with death; or if grievous bodily harm results, the offender shall be punished with death or imprisonment for life.

<sup>6</sup> The texts of the various articles, with the exception of article 4, are based on the translations made by the Legal Department of the Shanghai Municipal Council (The Commercial Press, Shanghai, China, 1935), pp. 2-3 and 119. Texts of articles 3, 4 and 5, taken from the same source, already appear in *Laws and Regulations on the Régime of the High Seas* (United Nations Legislative Series, Vol. II (1952), p. 24). A new translation of article 4, the key article on which the Chinese Government bases its comments on the question of collision, has been made because the existing text does not fully express the meaning of the original.

<sup>7</sup> An additional item which appears in the Chinese text submitted by the Chinese Government. Article 5 was amended on 7 November 1948.

<sup>8</sup> "A member of the crew" and "another member of the crew" would be closer to the meaning of the original expressions.

TRANSMITTED BY A LETTER DATED 2 JULY 1956 FROM THE  
PERMANENT MISSION OF DENMARK TO THE EUROPEAN  
OFFICE OF THE UNITED NATIONS

[Original: English]

The Danish Government wish to make the following comments on the provisional articles concerning the régime of the high seas and the régime of the territorial sea (chapters II and III of the Commission's report) as adopted by the International Law Commission as its seventh session.

I. *The régime of the high seas**Article 33*

According to this article, the decisions of the arbitral commission shall be binding. On the other hand, the article leaves the question open as to who is to supervise the observance of the provisions and as to what coercive measures may be applied against countries failing to abide by the decisions and against the fishermen of such countries. It is the opinion of the Danish Government that the efficacy of the whole arbitration scheme will depend on a satisfactory solution of these questions.

The particular interest which, from a Danish point of view, attaches to the preservation of the fauna of the arctic regions, makes it desirable in the opinion of the Danish Government that, in accordance with the underlying purpose of protecting and developing the living resources of the sea, the proposed convention should apply also to marine mammals, particularly seals, and that this be expressed in the draft articles.

II. *The provisions concerning the régime of the territorial sea**Article 1*

According to this article, the sovereignty of a State extends to a belt of sea adjacent to its coast and described as the territorial sea.

This axiom can be accepted provided it does not preclude that the breadth of this belt is fixed differently for the different relations in which a State exercises sovereignty over the parts of the sea nearest to its coast. According to Danish legislation and practice, the limit of the territorial sea is normally four nautical miles from the coast as regards the maintenance of customs control, whereas in other respects the limit of the territorial sea is three nautical miles from the coast. In other words, territorial sea as a term of international law should not necessarily be construed as a standard term, but should be variable according to the different functions it serves.

*Article 3*

In the opinion of the Danish Government it would be desirable if, as recommended by the International Chamber of Shipping in their statement of 27 April 1955, agreement was reached between the Government on a definite, not too wide, limitation of the territorial sea. However, the Danish Government are in agreement with the statement of the Commission to the effect that, as conditions are to-day, no uniform international practice can be demonstrated as regards the breadth of the territorial sea.

In these circumstances and in the light of existing practice the Danish Government take the following view:

The prevailing régime is not tantamount to complete freedom for each State to decide the breadth of its territorial sea. This point of view has also been upheld by the International Court of Justice in its decision of the British-Norwegian fisheries dispute. Thus, a State cannot, by altering the rules which have so far been applied for delimitation of the territorial sea, incorporate any large areas which have hitherto been high seas into its own territorial waters to the detriment of the interests of other States. On the other hand, it would not be equitable for those States which have so far maintained a territorial sea of, say, three nautical miles to be bound to that limit indefinitely, irrespective of other States maintaining a considerably broader territorial sea. Thus, it cannot be considered unreasonable if a State effects a certain limited extension of its territorial sea, when weighty national considerations warrant such a policy and when such extension can be effected without violating the established interests of other States in the waters in question. Such an extension should not, however, exceed the limits generally observed in the waters in question, and it should not be exorbitant as compared with the rules practised by other States, notably those whose coasts are adjacent to the waters involved.

As a State has not only certain rights but also obligations in its territorial sea, the Danish Government would recommend that it be indicated in this article that a State shall not limit its territorial sea to less than a breadth of three nautical miles.

As regards the problem of solving disputes between States on the questions falling under this heading, the Danish Government are of the opinion that, as conditions are to-day, it may be doubtful whether a diplomatic conference as proposed by the Commission would be a suitable means to that end. It would seem preferable, as a minimum and provisional solution, to establish an impartial and independent arbitral body, as previously considered, which could deal with cases where a State claims that its interests require an extension of the territorial sea maintained so far, while another State or other States oppose such a measure as being incompatible with their established interests.

*Articles 5 and 7*

A special bay rule based on geometrical computations, laying down general conditions for the cases when a basis line may be drawn across the mouth of an indentation, will hardly provide a satisfactory solution which will be

applicable to all the widely different geographical conditions. It will also be necessary to take economic and defence factors into consideration in the computation of bay-chords. It might be worthwhile considering whether the rule of article 5 would not be sufficient, possibly deleting the word "deeply" before "indented" in the second line of paragraph 1.

The last period but one of paragraph 1 of article 5 appears to imply that the sea areas within the base lines will always be "internal waters". This does not appear to be a necessary consequence of using the base line as a starting point for the fixing of the outer limit of the territorial sea. Hence, there should be nothing to prevent the drawing of base lines between islands and the mainland at the mouth of straits without thereby implying that the part of the strait lying within such base line is to be regarded as internal waters. Even if delimitation between the internal and outer territorial sea should normally follow the base lines used at the fixing of the outer limits of the territorial sea, it may be expedient to make deviations from this rule in certain cases. A State should not be precluded from fixing only the outer limits of its territorial sea without indicating any delimitation between the internal waters and the territorial sea.

In compliance with the wish expressed in the Commission's comments on article 7 for information concerning bays bounded by two different States, it may be stated that in the case of Denmark the question has been solved *vis-à-vis* Sweden by a declaration concluded between the two countries on 30 January 1932, and *vis-à-vis* Germany by the fixation of the frontier made by an international commission acting in accordance with article III of the Versailles Treaty. In both cases, the frontiers are based on the median line and exceptions from this principle have only been made when shipping- and fishery-interests of the States justified a different arrangement.

*Article 10*

In its comments on article 10 the International Law Commission mentions the question of formulating a special rule for groups of islands. In the opinion of the Danish Government it should not be necessary to formulate such a rule because the principle underlying article 5 implies that straight base lines may be drawn between the islands of a group. Perhaps article 5 should be amended so as to preclude any doubt. It would not appear reasonable to make a distinction between islands off a coast and islands forming an independent group. Incidentally, any such distinction would be difficult to maintain from a geographic point of view as an island may be so large that in the application of the said principle it should rank equally with a mainland.

*Article 12*

With regard to straits whose coasts belong to the same State, it must be permissible, under the general principle of article 5, to draw straight base lines between points on either side of the strait near its mouths. In accordance with the comments on articles 5 and 7, the drawing of such base lines should not affect the normal right of free passage through the strait.

*Articles 18 and 25*

Paragraph 4 of article 18 and paragraph 2 of article 25 refer to the right of innocent passage through international straits, partly for vessels in general and partly for warships. The Danish Government would find it very desirable that the provisions in question indicate, in exact terms, that the right of passage through an international strait does not imply permission for any navigation other than passage, and only in the normal sailing route. This could be achieved, for example, by formulating the relevant passages "through that part of the straits normally used for ...".

The Danish Government agree with the principle of international law that warships in time of peace have right of innocent passage through international straits. It is the view of the Danish Government, however, that this principle does not debar the State in question from taking, in certain areas, reasonable measures for the protection of its security, provided that these measures do not amount to a prohibition or to a suspension of the right of innocent passage, *vide* paragraph 4 of article 18 of the draft articles. The requirement of previous notification, for example, would be within the scope of such reasonable measures, and the Danish Government therefore believe that in their comments to paragraph 2 of article 25 the Commission have gone too far by suggesting that

"in straits normally used for international navigation between two parts of the high seas, the right of passage must not be made subject to previous authorization or notification".

The Danish Government are of the opinion that innocent passage is not interfered with when for special reasons, for instance security reasons, passage is made subject, not to any authorization, but merely to previous notification through diplomatic channels.<sup>9</sup>

In addition to these comments on the individual provisions of the draft, the Danish Government take the opportunity of pointing out that the report of the International Law Commission contains no reference to a problem which is of particular interest to Denmark, namely, the problem of the extent of the jurisdiction to which a coastal state is entitled as a result of its responsibility for the measures to be taken for the safety of navigation.

As the waters round the Danish coasts are comparatively shallow at a great distance from the nearest coast and contain many shoals and reefs constituting a danger to navigation, the Danish Government have undertaken the responsibility for marking the fairways by means of light-vessels, buoys and the like far beyond the Danish territorial sea. This particular responsibility rests partly on an old-established practice and partly on the express provision in article 2 of the Treaty of 14 March 1857 on the abolition of the Sound dues, under which the Danish Government were obliged to preserve and maintain "...the buoys, and beacons now existing which serve to facilitate navigation on the Kattegat, the Sound and the Belts" and

moreover "in future, as heretofore, in the general interest of navigation to take up for serious consideration whether it might be useful and convenient to alter the location and form of these . . . buoys and beacons or to increase their number, everything without any charge to foreign shipping". By agreements between the Danish Lighthouse Authority and the corresponding authorities of the neighbouring countries, a delimitation has been established of the area of responsibility of each country in the waters outside the territorial sea.

In order to accomplish this task efficiently and safely, it must be possible to enforce the regulations issued by the Danish authorities with that end in view, with binding effect on everyone navigating the said waters. As examples of such regulations may be mentioned:

(a) Prohibition of jettison of rubbish, cargo, ballast, ashes or the like in places where it may cause a reduction of the depth of the fairway to such a degree that free navigation is endangered.

(b) Rules on the placing of pound net stakes, including prohibition of placing such stakes in fairways where they may endanger navigation.

(c) Prohibition of establishing, without permission, sea-marks and the like in the fairways which may obstruct navigation.

(d) Prohibition of destruction or damage of established sea-marks and of using sea-marks for mooring or for securing fishing tackle, etc.

(e) Rules on the removal of wrecks and rendering them harmless, including the right of making the salvage of wrecks abandoned by the owner conditional on special permission by the Danish authorities. (Only such rules will provide the necessary assurance that the salvage contractor carries out the salvage with due regard to the safety of navigation and, particularly, provides the necessary depth of water over any wreckage left).

From the aspect of international law there is nothing to prevent such regulations from being enforced against Danish nationals outside the territorial sea. It is, however, obvious that the efficacy of the rules would be materially weakened if the argument should be raised that they are not enforceable against foreign nationals. Experience has proved, especially since 1945, the need for regulations for the salvage of wrecks by foreign contractors in those parts of the high seas where Denmark is responsible for the buoying of the fairways.

The Danish Government would therefore welcome a succinct formulation of a rule of international law to the effect that a State which, according to custom or international agreement, has assumed responsibility for the buoyage and similar measures for the safety of navigation in fairways outside the territorial sea, shall be entitled to issue, also with effect for foreign nationals who navigate in such waters, any regulation which may be required to prevent dangers to navigation, and entitled to exercise such jurisdiction over foreign nationals as may be required for the effective enforcement of these regulations.

In conclusion, the Danish Government wish to state that they may revert, in greater detail, to the problems dealt with in this document. Certain questions relating to ar-

<sup>9</sup> The observations of the Danish Government on paragraph 2 of article 25 were transmitted earlier by a letter of 13 January 1956.

title 22 of the provisional articles concerning the régime of the high seas are at the moment being studied by the Danish authorities.

## 9. Dominican Republic

### *Document A/CN.4/99*

TRANSMITTED BY A LETTER DATED 5 MARCH 1956 FROM THE PERMANENT MISSION OF THE DOMINICAN REPUBLIC TO THE UNITED NATIONS

[*Original: Spanish*]

1. The provisions of municipal law concerning the régime of the high seas, the régime of the territorial sea and the submarine or continental shelf are contained in article 5 of the Constitution of the Dominican Republic, in Act No. 3342 of 13 July 1952 concerning the extent of the territorial waters of the Republic, and in the Harbour and Coastal Police Act (No. 3003) of 12 July 1951.

2. So far as the extent of the territorial sea and the continental shelf are concerned, article 5 of the Constitution of the Republic provides that "the adjacent territorial sea and continental shelf are likewise part of the national territory", and adds that "the extent of the territorial sea and of the continental shelf shall be defined by statute". Article 1 of Act No. 3342 provides:

"a zone of three nautical miles along the coasts, the said zone extending seaward from the mean low-water mark, is hereby established as the extent of the territorial or jurisdictional waters".

Article 4 establishes:

"an additional zone adjacent to the territorial sea, to be known as the 'contiguous zone', which shall consist of a belt extending outward from the outer limit of the territorial sea to a distance of twelve nautical miles into the high seas".

Previous delimitations are subject to a transitional provision of the Act which states:

"The dimensions of the territorial sea and of the contiguous zone which are specified in this Act constitute the minimum limit of the aspirations of the Dominican Republic and, accordingly, do not represent an immutable position with respect to any progressive development of positive international law that may hereafter affect the régime of the sea."

3. The Bays of Samaná, Ocoa and Neiba, within the boundaries formed by lines drawn transversally between their respective capes and points, are declared historical waters or bays. These lines demarcate the boundaries of the internal waters and the base line of the territorial waters in the bays in question.

4. With regard to maritime resources, article 5 provides:

"The Dominican State reserves the right of ownership in and utilization of the natural resources and wealth which occur or may be discovered in the sea bed or subsoil of the sea in an area, adjacent to Dominican territory, the extent of which shall be determined by

the National Administration according to the requirements inherent in the taking possession and exploitation of the said natural resources and wealth and, where appropriate, through international treaties. The Dominican State shall have power to set up or to authorize the setting up of structures or installations necessary for the exploitation of the said resources and to exercise all and any policing measures necessary for their conservation."

5. In pursuance of Act No. 3003 (see para. 1), if any crime or offence is committed on board a Dominican or foreign merchant vessel, whether in a port or in the territorial waters of the Republic, the harbour-masters (*Comandantes de Puerto*) are empowered to act; they report the circumstances to the ordinary courts, but this action does not prejudice whatever action may be taken by other officials of the Judicial Police. If a crime or offence is committed on board a warship, the harbour-master concerned may not go on board but instead prepares a report setting forth the facts which have come to his notice.

6. The provisions relating to entry into port in distress or through *force majeure* and to the nationality of ships are contained, respectively, in article 46 and in articles 96 and 97 of Act No. 3003:

"A vessel shall be deemed to have entered a Dominican port in distress or owing to *force majeure* if its entry is occasioned by:

"(a) Lack of general provisions for the needs of the voyage;

"(b) Legitimate fear of being captured by enemies or pirates;

"(c) Accidents which render the vessel unseaworthy;

"(d) A storm which cannot be weathered on the high seas;

"(e) An unexpected illness or serious injury suffered by a passenger or crew member and requiring urgent attention; or

"(f) A mutiny on board, threats or serious disagreements between the crew.

"In all other cases entry into port shall be deemed to be voluntary.

"The following vessels possess Dominican nationality:

"(a) Vessels registered as such with the Port Authorities;

"(b) Vessels seized from the enemy in time of war or condemned as prize;

"A vessel cannot acquire Dominican nationality until its foreign registration has been cancelled."

7. The enclosed copies of article 5 of the Constitution and of Act No. 3342 contain provisions concerning the extent of the territorial waters of islands or islets; canals and other waters considered as territorial; the regulations governing the territorial sea and the contiguous zone in the areas bordering on the territory of the Republic of Haiti; and the powers of jurisdiction or control in the contiguous zone and in internal waters declared to be national territory.

## 10. Iceland

*Document A/CN.4/99/Add.2*

NOTE VERBALE DATED 6 APRIL 1956 FROM THE MINISTRY  
FOR FOREIGN AFFAIRS OF ICELAND

[*Original: English*]

The Ministry for Foreign Affairs of Iceland presents its compliments to His Excellency, the Secretary-General of the United Nations, and has the honour to refer to the Legal Department's note of 24 August 1955 (LEG 292/9/01) inviting the comments of the Government of Iceland upon the report of the International Law Commission covering the work of its seventh session. The Government of Iceland has the honour to submit the following comments.

I. *Preliminary remarks*

The Government of Iceland has studied the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea which were submitted in the report of the International Law Commission. Since the two régimes are closely related the following comments will whenever necessary refer to both sets of articles.

The fundamental provisions will be dealt with first (II), whereupon certain other provisions will be commented on (III).

II. *Provisions of fundamental importance*

*A. Baselines:* In the opinion of the Icelandic Government the International Law Commission has done very valuable work in redrafting articles 4 and 5 of the territorial sea draft. These articles constitute a marked improvement over earlier drafts. The Icelandic Government, however, finds it necessary to propose that the last sentence of paragraph 1 of article 5 should be deleted. It is there provided that the baselines should not be to and from drying rocks and drying shoals. In the Anglo-Norwegian Fisheries Case the International Court of Justice confirmed the legality of using drying rocks as basepoints and in present Icelandic legislation such basepoints are used in many instances.

*B. Bays:* Article 7 of the territorial sea draft also constitutes a marked improvement over earlier drafts. Also in this case useful work has been performed by the Commission for which it deserves credit. This applies particularly to paragraph 5 of article 7, without which the draft would have been unacceptable. It is submitted, however, that paragraph 5 should apply to all the preceding paragraphs.

*C. Breadth of the territorial sea:* The Commission wishes to have the comments of Governments before drafting the final text of article 3 of the territorial sea draft. However, the Commission has in a preliminary manner drafted certain basic postulates.

In paragraph 1 of article 3 the Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles. It does not seem appropriate to refer to the so-called

three-mile rule "as the traditional limitation". As the Commission itself recognizes, practice is not uniform in this field. It seems that it would have been quite sufficient for the Commission to state that fact.

In paragraph 2 of article 3 it is stated that the Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles. The Government of Iceland, as will be further explained later, does not share this view.

In paragraph 3 of article 3 it is said that the Commission considers that international law does not require States to recognize a breadth beyond three miles.

The views expressed in article 3 seem to present a very curious mixture and really to be irreconcilable. On the one hand the so-called three-mile limit is apparently given basic importance which in the opinion of the Icelandic Government is quite unwarranted. On the other hand a wider limit than twelve miles would apparently be considered illegal even if recognized by other states or justified in view of local considerations. The Government of Iceland has been unable to find a sound basis in these postulates.

The traditional régime of the sea is characterized by a sort of compromise between the jurisdiction of the coastal State in waters adjacent to its coast and the freedom of the seas beyond that area. The former is juridically on the same level as the latter. It would be a mistake to consider it as an exception to a principle. The difficulty has always been and still remains to decide where the line of separation should be drawn.

The practice of States seems to be incompatible with the acceptance of a general rule fixing the extent of the territorial sea with precision. A group of States would favour a general convention based on the system of the three-mile limit. The conclusion of such a convention would imply that the many States which are opposed to that limit would give up their opposition. That, of course, is thoroughly unrealistic.

In its judgement in the Fisheries Case the Court stated the following in connexion with the United Kingdom Government's assertion that the so-called ten-mile rule in bays should be regarded as a rule of international law:

"In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law."<sup>10</sup>

It seems clear that the same reasoning applies with equal force to the assertion that the three-mile limit for the extent of the territorial sea should be regarded as a rule of international law.

As indicated by the rapporteur of the International Law Commission, the practice of States varies greatly, and in the different reports of the rapporteur different limits are

<sup>10</sup> *I.C.J. Reports 1951*, p. 131.

proposed varying from three miles to twelve miles. In the report of the International Law Commission it is stated that on this question divergent suggestions were made during the debates of the Commission.<sup>11</sup>

A uniform system would be possible only if very extensive limits were to be adopted. It would not mean that all States would agree to the three-mile limit. On the contrary, the States who are in favour of that limit would have to be prepared to accept a much more extensive one. In the absence of that attitude it seems that the only practicable solution would be to accept the principle of regional or local systems which is in conformity with the facts of the present practice. The Government of Iceland is prepared to examine any reasonable proposition of that nature.

The question of the breadth of the territorial sea is, of course, closely linked with that of the contiguous zones and cannot be dealt with in an isolated manner. The basis for coastal jurisdiction is that certain interests of States in their coastal areas are recognized. One of these interests would be exclusive jurisdiction over fisheries in the coastal area. If a contiguous zone is used for that purpose the necessity, for example, as far as Iceland is concerned, for a wide territorial sea would appear in quite a different light from the situation where no such contiguous zone was provided. The reasons for this attitude are found in an earlier statement by the Icelandic Government as follows:

"... 2. The views of the Icelandic Government with regard to fisheries jurisdiction can be described on the basis of its own experience, as follows:

"Investigations in Iceland have quite clearly shown that the country rests on a platform or continental shelf whose outlines follow those of the coast itself (see provisional map, p. 54) whereupon the depths of the real high seas follow. On this platform invaluable fishing banks and spawning grounds are found upon whose preservation the survival of the Icelandic people depends. The country itself is barren and almost all necessities have to be imported and financed through the export of fisheries products. It can truly be said that the coastal fishing grounds are the *conditio sine qua non* of the Icelandic people for they make the country habitable. The Icelandic Government considers itself entitled and indeed bound to take all necessary steps on a unilateral basis to preserve these resources and is doing so as shown by the attached documents. It considers that it is unrealistic that foreigners can be prevented from pumping oil from the continental shelf but that they cannot in the same manner be prevented from destroying other resources which are based on the same sea-bed.

"3. The Government of Iceland does not maintain that the same rule should necessarily apply in all countries. It feels rather that each case should be studied separately and that the coastal State could, within a reasonable distance from its coasts, determine the necessary measures for the protection of its coastal fisheries

in view of economic, geographic, biological and other relevant considerations."<sup>12</sup>

These views remain unchanged.

The Icelandic Government recently has had occasion to present its views on this subject to the Council of Europe in a memorandum of September 1954 as well as in an additional memorandum of October 1955. In the former memorandum it is shown that in the period between 1662 and 1859 the fishery limits around Iceland were 16 miles, all bays being also closed to foreign fishing. In the latter part of the nineteenth century the enforcement of the prevailing limits by the Danish Government became inefficient and in 1901 they concluded an Agreement with the United Kingdom which specified the ten-mile "rule" for bays and three-mile fishery limits around Iceland. These limits were applicable until the Agreement was terminated in 1951, due notice in accordance with its own provisions having been given by the Icelandic Government to that effect. For many years it had then been quite clear that the fishstocks were rapidly decreasing due to overfishing, so that unless positive steps were taken the country's economic foundation would be faced with ruin.

In the last few years steps have been taken by the Icelandic Government towards enforcing its jurisdiction over the continental shelf fisheries in conformity with the provisions of the 1948 Law concerning the Scientific Conservation of the Continental Shelf Fisheries. The steps taken so far, although they only partially meet the requirements of the situation, have already been of immense value and constitute significant proof of the tremendous importance of exclusive fisheries jurisdiction as the basis of the country's economy. It should not be overlooked in this connexion that foreign fishing, far from being adversely affected, has benefited from the measures taken. The result of the measures has been that the fishstocks have increased and led to greater output of the fisheries in the Icelandic area. This matter is further discussed in the memorandum to the Council of Europe referred to above.

In the articles drafted so far by the Commission no contiguous zone is provided for exclusive fisheries jurisdiction. In the absence of such provisions the interests involved would have to be covered by a very wide territorial sea. If, on the other hand, a contiguous zone is provided, the text of article 2 of the high seas draft would have to be changed.

In chapter II of the high seas draft (articles 24-33) conservation of the living resources of the high seas is dealt with. Although these articles recognize the special interests of the coastal States, it is quite clear that they would not grant exclusive fisheries jurisdiction to the coastal States. According to them the necessary measures for conservation are to be worked out if possible through international agreements. If that is not possible the coastal state could adopt the necessary measures, but *inter alia* such measures must not discriminate against foreign fishermen. This system is reasonable if applied to the area beyond the limits of exclusive coastal jurisdiction over fisheries, provided the interests of the coastal State in

<sup>11</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9, para. 68.*

<sup>12</sup> *Ibid., Eighth Session, Supplement No. 9, annex II, section 8.*

such jurisdiction are reasonably protected. Within the limits of exclusive coastal jurisdiction, foreign fishing can of course be prohibited by the coastal State. This is an incontrovertible fact. But to say that such limits are fixed at, for example, three miles has no realistic foundation. What is called for is an appreciation by the coastal State of its own needs up to a reasonable distance. That distance might vary considerably in the different countries in view of economic, geographic, biological and other relevant considerations. To take an example, a country having no special interest in its coastal fisheries might consider relatively narrow limits sufficient for its purposes, whereas a country, like Iceland, basing its economic existence upon coastal fisheries, would consider the same limits quite unacceptable. Also, countries bordering upon a narrow sea, like the North Sea, would be in a different position from a country situated far from other countries. *The coastal State is in the best position to analyse and assess its requirements in this field and should do so (up to a reasonable distance which would not necessarily be limited to twelve miles).*

*Although conservation through international agreements, where foreign fishermen would have the same rights as the local fishermen, is reasonable and necessary beyond the limit of exclusive coastal fisheries jurisdiction, the former is not an acceptable substitute for the latter. This is the crux of the matter and that problem has to be faced in a realistic manner.* Consequently the Icelandic Government would not consider that the conservation articles adopted by the Commission would reduce the importance of exclusive coastal fisheries jurisdiction. In other words the conservation articles would supplement the coastal jurisdiction. They could not in any way substitute such jurisdiction.

### III. Other provisions

*Article 2* of the high seas articles provides for freedom of fishing in the high seas. As already pointed out this text would have to be changed if a contiguous zone for exclusive fisheries jurisdiction is provided.

*Article 22* of the same draft deals with the right of pursuit. It is submitted that the text of paragraph 3 should be amended so as to cover identification and pursuit by aeroplanes as well as identification from the coast.

*Article 24:* Same observations as on article 2 above.

## 11. India

### *Document A/CN.4/99*

A. TRANSMITTED BY A NOTE VERBALE DATED 10 FEBRUARY 1956 FROM THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS

[Original: English]

#### *Régime of the high seas*

*Article 2:* The Government of India are of the view that it is desirable to clarify that the freedoms enumerated in this article are to be enjoyed in conformity with the rules of international law. The position as it exists today is that the freedom of the high seas is subject to certain

recognized exceptions in international law including the right of a coastal State to adopt measures necessary for self defence. Most of these exceptions find place in the subsequent articles, and it does not appear to be the intention of the International Law Commission to introduce any basic changes in the existing position. To put the matter beyond controversy, the Government of India would suggest the insertion of the following clause at the end of the article:

“These freedoms shall be enjoyed in conformity with the provisions of these articles and other rules of international law”.

It would appear that a similar provision has been made in article 1 (2) on the régime of the territorial sea.

*Article 5:* The Government of India have undertaken a revision of their laws relating to merchant shipping and for the present they would like to reserve their comments on this draft article.

*Article 22:* The Government of India are of the view that this article should be suitably amended so as to allow the right of pursuit of a foreign vessel also in cases where the pursuit has commenced within the contiguous zone though outside the territorial sea. The Government of India feel that unless such a right is recognized the utility of contiguous zones would be much diminished and the purpose of establishing such zones may be somewhat frustrated.

*Articles 24 to 30:* The Government of India have no comments on article 24. They are, however, of the view that the basis of the draft articles 25 to 30 are unacceptable. They do not protect the legitimate interests of coastal States and, in particular, are unfair to under-developed areas which have expanding populations increasingly dependent for food on the living resources of the seas surrounding the coasts, and which for political reasons were unable hitherto to assert their rights to develop their fishing fleets. The Government of India feel that a coastal State should have the exclusive and pre-emptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the high seas contiguous to its coast. Unless such a right of the coastal State is recognized, States with well developed fishing fleets may indulge in indiscriminate exploitation of the living resources of the sea contiguous to the coast of another State much to the detriment of that State and its people. The Government of India consider that it would be undesirable to confer a right on a State to adopt conservation measures or establish conservation zones in areas contiguous to the coast of another merely because its nationals have engaged in the past in fishing in such areas. The primary right and duty of conservation of living resources should be that of the coastal State in respect of areas contiguous to its coast. The Government of India do not deny the right of other States to fish in the high seas contiguous to the coast of another, but where conservation measures have been adopted by the coastal State, other States may approach the latter for suitable agreements in this regard. The Government of India feel that the exercise of such a right by the coastal State will be in the general interest of the international community and will not in any way interfere

with the freedom of *bona fide* fishing in the high seas enjoyed by all the States. The Government of India attach great importance to these articles and desire that these be reconsidered in the light of the above comments.

The Government of India would suggest the following amendments to these articles:

*Article 25:* Insert the words "contiguous to its coast" between the words "high seas" and "where" in line 2.

*Article 26:* Insert the words "beyond the belt of 100 miles from the coast of a State" after the words "high seas" in line 2.

*Article 28:* This becomes unnecessary if amendments to article 25 are accepted.

*Article 29:* The proviso to paragraph 1 should be omitted and the following proviso be substituted:

"Provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures".

In paragraph 2: clause (a), omit the word "scientific"; clause (b), in place of the existing clause substitute the following: "That the measures adopted are reasonable"; clause (c), at the end of the clause insert the words "as such".

*Article 30:* May be deleted.

*Articles 31 to 33:* The Government of India would prefer to reserve their comments on these articles until a final decision is reached on the subject of arbitral procedure.

*Annexures to articles on the régime of the high seas:* The Government of India wish to offer the same comments as under articles 24 to 33.

#### *Régime of the territorial sea*

*Article 1:* The Government of India would suggest insertion of the following proviso at the end of paragraph 2:

"Provided that nothing in these articles shall affect the rights and obligations of States existing by reason of any special relationship or custom or arising out of the provisions of any treaty or convention".

*Article 3:* The Government of India are unable to accept paragraph 3 of this article as this will be in conflict with the provisions of paragraph 2 and would render the said provisions meaningless. The Government of India would suggest that paragraph 3 should be omitted and paragraph 2 be redrafted as follows:

"The maximum breadth of the territorial sea may be fixed at twelve miles and within that limit each country, whatever the geographical configuration of its coast line, should have freedom to fix a practical limit".

*Article 5:* The Government of India would suggest the substitution of the word "area" for the word "region" in paragraph 1.

*Article 7:* Comments to be telegraphed later.

*Articles 8, 9, 13:* Comments to be telegraphed later.

*Article 16:* The Government of India would suggest insertion of the following clause at the end of paragraph 1:

"Except in times of war or emergency declared by the coastal State".

*Article 19:* The Government of India would suggest that the following be inserted as sub-clause (a) and that the existing sub-clauses be renumbered as (b), (c), (d), (e) and (f) respectively.

"(a) the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".

#### *Document A/CN.4/99/Add.3*

B. NOTE VERBALE DATED 17 APRIL 1956 FROM THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS

[Original text: English]

The Permanent Representative of India to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to refer to the comments of the Government of India forwarded with his note No. 325, dated the 10th February 1956, on the draft articles on the régime of the territorial sea provisionally adopted by the International Law Commission.

Article 13 of the régime of the territorial sea is acceptable to the Government of India subject to the following proviso:

"Provided that if there is a port situated at or near the mouth of a river or on the estuary into which a river flows, the territorial sea shall be measured from such outermost limits as may be notified by the Government or the port authority having jurisdiction over the port, in the interest of pilotage and safe navigation to and from the port."

The Government of India have no comments to offer on articles 8 and 9. Comments as regards article 7 will be communicated shortly.<sup>13</sup>

#### 12. Ireland

#### *Document A/CN.4/99/Add.4*

LETTER DATED 20 APRIL 1956 FROM THE DEPARTMENT OF EXTERNAL AFFAIRS OF IRELAND

[Original: English]

I am directed by the Minister for External Affairs to refer to your letter of 31st January 1956, concerning the report of the International Law Commission covering the work of its seventh session (LEG 292/9,01; LEG 292/8,01), and to say that the Government of Ireland have read with interest and appreciation the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea adopted by the International Law Commission at its seventh session. However the Government of Ireland consider that the time available

<sup>13</sup> By a *note verbale* of 23 August 1956, the Permanent Representative of India to the United Nations notified the Secretary-General that the Government of India had no comments to offer on article 7.

for the study and furnishing of comments on this important subject by those States admitted to membership of the United Nations at the tenth session of the General Assembly in inadequate and accordingly wish, at this stage, to reserve generally their attitude as regards the articles, particularly as regards chapter II of the draft articles on the régime of the territorial seas.

Nevertheless, without prejudice to the general reservation of their attitude, the Government of Ireland take this opportunity of indicating the following in relation to article 5 of the provisional articles concerning the régime of the high seas:

Article 5 provides that for purposes of recognition of a ship's national character by other States, that ship must be Government-owned or more than half-owned by:

(1) Persons actually resident in the territory of the flag State who are either nationals of that State or legally domiciled there; or

(2) A partnership in which the majority of the partners are such persons; or

(3) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.

Under the Mercantile Marine Act, 1955, the Government or a Minister of State, an Irish citizen or an Irish body corporate are alone unconditionally entitled to own an Irish ship or a share therein. No distinction is drawn between Irish citizens actually resident in Ireland and those actually resident in other countries.

Moreover, provision exists in that Act for the granting, by order of the Government, of registry and ownership rights in Ireland to citizens of and bodies corporate registered in another State which permits Irish citizens and bodies corporate to own a ship of its flag or a share therein. One such order has been made to date.

### 13. Israel

#### *Document A/CN.4/99/Add.1*

TRANSMITTED BY A NOTE VERBALE DATED 21 MARCH 1956  
FROM THE PERMANENT MISSION OF ISRAEL TO THE UNITED  
NATIONS

[*Original: English*]

#### I

The present observations are submitted in accordance with provisions contained in the Statute of the International Law Commission and in response to the invitation of the Secretary-General of the United Nations. By way of preliminary observation the Israel Government wishes to place on record its appreciation of the work which has been achieved in the field of the codification and progressive development of the international law regarding the high seas and the régime of the territorial sea by the International Law Commission, by its Special Rapporteur, Professor J. P. A. François, and by the Development and Codification of International Law Division of the Secretariat of the United Nations. Whatever may be the ultimate outcome in these important spheres, there is no room for doubt concerning the high scientific value of the

documents which have been prepared in connexion with these topics, and which serve, and will assuredly continue to serve, as important signposts in connexion the clarification of the legal aspects of the problem. At the same time the Government deems it necessary to place on record its view that, regarded as a whole, the complex of problems involved in these two topics is not solely or even predominantly of a legal character. The non-legal elements will, in due course and in the proper organs, have to be accorded a like degree of careful and penetrating study such as the International Law Commission has succeeded in giving to their legal aspects.

A word of comment is ventured on the form of the Commission's reports in the hope that at its eighth session the Commission and its general Rapporteur, as well as the Secretariat, will be able to give consideration to the somewhat technical problem about to be mentioned. The different kinds of administrative difficulties which stand in the way of the preparation of the Commission's reports and the rapid circulation of the official summary records of the Commission's deliberations are appreciated. But at the same time it is felt that the summary records of the Commission's deliberations must be regarded as an integral part of its reports. Indeed, it is impossible to acquire complete understanding of the different formulations put forward by the Commission, whether in its draft articles or in its comments, without careful perusal of the Commission's deliberations preceding the final adoption of the article or comment in question. Furthermore, the system of incorporation of portions of comment by reference to previous reports of the Commission has led to some unnecessary confusion, and it is requested that this system be abandoned. The Government of Israel considers that it would be useful, both in connexion with the discussion on the Commission's final draft which is due to be placed on the provisional agenda of the eleventh session of the General Assembly, and for any other discussions which might subsequently take place, were the Commission's report, or an accompanying document prepared by the Secretariat, to set forth with great particularity and detail the full history of each article and comment, including a chronological survey of the different drafts and attendant proposals put forward during the various deliberations of the Commission, both those adopted by the Commission and included in its various sessional reports and those which were not adopted by the Commission. Furthermore, such synoptic survey should also contain the most ample references to the summary records and documentations of the Commission's eighth and all previous sessions at which the particular item was discussed. In this connexion it is also considered that additional scientific and political value will attach to such a report could it be found possible to include in it comparable references to the proceedings of The Hague Codification Conference of 1930. Owing to the relative unavailability of much of the earlier documentation it is felt that it is incumbent upon the various organs to provide some adequate substitute.

#### II

In its note of 24 January 1950 (see A/CN.4/19), this Ministry gave a preliminary survey of the laws in force in Israel and relating to the topics of territorial waters

and the régime of the high seas. In response to a subsequent invitation of the Secretary-General, in connexion with the preparation of further volumes of the United Nations Legislative Series (a publication of which this Government is highly appreciative), further factual information of similar character was transmitted to the Secretary-General in this Ministry's note dated 13 December 1955. In connexion with these documents the following observation is required: As is apparent from the dates of most of the legislation to which reference is made in those communications, by far the greater part of that legislation originated with the mandatory authorities prior to the independence of Israel. Essentially in order to avoid the creation of a legal vacuum and for reasons of obvious convenience, the legislative organ decided at the very beginning of the State's independent existence to reintroduce into force the whole corpus of mandatory legislation previously in force. Subsequent legislative action has been in the main, though not entirely, concerned with introducing various amendments to the earlier legislation thus maintained in force. The various statements of the existing law transmitted on previous occasions in order to assist in the work of the International Law Commission must be taken therefore as what they are, namely, as descriptions of law which for the greater part does not yet reflect, or does not necessarily reflect, the general policy of the country as regards the matters with which they are concerned. This policy is still in early stages of its development and is likely to remain so for some time. This facet may be illustrated by one example — a cardinal one. In a number of domestic laws, the breadth of the country's territorial sea has been defined by reference to the three-miles rule, and other legislation of relevance to that topic faithfully reflects the policies of the United Kingdom, as mandatory power, upon them. The views of the United Kingdom on all matters connected with the law of the sea are based upon a number of considerations of policy and of interest particularly to the United Kingdom. As will be seen in the course of these observations, in this matter the Government of Israel has reached conclusions which are different from those of the United Kingdom. In so far as international action is concerned the Government has taken the necessary steps to give formal public notification of what those views are. It has not yet found it possible to complete the necessary legislative steps to bring all the domestic legislation into line, or fully into line, with its international position. For this reason alone the relevant domestic legislation of Israel, nearly all of it a "heritage" of the previous rulers of the country, can under no circumstances or for any purpose be regarded as indicating the view of the Government and legislature thereon, or as evidence of the State practice of Israel.

The two most important international actions undertaken by the Government of Israel in connexion with the topics under discussion relate to the continental shelf (submarine areas), and the breadth of the territorial sea. In a *note verbale* dated 17 March 1952 (A/2456, p. 58) from the Permanent Delegation of Israel to the United Nations, a number of the Government's general views in connexion with an earlier formulation by the International Law Commission of draft rules on the continental shelf

were set forth. Since then, by a Proclamation dated 3 August 1952, the Government decided to extend all its competences over the submarine areas (continental shelf) contiguous to the shores of Israel.

The following is a translation of the formal proclamation embodying this policy published in *Yalkut Hapirsumim* No. 244 of 11 August 1952, page 989.

#### "PROCLAMATION

"Whereas recent scientific investigations indicate the presence of mineral wealth and other natural resources in the submarine areas contiguous to the coasts of Israel;

"And whereas it is desirable to take steps to preserve these resources and to assure their availability for the purpose of future research, utilization and development;

"And whereas several other States have taken steps to exercise jurisdiction over the submarine areas contiguous to their coasts;

"Therefore the Government of Israel hereby proclaims and publicly announces as follows:

"(1) The territory of the State of Israel shall include the seabed and the subsoil of the submarine areas contiguous to the coasts of Israel and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas.

"(2) Nothing contained in paragraph 1 shall affect the character as high seas of the waters as are above the said submarine areas and outside the territorial waters of Israel.

"12 Av 5712 (3 August 1952)

"By order of the Government

"Hannah EVEN-TOV

"Deputy Secretary to the Government"

Shortly afterwards the Knesset passed legislation by which this policy was transformed into a rule of domestic law. Following is a translation of the law in question.<sup>14</sup>

#### No. 21; SUBMARINE AREAS LAW, 5713 — 1953

1. (a) The territory of the State of Israel shall include the sea floor and under-ground of the submarine areas adjacent to the shores of Israel but outside Israel territorial waters, to the extent that the depth of the superjacent water permits the exploitation of the natural resources situate in such areas.

(b) Nothing in subsection (a) shall affect the character of the water superjacent on the said submarine areas, and outside Israel territorial waters, as waters of the high seas.

With regard to the breadth of the territorial sea, the Government decided, after careful review of all factors

<sup>14</sup> Passed by the Knesset on the 25th Shevat, 5713 (10th February, 1953) and published in *Sefer ha-Kukkim* No. 120 of the 5th Adar, (20th February, 1953), p. 53; the Bill and an explanatory note were published in *Hatza'ot Hok* No. 133 of the 20th Av, 5712 (11th August, 1952), p. 332. English translation from *Laws of the State of Israel*, Vol. 7, 5713—1952/3, authorized translation from the Hebrew, p. 41.

involved, upon a reasonable increase in the limits of the territorial sea beyond the so-called traditional rule of three miles. In the circumstances the reasonable extended limit was placed at six nautical miles from the line of low-tide. The formal embodiment of this policy is found in a Notice published in *Yalkut Hapersumim* No. 442 dated 22 September 1955, page 1, of which the following is the tenor:

“GOVERNMENT’S DECISION OF 24 Elul 5715  
(11 September 1955)

“*Notice on the maritime frontier of the State of Israel*

“The maritime frontier of the State of Israel is placed at a distance of six nautical miles from the coast measured from the low-water line, and the areas of the sea between the low-water line as aforesaid and the maritime frontier, together with the air space above them, constitute the maritime areas of Israel.”

In this case this Ministry found it desirable to send a formal notification of the terms of the Government’s Proclamation (while not considering that in strict law it was under any obligation to do so, the document in question having been published in the corpus of Israel official documents regularly published in *Yalkut Hapir-sumim* — the Official Gazette — and thus being available for the examination of other Governments whenever they should desire) to all countries with which diplomatic relations are maintained, as well as for information to the Secretary-General of the United Nations and of other specialized agencies which might be interested.

### III

No comment is made at present on the arrangement of the articles by the Commission with one exception (relating to straits). However, before proceeding to the detailed observations on them, a few words of comment are necessary on some general problems which are of transcendental importance.

The first of these problems relates to the breadth of the territorial sea at present discussed in article 3 of the Draft articles on the régime of the territorial sea. In some respects this is the pivot upon which the whole of the Commission’s proposals depend — both those on the high seas and those on the territorial sea — but it is believed that this problem is in fact far wider than a mere technical legal problem. It is a matter of common knowledge that there exist a number of international tensions which have their origin in important conflicts of interests and in which the very concept of the territorial sea plays an important role. The proceedings of the International Technical Conference on the Conservation of the Living Resources of the Sea held in Rome in April 1955, in the opinion of the Israel Government, afford little ground for confidence that it is possible to find on a technical and scientific basis a set of principles of universal validity upon which a satisfactory legal régime can be constructed. Re-reading in the twentieth century the classic literature on the topic in the light of the able researches of Mr. Wyndham Walker in *The British Year Book of International Law*, Vol. 22 (1945), p. 210, and of Mr. H. S. K. Kent in the *American Journal*

*of International Law*, Vol. 48 (1954), p. 537, it appears that what is sometimes called the traditional three-miles rule and the rigidity of its application have their origin in a combination of a number of fortuitous circumstances, the present importance of which is negligible. The validity today of the transference of the traditional rule and its rigid application to other parts of the world, in conditions entirely different from those prevalent when it emerged as the solution to a classic controversy of the formative period of modern international law, cannot be taken for granted. Leaving aside any considerations due to particular requirements of particular States, it is an impressive fact that the two publicists previously quoted have drawn attention to the circumstance that in the Mediterranean area for example, the three-miles rule is not traditional. Indeed, how untraditional the three-miles rule is can be seen from even a cursory perusal of the reports submitted to the Commission by the Special Rapporteur. In his first report on the régime of the territorial sea (A/CN.4/53) the following Mediterranean countries were listed as maintaining more than three nautical miles for the breadth of their territorial sea: Egypt, Italy, Portugal, Spain, Turkey, Yugoslavia. In the second report on the same subject (A/CN.4/61) the following Mediterranean countries were listed as maintaining more than three nautical miles for the breadth of their territorial sea: Egypt, Greece, Italy, Lebanon (apparently), Portugal, Spain, Syria (apparently), Turkey, Yugoslavia. Of the countries possessing a Mediterranean seaboard, two only were indicated as maintaining the system of three nautical miles: France, including Algeria and Tunisia, and Israel (a reference only to mandatory practice). Similarly, perusal of the practice of other States of the Asian continent does not disclose any overriding enthusiasm for the three-miles rule. What is called the Commonwealth system based on three nautical miles is maintained by the members of the Commonwealth, Ceylon, India and Pakistan. Other Asian countries listed as maintaining the three-miles rule or less are: China (but it is not stated which China), Indo-China, Indonesia and Japan. Of the remainder Iran and Saudi Arabia maintain the six-mile belt.

In its report covering the work of its seventh session the International Law Commission proposed to consider that international law does not require States to recognize a breadth beyond three miles, but it particularly asked for comments of Governments on this proposal.<sup>15</sup> Having regard to the serious political tensions previously mentioned and to the fragile basis upon which the so-called traditional rule rests, it is considered that the approach of the International Law Commission, as manifested in article 3 of its draft articles on the régime of the territorial sea, is open to serious criticism. Furthermore, an inherent contradiction seems to exist between paragraph 2 and paragraph 3 of the said article. The Commission states that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles, regarding this as a statement of an incontrovertible fact. The implication of this observation by the Commission

<sup>15</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, p. 16.

depends ultimately upon what is meant by "fact". Sufficient evidence exists to show that this is not a fact of which the law must draw the consequences, but rather the reverse, that it is itself the consequence of another fact — namely, that universal international law does not lay down that three miles, and only three miles, is the recognizable limit of the territorial sea. This indeed is recognized, although with hesitation, in paragraph 2 of article 3, and if article 3 limited itself (subject to certain drafting changes) only to paragraphs 1 and 2, then it might be found to constitute a satisfactory basis for a universal rule. But the addition of paragraph 3 completely destroys the whole balance of the article and opens the way both to an aggravation of existing disputes and to the creation of new disputes. Either the law does, or the law does not, present an absolute maximum for the breadth of the territorial sea. If it does, then the Commission must say so and indicate how it proposes to deal with the existing situation in which a great number of States are likely to be found to have a different limit. If the rule of international law does not contain an absolute maximum figure (as this Government believes to be the case), then it would appear to be incumbent upon the Commission to search out the controlling principles of international law which will enable the law to perform its proper regulatory function in international affairs. By proposing, in paragraph 2, a maximum of twelve miles while at the same time considering that States are not required to recognize a breadth beyond three miles, the Commission fails to answer the crucial question, namely: What is the position of a State which exercises its right recognized by the Commission to extend its territorial sea to a limit of twelve miles *vis-à-vis* a State which exercises another right which emerges from the Commission's formulation, not to recognize a breadth of more than three miles? What is the legal régime of the *mare nullius* the breadth of which may be up to nine nautical miles, the shoreward line of which would itself be at least three nautical miles from the coast, and how are disputes on that point to be resolved? It is essential for an answer to be found to this problem if the Commission is to proceed along the lines of its report on its seventh session.

The Government is loth to believe that universal international law is so deficient in controlling principles as to be unable to suggest a solution to the conflict of interests between those of the littoral State and those of the international community, embodied in the concept of freedom of navigation. In fact the situations of tension rarely concern the bare notion of freedom of navigation. They appear to rest upon more concrete antagonisms of an essentially economic and sociological character arising out of the exercise of the right of freedom of navigation. The judgement of the International Court in the *Anglo-Norwegian Fisheries* case is interpreted as laying down that the law must take those factors into consideration. That case showed that the law will apply a general criterion of reasonableness, and the Court implied that what is reasonable in a given case depends upon all the circumstances, each of which has to be treated on its own merits, such circumstances including also the relevant elements of geography and environment. It is therefore recognized that each individual State may have individual reasons

for wishing to increase the limit of its territorial sea beyond three miles and even beyond some other arbitrary figure which may be laid down. An approach on this basis would appear to offer greater prospects for the codification and the progressive development of international law than any mechanical one, and it leads to the conclusion that the draft must also deal carefully with the settlement of disputes. Possibly this will be given an answer in the so-called "final clauses" of the draft, if it is put in the form of a convention.

Finally, it may be open to question, in the opinion of this Ministry, whether there exists any possibility, in draft articles intended to have universal application, to go into such detail as the number of miles of territorial sea that may be permitted. It would be going too far to state categorically that on this matter there exist a number of regional customs operative in clearly defined geographic regions. However, persual both of the illuminating reports submitted by Professor François and of the proceedings of the International Technical Conference above referred to does seem to indicate that a regional approach might offer more chances of success than a universalist approach. More careful analysis of all the State practice adopted by independent States in the principal maritime regions, and of the general circumstances which led to the adoption of those practices, may be found to supply an underlying unifying factor which is at present lacking. If that be so, then it would appear to be the proper function of the Commission to attempt to establish what are the controlling rules for preventing or regulating conflicts between the States of one region and those of another.

#### IV

Of no less importance, in the opinion of the Israel Government, is the question of straits. The political tensions to which problems of navigation through straits give rise is a well-known feature of diplomatic history, and the fact that several, though by no means all, of the major straits of international concern are regulated by international conventions attests to the practical importance of the question.

It is not considered that the treatment by the Commission of the law of straits is satisfactory. These provisions are scattered over a number of articles. For example, article 12, which partly incorporates article 14, deals with the delimitation of the territorial sea in straits. Paragraph 4 of article 18 lays down — as the Commission was bound to do in the light of the judgement of the International Court in the *Corfu Channel* case — a rule that there must be no suspension of the innocent passage of foreign vessels through straits used for international navigation between two parts of the high seas. Paragraph 2 of article 25 deals with the passage of warships through straits. This arrangement of the provisions regarding straits within their context of the draft articles on the régime of the territorial sea is liable to bring about some distortion of the law.

Generally speaking, as regards the material law, the propositions advanced by the Commission covering straits are in themselves seen to be adequate (subject to a few drafting changes), but only so long as they are considered

independently from their context. For under the present arrangement of the texts, the formulation of the principle of freedom of navigation through straits might be interpreted as if it were a derogation from the rights to exercise sovereignty possessed by the littoral State or States. However, the correct manner of looking at the question is to regard the principle of freedom of navigation as predominant, and the exercise of any rights of sovereignty, including those classified by the Commission as rights of protection, as an exception from the predominant right and interest of the international community. What this means is that where access to a given port — whether an existing one or one which at some future date a State may wish to establish — is only possible by traversing a strait (in the geographical sense), then it is quite immaterial whether that strait is or is not within the waters classed as the territorial sea of one or more of the littoral States, or what is the legal nature (gulf, bay, high seas) of the waters on which the harbour is situated. In such circumstances the right of passage for the ships of all nations, and quite regardless of their cargo, is and must remain absolutely unqualified, and the littoral State or States have no right whatsoever, so long as the matter is not regulated by Convention, to hinder, hamper, impede or suspend the free passage of those ships. The same rule is also true as regards warships. This principle is clearly recognized in paragraph 4 of article 18 of the Commission's draft.

For these reasons it is considered necessary that all the provisions regarding straits should be formulated as a separate chapter which probably ought to be included not in the draft articles on the régime of the territorial sea but in those dealing with the high seas. The interests of the international community must here have absolute predominance over those of the littoral States whose territorial waters have to be traversed in making for a given harbour. In this respect the passage through straits of this character is assimilated to the high seas themselves. Such a rearrangement of the text would also remove doubts as to existence of the right of free aerial navigation over all waters assimilated with high seas.

## V

The following comments are made on the *Provisional articles concerning the régime of the high seas*:

### Article 1

The necessity for including definitions in any codification is recognized. However, lack of precision in the definitions is liable to harm the work of codification. It is therefore indispensable to avoid recourse to definition except where absolutely necessary. Article 1, by attempting to define the term "high seas" by reference to other elements — "territorial sea" and "internal waters" — themselves undefined, lacks the necessary precision. The reference to "internal waters" is particularly disturbing, because of the physical impossibility, under the Commission's approach, for high seas ever to come within physical contact with internal waters, the territorial sea always being interposed. The immediate purpose of article 1 of the draft articles on the régime of the territorial sea is to establish the juridical status of the territorial sea,

but without defining the territorial sea. In these circumstances it may be asked what is the merit of mentioning internal waters in an article which purports to deal with the definition of the high seas? If the purpose of article 1 is to define those areas of salt water to which the articles concerning the régime of the high seas apply, and not to prescribe the extent of those areas, it would appear preferable to reduce the elements necessary for a definition of the high seas to one instead of two, with the general object of eliminating as far as possible the uncertainties inherent in ambiguous terms. The same result could also be achieved by suppressing article 1 altogether, and by adding a new introductory paragraph to article 2 to the effect that for the purpose of the present articles all parts of the sea not included in the territorial sea are comprehended within the term "high seas"; the high seas being open, etc. (as in article 2). See further, comment on article 1 of the draft on the régime of the territorial sea.

### Article 2

The four freedoms which together constitute the freedom of the high seas are not accorded equal treatment in the provisional articles. Whereas freedom of navigation, freedom of fishing, and freedom to lay submarine cables and pipelines are elaborated elsewhere in the draft, no further mention is made of the freedom to fly over the high seas, a matter which the Commission seems to regard as one concerning the formulation of rules of air navigation.

Difficulties which have led the Commission to refrain from discussing in detail rules on air navigation in a document relating to the law of the sea are appreciated. But since the Commission considers that freedom to fly over the high seas follows directly from the principle of the freedom of the sea, it would at least seem logical for it to have included a reference to the matter, for example in article 3. Probably a distinction has to be made between the rules of air navigation which are to a great extent regulated by the Convention on Civil Aviation signed at Chicago on 7 December 1944 (and its various appurtenant documents), and the general international law governing the right to air navigation over the high seas. Clearly, the first aspect is better dealt with by the International Civil Aviation Organization, but that does not preclude the Commission from laying down what are the general rules of international law concerning such rights of navigation, since it is of opinion that, in so far as concerns the high seas, freedom to fly over the high seas follows directly from the principle of the freedom of the sea.

The omission of any further mention of this aspect may have an additional consequence in that it might open the way to the argument that this right is different in kind from other rights and freedoms. But such an interpretation would be completely false and it should be made clear that the right to aerial navigation exists wherever there is freedom of navigation on the sea without any exception.

It is observed that whereas article 2 refers to "freedom", and other articles, including 3 and 24, refer to "right", neither word appears in the heading to chapter III of the provisional articles, nor is any explanation given for this different terminology.

#### Article 4

Regarding the decision of the Commission, that the question whether the United Nations and possibly other international organizations should also be granted the right to sail vessels exclusively under their own flags calls for further study, and that such study will be undertaken in due course, this is considered to be a matter of sufficient importance to warrant more definite conclusions on the part of the Commission before its final draft is placed before the General Assembly. Such study should, it is considered, also cover the partly related question of the right of the United Nations and possibly other international organizations to fly aircraft exclusively under their own colours — an aspect which has arisen more than once in connexion with the activities of various United Nations agencies operating in the Near East.

The general problem might be simplified were a distinction made between the legal consequences implicit in the conception of the nationality of a ship, including in particular the total application of the law of the flag — both civil and criminal — to that ship and to all persons on board and events occurring on board (subject only to the exceptions in the way of concurrent jurisdiction recognized by general or particular international law), and the use for international purposes of recognized signs and insignia in order to secure certain measures of protection or certain other privileges which, but for those signs and insignia, the vessel would not be entitled to enjoy. This seems to be the conception underlying the system of identifying hospital ships and other vessels protected under the Geneva Conventions for the Protection of War Victims of 1949, and a similar approach to the problem under discussion might point the way to a satisfactory solution. The degree of protection thus accorded to vessels wearing the United Nations colours would then depend the vessel continuing to abide by the conditions under which the right to wear those colours was recognized. As a general illustration, reference may be made to paragraph 38 of this Ministry's note of 24 January 1950 (see A/CN.4/19).

#### Article 5

Care should be used in employing terms such as "partnership" or "joint stock company" since these may have too technical a connotation in the various systems of municipal law. As far as Israel is concerned, co-operative societies are to be assimilated to the other juridical persons mentioned in this article. It is suggested that sub-paragraphs (b) and (c) of paragraph 2 might be combined into one sub-paragraph applicable to all juridical persons.

#### Article 6

The difficulty of appreciating the import of this article is due to the unwillingness of the Commission to consider the problem of the rights and obligations of States concerning change of flag. While appreciating the reasons which have led the Commission to the view that this topic would raise a number of complicated problems, it is nevertheless considered that further examination of them must be undertaken. The assimilation of ships sailing under two flags to ships without a nationality seems to

be an extremely far-reaching conclusion, and reserve is expressed pending further consideration.

#### Article 10

Israel has not yet been able to ratify the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation signed in Brussels on 10 May 1952. Pending consideration by the competent domestic organs, comment on article 10 of the Commission's draft is reserved. But doubt is felt whether the solution adopted by the Commission in this respect is in absolute conformity with that adopted by the Brussels Convention. By article 1 of that Convention, criminal or disciplinary proceedings may be instituted against persons involved in a collision or other incident of navigation only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation. On the other hand, article 10 of the draft confers also on the State of which such persons were nationals the right to institute penal or disciplinary measures. If, as the Commission states in its comment, this addition is made in order to enable States to take disciplinary measures against their nationals with a view to withdrawing the certificates issued to them, then, in such cases, the national State should base its disciplinary (but not penal) action on the conviction pronounced by the courts of the State of the flag, and they alone should be competent in the criminal matter. If paragraph 1 were formulated in that sense, a second paragraph might be added as follows:

"However, the State of which such persons are nationals shall be entitled to take disciplinary measures with a view to withdrawing the certificates issued to them."

#### Articles 12-20

It is suggested that these articles, all of which relate to the policing of the high seas, should be combined to form one chapter of the document. Article 21 should also be included in that chapter because article 21 relates essentially to the suppression of the slave trade and the suppression of piracy.

With regard to article 12, it is observed that the last sentence refers specifically to a warship and a merchant vessel. However, article 8 mentions another category of "State ships". The Commission already having quite properly extended the purport of article XXVIII of the General Act of Brussels of 2 July 1890 to merchant ships, it would be equally proper for the Commission to mention other State ships.

#### Articles 24-38

The position of the Government of Israel on all the articles concerning fishing, other than article 2, is reserved pending fuller consideration of the proceedings of the International Technical Conference held at Rome in April 1955.

At the same time it is believed that article 7 of the annex, relating to arbitration, needs very careful reconsideration. The system of arbitration proposed by the

Commission appears to constitute an abdication of the role of international law in the settlement of this kind of dispute. It is therefore extremely prejudicial to the prospects of satisfactory settlement of such disputes, because it opens the way to the introduction of too great a political element in the constitution and probably in the functioning of the arbitral commission.

In this Government's understanding, the essential function of arbitration is to provide a machinery for the quasi-judicial settlement of international disputes, especially, but not exclusively, where a high degree of expert and technical knowledge is required on the part of the members of the tribunal. Thus conceived, an arbitral tribunal (subject to the will of the parties) is distinguished from a judicial tribunal proper in that it is recognized that the decision may be reached taking into account the non-legal factors equally with the legal elements of the dispute, whereas in a judicial tribunal the dispute may only be decided by application of international law. As the Commission has been requested by the General Assembly to reconsider its draft on arbitral procedure, it is suggested that the difficulties which the Commission encountered when drafting articles 7 to 9 of the annex to the provisional articles concerning the régime of the high seas should be taken into consideration, and that the formulation of articles 7 to 9 should be postponed until thereafter.

## VI

The following comments are made on the *Draft articles on the régime of the territorial sea*:

### Articles 1 and 2

In view of the comments made on article 1 of the provisional articles on the régime of the high seas, the question arises whether articles 1 and 2 of the draft articles on the régime of the territorial sea might not well be combined with article 1 of the articles concerning the régime of the high seas so as to form a comprehensive introductory chapter to the two sets of articles which, although dealing with matters which are juridically distinct if interrelated, nevertheless have a single unifying element — the sea. From this point of view, the articles on the high seas deal with that part of the sea — the greater part — over which sovereignty cannot be exercised while those on the régime of the territorial sea deal exclusively with that part of the sea which is subject to the sovereignty of the littoral State.

Obviously international law, and only international law, defines the conditions according to which sovereignty may be exercised over that part of the sea itself subject to sovereignty. Paragraph 2 of article 1 should not be drafted in such manner as to suggest that these articles themselves are something distinct from any other rules of international law.

The importance of this question arises principally from article 2, especially in the light of the discussion in the 295th meeting of the Commission. It is necessary to make clear what is the distinction between sovereignty, and the exercise of sovereignty, each treated separately in the two paragraphs of article 1, as well as the implications of the

extension of the concept of sovereignty, or its exercise, to the air space above the territorial sea. There is probably a contradiction between article 2 of the draft articles on the régime of the territorial sea and the recognition in article 2 of the provisional articles concerning the régime of the high seas, that the freedom to fly over the high seas follows directly from the principle of the freedom of the sea. As has previously been mentioned, the right to aerial navigation (in the Commission's conception) derives from the principle of the freedom of navigation, and as the Commission recognizes in several articles of its draft, the freedom of navigation or the right to free navigation does not only depend upon whether the waters in question are high seas but is also fully exercisable through other waters which might physically be territorial sea.

It further appears, from careful perusal of the whole of the two sets of draft articles, that the concept embodied in articles 1 and 2 of the draft articles on the régime of the territorial sea is not the postulate from which all other rules can be deduced so much as the residuum after all the other rules have been formulated. More detailed formulation of the question of competence and jurisdiction in the territorial sea, including straits, may render the dispositions of articles 1 and 2 superfluous in the context of articles on the régime of the territorial sea without prejudicing their general character as part of an introductory chapter to both sets of articles.

### Article 3

For reasons already given the draft article is not regarded as acceptable.

### Article 7

It is considered that the draft articles would be deficient on a crucial issue were the Commission not to consider the problem of bays, the coasts of which belong to more than one State.

With regard to article 7 itself the following questions arise:

1. Is it considered that the definition of paragraph 1 applies also to gulfs?

2. Having regard to paragraph 3 and to the Commission's comment on the article, is it considered that the definition of article 7 applies only to bays having a single coastal State, and, if so, is it considered that the existence of a single coastal State is an essential element of the definition of a bay? What then is the position of bays in which this element is absent?

3. If the general purpose of article 7 is to lay down a method of determining the distinction between territorial sea and internal waters as regards bays, what is the practical purpose of the introductory words of paragraph 7: "For the purpose of these regulations?" The draft articles do not discuss the régime of internal waters. If the judgement of the International Court in the *Fisheries* case is correctly understood<sup>16</sup> the possibility exists that internal waters may nevertheless constitute a navigational route, and while the existence of such navigational route within internal waters would not prejudice their

<sup>16</sup> *I.C.J. Reports 1951*, p. 132.

character as internal waters, the question nevertheless arises whether international law has anything to say on the topic.

4. What is the difference from the juridical (and not geographical) point of view between the straight base lines discussed in article 5 and the closing line of a bay mentioned in article 7?

These questions have been raised because of difficulty that has been experienced in appreciating the practical value of the provisions of article 7 considered as something distinct from those of article 5. However, if the practical value resides in the fact that, contrary to article 5, article 7 contains restrictions, firstly as regards the extent of water enclosed within an indentation by reference to its mouth (an area as large as or larger than that of the semi-circle drawn on the entrance of that indentation), and secondly as regards the fixed distance of the entrance, the objective might be obtained by a formula which would specify that the internal waters of a State include the waters enclosed within a well-marked indentation occurring on its own coast if the area of that indentation is as large as or larger than that of a semi-circle having for its diameter a line not exceeding miles from low tide mark and traced between the points of entrance of the indenture. Paragraphs 2, 4 and 5 would then remain as they are, but paragraph 3 could be eliminated.

It is considered that the diameter of twenty-five miles, which is the figure mentioned by the Commission in paragraph 3, is excessive and would constitute too severe a restriction of the area of sea not capable of coming under sovereignty of a State. A figure of some ten to twelve miles at the maximum would appear more reasonable.

#### Article 12

For reasons already given, it is considered that, regardless of their position as territorial sea, straits in the geographical sense which constitute the only access to a harbour belonging to another State can under no circumstances fall within the régime of territorial sea.

#### Articles 16-19

It is possible that the title of article 16, "Meaning of the right of innocent passage", is not entirely an accurate heading. The article as a whole does not place emphasis upon freedom of transit and freedom of communications such as was clearly enunciated in the Barcelona Convention of 20 April 1921. Paragraph 3 of article 16, read together with article 18, is couched in terms so wide as to render completely nugatory the recognition of the right contained in paragraph 1. It is necessary to give absolute precision to what is meant by the expression "acts prejudicial to the security of the coastal State" in formulating what is a serious derogation from the right of innocent passage. Above all, it has to be made clear that this derogation from the general right is not operative when the passage in question constitutes the only access to a given port.

None of the dispositions of chapter III appear to place any emphasis on the fact that it is the behaviour of the vessel herself, and not extraneous circumstances, which

determines the innocent character of a particular passage.

It is not clear why in paragraph 4 of article 18 the Commission found it necessary to depart from the very clear language of the International Court in its judgement in the *Corfu Channel* case and, by the addition of the word "normally", to distort almost beyond recognition the very clear statement of the law made by the Court. Furthermore, the word "suspension" is far too broad an indication of what is permitted to the littoral State, especially as paragraph 3 emphasizes the temporary character of any such action. It is noted that article 17 uses the word "hamper" and article 25 the word "interfere". Probably all three words should be used in all three places, it also being made clear that nothing permanent or discriminatory is involved.

As to article 19 (c), which refers to the conservation of the living resources of the sea, it is considered that the duty of foreign vessels to conform with such laws and regulations depends upon those laws and regulations being themselves conformable not merely to general international law but to particular international law in force between the flag State and the littoral State. Subject to any rules of particular law in force between them, it has to be made clear that the obligations deriving from article 19 (other than those referred to in article 19 (d)) on the part of a foreign vessel also depend upon the absolutely non-discriminatory character of the laws and regulations which should apply equally to vessels of the littoral State and to all foreign vessels.

#### Article 21

Without questioning the general tenor of this article, it is believed that it might be open to misinterpretation in so far as no mention is made of the right of the authority of the coastal State to take steps to suppress illicit transit traffic in stupefying drugs, a matter which of course is regulated by a considerable number of international conventions.

#### Article 22

It is considered preferable to set forth seriatim the types of civil maritime claims which would justify arrest of a vessel rather than merely to refer to the Brussels Convention relating to the Arrest of Sea-going Ships. It is noticed that paragraph 2 of article 22 refers only to civil maritime claims justifying the arrest of vessels, but does not mention the place in which the arrest may be effected. A similar problem is regulated in paragraph 1 of article 21 by the proposal regarding the arrest of any person, etc., on a vessel *passing through the territorial sea*. It is not clear whether arrest under paragraph 2 of article 22 may be exercised in the same manner.

It is further observed that paragraph 3 of this article is the only one to contain reference to the individual (a claimant). Careful reconsideration of this formula would appear desirable. Furthermore, to the extent that the law in force in Israel does not permit the arrest of another vessel owned by the person who at the relevant time was owner of the arrested vessel, as is proposed by the Commission, the Israel Government's position in that aspect is reserved.

Finally, the competent organs of the State not having yet pronounced themselves as regards ratification by Israel

of that Convention, reserve is expressed at the provisions of paragraph 4. The law in force in Israel at present (the U.K. Merchant Shipping Act, 1894, section 688) envisages a somewhat broader power to levy execution against or to arrest a foreign vessel for the purpose of any civil proceedings than is mentioned in the said paragraph 4.

## VII

Observing the fact that by virtue of previous decisions of the General Assembly, including in particular its resolution 899 (IX) of 14 December 1954, the provisional articles concerning the régime of the high seas and the draft articles on the régime of the territorial sea will be placed on the provisional agenda of the eleventh session of the General Assembly, it is considered that it would be generally advantageous were the Commission, in accordance with article 16 (j) and article 22 of its statute, to indicate in the recommendations which it is entitled to make to the General Assembly, what further procedure it considers would be useful to carry the work so ably performed by the Commission up to the present to a successful conclusion. In the *note verbale* of 17 March 1952, paragraph 3, the view was expressed that ultimately the whole work of the Commission on the two topics of the high seas and territorial sea would have to be discussed together as a single phase, either in the General Assembly itself or in a specially convened diplomatic conference. From its study of the developments that have occurred since 1952, the Government of Israel remains in favour of that type of procedure. Nevertheless, it considers that much further preparatory work is required before such a full discussion could profitably be undertaken. The views of the Commission would certainly be of the greatest assistance in considering these further aspects.

### 14. Italy

#### *Document A/CN.4/99/Add.8*

COMMENTS TRANSMITTED IN A LETTER DATED 14 JUNE 1956  
FROM THE MINISTRY OF FOREIGN AFFAIRS OF ITALY

[*Original: French*]

I. COMMENTS ON THE DRAFT ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS APPROVED BY THE INTERNATIONAL  
LAW COMMISSION AT ITS FIFTH SESSION (1953)

#### 1. *Continental shelf*

##### *Article 2*

We are of the opinion that the sovereign rights of the coastal State over the continental shelf should be limited to mineral resources only. The term "natural resources" used in this article appears to be of too wide a scope, seeing that an exception is created to the principle of freedom of the high seas, and also that the rule as worded in the proposed text conflicts with the principle of freedom of fishing clearly laid down in article 2, paragraph 2, of

the 1955 draft articles concerning the régime of the high seas.

It must also be remembered that the new concept of the continental shelf owes its origin to the questions which arose concerning the right to explore and exploit mineral resources.

Hence, having regard to the present requirements of most States, it does not seem possible to extend the scope of this concept to include all natural resources.

This remark, of course, applies also to all the other articles containing the term "natural resources".

#### 2. *Contiguous zone*

The rule concerning the contiguous zone is not acceptable in its present form, chiefly because it does not meet anti-smuggling requirements.

It may be pointed out that Italy has a territorial sea six miles wide, but its customs control belt extends up to twelve miles from the coast. In this latter belt full jurisdiction in the matter of customs laws is now exercised.

In view of Italy's geographical position and the configuration of its coasts, diminution as provided for in the draft of the powers granted to the coastal State in the contiguous zone would make the measures to prevent and punish smuggling ineffectual.

The draft article concerning the contiguous zone could be accepted by Italy if the words "within its territory or territorial sea" were deleted from the text, which would then read as follows:

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the baseline from which the width of the territorial sea is measured."

II. COMMENTS ON THE DRAFT ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS AND THE REGIME OF THE  
TERRITORIAL SEA APPROVED BY THE INTERNATIONAL LAW  
COMMISSION AT ITS SEVENTH SESSION (1955)

#### A. *Régime of the high seas*

##### 1. Right to a flag

##### *Article 5*

To avoid any doubt over the interpretation of this article, it would be well to insert the words "or of public corporations" after the words "property of the State concerned".

It would also seem desirable to specify that the conditions required for recognition of a ship's national character by other States also exist when the ship is owned (in the proportion laid down in article 5, paragraph 2) by the State or by a corporate body.

##### 2. Immunity of other State ships

##### *Article 8*

It is apparent from the text of article 8 and the com-

<sup>17</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, chap. III.*

ment thereon that the Commission decided to assimilate ships used on commercial government service to warships for purposes connected with the exercise of powers on the high seas by States other than the flag State.

We consider that such assimilation is not sufficiently justified, for in the case in question the activities carried on by those using the ship might be of an essentially private nature.

Hence the category of State ships should be kept within the limits laid down by the Brussels Convention of 10 April 1926 concerning the immunity of State-owned vessels.

### 3. Piracy

#### Article 14

Article 14 of the draft states that illegal acts (of violence, etc.) committed by the crew or the passengers of a private ship or a private aircraft against a ship on the high seas or in territory outside the jurisdiction of any State are acts of piracy. But it does not provide for the converse: namely, that the illegal acts in question directed by a private ship against an aircraft are also to be considered piracy.

We think it advisable to draw the Commission's attention to this point because the comment on the article shows that this particular case has not yet been studied.

#### Article 16

To prevent the definition of pirate ships given in article 16 covering only ships permanently engaged in acts of piracy, it would be advisable to replace the principle of intended use by that of actual use, which lends itself better to the inclusion also of the case of occasional use for piracy.

#### Article 20

We propose that the power of seizure be extended also to ships performing official duties, such as customs control and policing.

### 4. Right of pursuit

#### Article 22

We propose that the right of pursuit be also granted to aircraft.

### 5. Right to fish

#### Article 25

It would seem desirable that in the case covered by this article regulation of fishing on the high seas should be permitted solely on the basis of scientific findings.

#### Article 26

Similarly, in the case covered by this article, we think it necessary to provide that the request for negotiations to regulate fishing be supported by the results of research and studies actually carried out.

#### Article 29

We think it necessary that the right given to the coastal State of adopting protective measures in the high seas contiguous to its territorial waters should be limited in all cases to a distance not exceeding twelve miles measured

from the baseline referred to in articles 4 and 5 of the draft concerning the territorial sea.

#### Article 30

We propose the deletion of this article, in view of the disputes which might arise from the application of this standard.

#### Article 31

We think it would be more practical and fairer for the Commission provided for in this article to consist, not of four or six biologists and one expert in international law, but of two or four biologists, two fisheries experts particularly well acquainted with the areas involved in the dispute, and one expert in international law.

#### Article 32

We think it would be better if the measures adopted unilaterally or otherwise by coastal States, particularly on the high seas, were, in the event of appeal to the Commission provided for in article 31, suspended *de jure* unless the Commission decides otherwise.

### 6. Submarine cables and pipelines

#### Article 34

In view of technical advances, it would be advisable to provide not merely for the laying of telegraph or telephone cables and oil pipelines, but rather, by a more general wording, for the laying of any kind of submarine cable or pipeline.

## B. Régime of the territorial sea

### 1. Extension of the territorial sea

#### Article 3

As regards the extension of the territorial sea, in view of the difficulties of reaching agreement on a uniform limit, we propose that the problem be solved by allowing different limits to be laid down for specific geographical sectors.

In the case of Mediterranean waters — where the three-mile limit is not traditional — we propose a maximum limit of six nautical miles, without prejudice, of course, to the powers which the coastal State may exercise in the contiguous zone, as mentioned in the comments already made concerning the article on that zone.

### 2. Rights of protection of the coastal State

#### Article 18 and article 25

As regards article 18, paragraph 4, and article 25, paragraph 2, it would be well to state that the passage of ships, without distinction as to nationality, through straits covered by these rules may be suspended for short periods in exceptional circumstances, subject to due publicity being given.

## 15. Lebanon

### Document A/CN.4/99/Add.2

NOTE VERBALE DATED 4 APRIL 1956 FROM THE MINISTRY OF FOREIGN AFFAIRS OF LEBANON

[Original: French]

The Ministry of Foreign Affairs presents its compli-

ments to the Secretary-General of the United Nations and has the honour to refer to the letter LEG 292/9/01; LEG 292/8/01, dated 24 August 1955, from the Legal Counsel of the United Nations concerning the draft provisional articles relating to the régime of the high seas and the territorial sea, contained in the report of the International Law Commission covering the work of its seventh session.

The Lebanese Government considers that the two drafts represent, on the whole, a clear and valuable codification of the principles of public international law relating to the régime of the sea.

The draft articles applicable to the régime of the territorial sea call, however, for the following comments:

*Article 3. Breadth of the territorial sea*

Although it is impossible, in the present state of the law, to reach agreement on this point, it is nevertheless desirable that upper and lower limits should be formally fixed for the breadth of the territorial sea.

*Article 18. Rights of protection of the coastal State*

The present text might be amended so as to enable the coastal State to suspend its application in time of war or in the event of exceptional circumstances being officially proclaimed.

## 16. Nepal

### *Document A/CN.4/99/Add.6*

LETTER DATED 6 MARCH 1956 FROM THE MINISTRY OF  
FOREIGN AFFAIRS, NEPAL

[Original: English]

I am directed to acknowledge with thanks the receipt of your letter No. LEG 292/9/01 dated 31 January 1956, transmitting the report of the International Law Commission containing in chapter II and annex "Provisional articles concerning the régime of the high seas" and in chapter III "Draft articles on the régime of the territorial seas".

In view of her geographical situation as a landlocked country, Nepal has very little direct concern with the above articles. However, I have the pleasure to inform you that the two drafts referred to above are acceptable in principle to the Government of Nepal, and they have very much appreciated the attempts made by the Commission.

## 17. Netherlands

### *Document A/CN.4/99/Add.1*

TRANSMITTED BY A LETTER DATED 16 MARCH 1956 FROM  
THE PERMANENT MISSION OF THE NETHERLANDS TO THE  
UNITED NATIONS

[Original: English]

COMMENTS ON THE PROVISIONAL ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS

The comments and suggestions are not to prejudice the

position of the Governments of Surinam and the Netherlands Antilles, which Governments are at present studying the matter.

### *General*

It is known to the Netherlands Government that the International Council of Scientific Unions has, in a letter to the Director-General of UNESCO, expressed its concern about the consequences which the draft of the International Law Commission concerning the continental shelf might entail for fundamental research in the fields of geophysics, submarine geology and marine biology of the seabed and the subsoil of the continental shelf. The Netherlands Government are of the opinion that it is advisable to draw the Commission's attention to this fact and to recommend that it include, either in its draft or in its comments, a provision to the effect that the coastal State shall be obliged to permit examination of the seabed of the shelf for purely scientific purposes.

The provisional articles concerning the régime of the high seas further give rise to the general comment that the draft is only concerned with the *high seas*. As the draft also deals with some problems having wider implications, as for instance the slave trade referred to in article 12, the Netherlands Government would like to emphasize that the fact that the draft applies only to a limited area should never be pleaded in favour of an argument that outside that area — i.e., on the mainland or on the territorial sea — those illegal acts should be legal.

### *Articles 1-4*

These articles require no comment.

### *Article 5*

The Netherlands Government welcome the efforts of the International Law Commission to lay down certain safeguards against the possible abuse of the right of a sovereign State to fix the conditions for the registration of ships in its territory and the right to fly its flag.

There exists, of course, a certain analogy between the "nationality of ships" and the nationality of individuals. In this connexion the Netherlands Government would like to recall that at the Codification Conference which was held at The Hague in 1930, the principle was recognized according to which, though each State is free to determine under its national law who are its nationals, such law must be recognized by other States only "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality". The same principle, in regard to protection due to foreign nationals, underlies the judgement of the International Court of Justice in the *Nottebohm Case* of 6 April 1955).

Though the Netherlands Government wholeheartedly subscribe to the said principle — also with respect to the "nationality of ships" — they do not, however, approve of the way in which the International Law Commission has developed it. They doubt whether it is possible to lay down detailed regulations which the State granting the right to fly its flag is bound to observe.

Regulations of such a kind will necessarily give rise to many questions and uncertainties. So, for instance, difficulties will undoubtedly arise with regard to the conditions relating to vessels owned by joint stock companies as referred to in article 5, paragraph 2 (c). It is a well-known fact that the recognition of foreign companies and their nationality form the subject of many controversies.

Furthermore, the Netherlands Government do not think it possible, even if agreement should be reached on more detailed regulations, that such regulations would completely prevent abuse.

Therefore, the Netherlands Government deem it preferable only to lay down in article 5 the guiding principle according to which, for purposes of recognition, there must be a genuine connexion between the ship and the State. Apart from such a provision, which aims only at the prevention of abuse in a negative way, the Netherlands Government deem it desirable to prescribe that States by taking the necessary legal measures create safeguards lest ships flying their flag disregard their legislation as to the safety at sea etc. The Netherlands Government are well aware of the fact that such a rule has been laid down by the Commission in article 9 of the present draft, but they are of the opinion that the scope of that article is too narrow.

Moreover, it would be preferable to put the matters dealt with in article 5 and article 9 closely together in order to emphasize that these matters are interrelated. For these reasons the Netherlands Government propose to replace the present article 5 by the following articles 5a and 5b;

“ Article 5a

“ Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine connection between the State and the ship.”

“ Article 5b

“ States shall issue for their ships regulations in order to ensure the safety at sea *inter alia* with regard to:

“ 1. The adequacy of the crew and reasonable labour conditions;

“ 2. The construction, equipment and seaworthiness of the ship;

“ 3. The use of signals, the maintenance of communications and the prevention of collisions.

“ In issuing such regulations the States shall observe the standards internationally accepted for the vessels forming the greater part of the tonnage of sea-going ships.

“ States shall take the necessary measures in order to guarantee the observance of the said regulations. To that effect they shall provide *inter alia* for the registration of the ship in the territory of the State and for the documents showing that the pertinent regulations of national legislation have been observed.”

The tests which must be applied in order to decide whether there is a genuine connexion as referred to in article 5a should relate to the ownership or to the administration of the ship or to the nationality of the captain and the crew.

The Netherlands Government are of the opinion that in certain respects regulations with regard to labour conditions, such as the regulation of working hours, might affect the operation of a ship. To that extent they deem it desirable to refer to such regulations in article 5b.

Article 6

The Netherlands Government do not agree with the statement in the comment that the purpose of article 6 is to ensure that ships will have only one nationality. They are of the opinion that the purpose is rather to prevent ships which have the right to fly the flag of two or more States from using one or other as the need arises. In order to avoid any misunderstanding it would be desirable to add after the words “ two or more States ” the words “ using one or other as the need arises ”.

Article 7

The Netherlands Government think it desirable that the provision of the second paragraph should be brought into line with The Hague Convention of 1907, No. VII, in which case the provision will have to be worded as follows:

“ The term ‘ warship ’ means a vessel under the direct authority, immediate control, and responsibility of the Power the flag of which it flies, bearing the external marks distinguishing warships of its nationality, the Commander of which must be in the service of the State and duly commissioned by the proper authorities, whilst his name must figure on the list of officers of the fighting fleet and the crew of which is subject to military discipline.”

Article 8

In the opinion of the Netherlands Government there is no reason why Government vessels which are operated for purely commercial purposes should be assimilated, with regard to the immunity of jurisdiction, to warships. In accordance with a general tendency in international law the immunity of foreign States is not recognized in so far as they act in a private capacity. In that connexion mention may be made of the Convention and Statute respecting the international régime of maritime ports, which was signed at Geneva on 9 December 1923, of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926, of the Convention drafted by The Hague Codification Conference of 1930 and of article 23 of the report of the International Law Commission regarding the territorial waters. The same tendency is revealed by the practice of States. Some Governments which for quite a long time have advocated the principle of an unlimited immunity of foreign States have recently changed their attitude (cf. Bulletin of the Department of State, Volume 26, 23 June 1952, page 984). Other States, for example the Soviet Union, have con-

cluded bilateral treaties in which the principle of a limited immunity was recognized.

Besides, in view of the fact that in some countries commerce and shipping are wholly in the hands of State-owned enterprises, the principle of unrestricted immunity would mainly benefit such States.

For these reasons the Netherlands Government would propose, in accordance with the Brussels Treaty, to replace the words "on government service" by the words "on governmental and non-commercial service".

#### Article 9

If the Netherlands proposal with regard to article 5b is accepted, article 9 may be cancelled.

#### Article 10

The matter dealt with in this article has likewise been regulated in article 1 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation, concluded at Brussels on 10 May 1952 (Cmd 8954). On a comparison of the two texts being made a number of discrepancies leap to the eye. In the first place it is apparent that the Brussels Convention does not, like the present draft, recognize *expressis verbis* the jurisdiction of the State of which the persons in the service of the ship are nationals. This does not appear to be an essential difference, however, because the purpose of the draft is only to remove all doubt as to the *jurisdiction* of the national State, whilst it is not intended at all to impose upon that State an *obligation* to exercise its penal jurisdiction.

Further it is apparent that the words "involved in the collision" in the fifth line, do not appear in the Brussels Convention. In the opinion of the Netherlands Government these words are superfluous.

Finally, the Brussels Convention refers to "criminal or disciplinary proceedings", whereas the draft only refers to "proceedings". As it does not serve any useful purpose to restrict the civil jurisdiction of any State, the Netherlands Government would prefer the Brussels text.

Basing themselves on the above considerations, the Netherlands Government would suggest that article 10 be worded as follows:

"In the event of a collision or any other incident of navigation concerning a ship on the high seas and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship was flying the flag, or of the State of which such persons are nationals."

#### Article 11

Chapter V, Regulation 10, of the International Convention for the Safety of Life at Sea of 19 June 1948, contains a provision regulating the same matter as the article under discussion, but it goes further in that it also imposes upon ships at sea the obligation to proceed to a ship in distress upon distress messages being received.

Though it would be going too far to include the detailed regulations of 1948 in their entirety in the present draft, it may be advisable to substitute for the first sentence:

"The master of a vessel is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all speed to the assistance of persons in distress, if he is informed of their need for assistance, in so far as such action may reasonably be expected of him."

#### Article 12

The purpose of this article is to enable a State to prevent foreign vessels from unlawfully flying its flag. This purpose might be expressed more explicitly by wording the end of the first sentence as follows:

"...and to prevent foreign vessels from unlawfully using its flag for that purpose."

#### Article 13

A discrepancy is apparent between article 13, which refers to "piracy on the high seas" and the following articles (see, for instance, article 14, paragraph 1, sub-paragraph (b), in which piracy is also considered to be possible elsewhere.

#### Article 14

On the ground of the general tendency in international law outlined in their comments on article 8, the Netherlands Government are of the opinion that State-owned merchant vessels should be regarded as private vessels within the meaning of article 14. That is why the Netherlands Government deem it desirable that article 14 should be supplemented in such a way that it is quite clear that it does not refer to warships and to State-owned vessels having a public function.

Another comment to which article 14 gives rise is that in article 14, paragraph 1, sub-paragraph (a), only the term "vessel" is used, whereas in sub-paragraph (b), the terms "vessels, persons or property" are employed. In the beginning of paragraph 1 of this article the terms "persons and property" are used. In the one case, acts directed against other objects than ships and against persons are regarded as piracy, whereas this is not so in the other case. This distinction may be of practical value in case the acts would be directed against a seaplane which would have landed on the high seas. The removal of this inconsistency may greatly simplify the wording of the entire first paragraph.

In connexion with what has been stated by the International Law Commission in the last paragraph of the comment on article 14, it may be observed that many writers of note hold a different opinion on the subject of mutiny (cf. for instance: Higgens-Colombos, Ortolan, Oppenheim-Lauterpacht 1955, Gidel; cf. also a decision of the Privy Council in the case of the Attorney General Hong Kong v. Kwok-a-Sing). The Netherlands Government are, however, of the opinion that the view of the Commission is correct. The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers are not directed outwards.

If the Netherlands Government's suggestions regarding article 16 are adopted, the second paragraph of article 14 will have to be modified (cf. the comments on article 16). The text might be worded as follows:

"2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge that the ship or aircraft is devoted by the persons in dominant control to the purpose of committing an act described in the present article."

#### Article 15

Consequent upon their remark with regard to article 14, the Netherlands Government deems it desirable that, also for the purpose of article 15, Stated-owned vessels having a public function should be put on a par with warships.

In order to make the English text conform to the French text, in which it says "*dont l'équipage s'est mutiné*", the English text should read: "whose crew has mutinied".

#### Article 16

One might wonder what function this article is meant to have. It is a definition, but the giving of a definition of the term "pirate ship" has little practical significance; apart from article 17, the term is found only in articles 14 and 18. As will appear, however, from its comment, article 18 gives to the term "pirate ship" a different meaning, namely a ship which *has committed* acts of piracy.

That is why the Netherlands Government suggest that article 16 be deleted, that the terminology of article 14, paragraph 2, be made to conform to that of article 16 (see comments on article 14 above), that the wording of article 18 be made to conform to the comment of the Commission and that also in article 17 the phrase "ship or aircraft which has committed acts of piracy" be used. In case article 16 should be retained in principle, the Netherlands Government would state as their view that it does not serve any useful purpose to exclude the acts referred to in article 14, paragraphs 2 and 3, from the reference in article 16 to article 14. In the Netherlands Government's view, article 16 should therefore in that case be concluded with the phrase "an act described in article 15". This view also finds expression in the new text proposed for article 14, paragraph 2.

#### Article 17

See comment on article 16.

#### Article 18

As expounded in the comments on article 16, the phrase "a pirate ship or aircraft" will have to be replaced by "a ship or aircraft which has committed acts of piracy", irrespective of the question whether article 16 is to be retained or not.

In the Harvard draft (*Research in International Law* 1932, pages 743 ff.) more detailed regulations concerning piracy are given than in the present draft. As instances may be adduced article 13 concerning the rights of third parties acting in good faith and article 14 concerning a fair trial. The concise nature of the present draft precludes

the laying down of detailed regulations on these points. It would be desirable, however, if the International Law Commission in its comment would draw the attention of the States to their obligation to observe the principles just mentioned.

As to the question whether article 18 also permits action on account of acts committed in the past, see comments on article 21.

#### Article 19

The question arises why the wording of this article should be different from that used in article 21, paragraph 3, as probably the same is meant in both articles.

#### Article 20

This article requires no comment.

#### Article 21

The Netherlands Government would prefer to see the words "at sea" at the beginning of the first paragraph, replaced by the words "on the high seas" in conformity with the terminology used elsewhere.

A question which is connected both with article 21, paragraph 1, sub-paragraph (a), and with article 18, is the question whether the competence of States to board, examine and seize ships also extends to ships which have committed acts of piracy only during preceding voyages. Two different views may be held on this point: the competence may be restricted either to cases in which *during the present voyage of the ship* acts of piracy were committed, or this competence is extended to past acts of piracy, provided of course that the ship is still in the same hands as during the preceding voyages. The drafters of paragraph 2 of article 4 of the Harvard draft adopted this point of view. This view is justified if the exercise of jurisdiction by the States is regarded as the exercise of international jurisdiction, and piracy as an international offence. From the text it is not clear which view is held by the International Law Commission.

#### Article 22

The second sentence of the third paragraph says that the commencement of the pursuit shall be accompanied by a signal to stop. The French text is more accurate: "*le commencement — devra — être marqué par l'émission du signal de stopper*". This version is also the one that is most in conformity with the 1930 Codification draft.

The last sentence of the third paragraph might be worded more clearly as follows:

"The order to stop shall be a visual or auditive signal given at a distance which enables it to be seen or heard by the foreign vessel."

Finally, the Netherlands Government are of the opinion that the article should indicate who can undertake the pursuit. They would like the following provision to be added to the article:

"The right of pursuit can only be exercised by warships and other vessels on governmental and non-commercial service."

#### Article 23

As far as oil discharged from ships is concerned, it

must be pointed out that the pollution of the sea can also be caused by other oil than fuel oils. That is why these words had better be replaced by "oil".

The Netherlands Government wish to point to the fact that States granting concessions for the exploitation of the continental shelf have already issued regulations concerning the measures to be taken by the grantee to prevent leakages and blow-outs. In view of the enormous quantities of oil which may pollute the sea and the harm which may also be done to third States and their nationals, if such safety measures are not taken, the Netherlands Government are of the opinion that the following should be provided in the interest of all:

*" Article 23a*

" All States shall draw up regulations to prevent water pollution by oil, resulting from the exploitation of submarine areas."

The Netherlands Government would also point to a new source of pollution of the sea, namely the dumping of radio-active waste matter into the sea, which may especially be dangerous to fish and to consumers of fish. They therefore propose to insert the following provision:

*" Article 23b*

" All States shall co-operate in drawing up regulations to prevent water pollution from the dumping of radio-active waste."

*Articles 28 and 29*

It is doubtful what has to happen if the negotiations referred to in article 29 do not produce any positive results with regard to an area for which other States had already made regulations, so that article 28 also applies: Should paragraph 2 of article 28 then be observed or is the coastal State in question entitled under paragraph 1 of article 29 to adopt unilaterally "appropriate conservation measures"? Or must it be assumed that the negotiations referred to in article 29 could not have been opened in such a case and that the coastal State in question could only apply for participation in the (existing) regulations in virtue of article 28?

Paragraph 3 of article 29 stipulates that, as soon as an arbitral decision is made, the right to adopt unilateral measures shall cease. The Netherlands Government assume that this is also the case when an arbitration procedure begun under the preceding articles has led to a decision, and that the same is true when an arbitral commission set up in case of disagreement on some unilateral measures should rule that the above right shall cease in virtue of an interim decision made by that commission.

The determination of the concept of "scientific evidence" should be left to the arbitral commission.

*Articles 31-33*

Since the arbitral commissions referred to in these articles imply a kind of legislative arbitration, it would be more correct if the International Law Commission would bring out more clearly in its report that these commissions are free to lay down any regulations they think justified and efficient, even though they should deviate

from the existing regulations. That is why the terms "parties" and "differences to be settled" had probably better be dropped in this connexion.

*Article 34*

In connexion with this article it must be pointed out that in the third paragraph of the comment it erroneously says that paragraph 1 of article 34 was taken from article I of the 1884 Convention. This must be an error as article I of the Convention runs as follows:

*"La présente convention s'applique, en dehors des eaux territoriales, à tous les câbles sous-marins légalement établis et qui atterrissent sur les territoires, colonies ou possessions de l'une ou de plusieurs des Hautes Parties contractantes."*

Furthermore the Netherlands Government would like to note that article 34 is a duplicate of article 5 of the regulations concerning the continental shelf, laid down by the Commission during its 1953 session.

*Article 35*

In the Netherlands Government's view the phrase "resulting in the total or partial interruption etc." should be replaced by: "in such a manner as might interrupt or obstruct telegraphic communication", this being the official English translation of the Convention concerning Telegraph Cables of 1884 (H.M.S.O., Cmd 4384).

After the words "in like circumstances", occurring in the same sentence, the Netherlands Government would like to insert "which might result in loss of the material carried by the pipeline". This is a natural consequence of the analogous application of the regulation concerning submarine cables. The addition clearly shows that the protection envisaged in article 35 only applies to those pipelines that are in use.

*Articles 36 and 37*

These articles require no comment.

*Article 38*

The Netherlands Government would suggest that after the words "a submarine cable" the words "or pipeline" be added and that the last words "of the cable" be deleted. The word "pipeline" was probably omitted by mistake.

COMMENTS ON THE DRAFT ARTICLES ON THE REGIME OF  
THE TERRITORIAL SEA

*Article 3 (territorial sea)*

As regards this article the Netherlands Government would merely refer to their earlier exhaustive comment (A/CN.4/90) on their standpoint concerning the breadth of the territorial sea. They regret that the Commission has apparently not succeeded in finding a solution for the difficulties that have been encountered.

*Article 13*

The situation described by the Commission in its comment on this article does not exist in the Netherlands. In the Netherlands Government's view special regulations will have to be made concerning this matter by the States

concerned if this should be demanded by the existing situation.

#### Article 14

The Netherlands Government wonder if this article has still any *raison d'être* by the side of the articles drafted by the Commission for straits.

#### Articles 16-18

The Netherlands Government express their agreement with these articles and are of the opinion that a number of vague definitions as, for instance, "any act prejudicial to its security or to such other of its interests as the coastal State is authorized to protect under the present rules" are unavoidable, and, though it is desirable that the States should ensure innocent passage to the fullest possible extent, reference will nevertheless have to be made to the vague definitions in paragraph 3 of article 18.

#### Article 25

The Netherlands Government would wish to see the wording of article 26 of the Commission's report of 1954 restored. They do not see any grounds for changing the earlier regulations as, in their view, those regulations fully met the requirements of actual practice. As far as the Netherlands is concerned these regulations have never produced any difficulties.

In general, the Netherlands Government suggest that the International Law Commission make it clear that "mile" means the nautical mile of sixty to the degree of latitude.

Finally, the Netherlands Government wish to point to a number of inconsistencies in the terminology of the above-mentioned draft articles. Instances are: "regulations" in article 7 by the side of "draft articles" in the title, and in paragraph 3 of article 12 the words "two miles in breadth" and "within" by the side of "two miles across" and "in" in paragraph 4. Further there is the inconsistent use of the hyphen in words as "straight baseline" (article 5 by the side of article 7, paragraph 5) and "largest-scale chart" (article 4 and article 15 by the side of article 14).

### 18. Norway

#### *Document A/CN.4/99/Add. 1*

TRANSMITTED BY A LETTER DATED 27 MARCH 1956 FROM THE PERMANENT MISSION OF NORWAY TO THE UNITED NATIONS

[Original: English]

The Norwegian Government has not had sufficient time for a thorough examination of all the proposed articles. While offering certain suggestions it wishes therefore, in general, to reserve its position.

#### *Régime of the high seas*

It should be made clear to what extent the articles under this heading are intended to be applicable in time of war as well as in time of peace.

The term "merchant vessel", which is employed in

several of the draft articles, should be defined. It might, in the first place, be made clear that the term includes fishing vessels and other private vessels not used for trading purposes (in articles 14 and 15 the term "private vessel" is employed). In the second place, it should be made clear whether, and to what extent, the term is meant to include state ships other than warships.

#### Article 5

The provisions contained in paragraphs 2 (a) and 2 (b) would gain in clarity if the word "actually" were deleted.

The provision contained in paragraph 2 (c) should be made more restrictive in harmony with the principle embodied in paragraphs 2 (a) and 2 (b). The present Norwegian Law on Navigation of 20 July 1893 prescribes, in § 1, 2, that ships belonging to a joint stock shipping company may be registered in Norway only if the following conditions are fulfilled: Its main office and the seat of its board of directors must be in Norway. Its board of directors must be composed of Norwegian nationals who are shareholders and residents of Norway. Six-tenths of the share capital must be owned by Norwegian nationals.

#### Article 8

In order to avoid misinterpretation, attention is drawn to the fact that the term "commercial" in the fourteenth line of the comments on article 8 is a misprint for "non-commercial".

#### Article 11

Although concerned in substance with individual duties, this article, according to the comments, is intended to be an expression of international law. It is not clear why the article, in contradistinction to other articles relating to individual duties (see, for example, articles 9, 12, 23, 35 and 38), fails to enjoin States to enact the necessary legislation.

#### Articles 19 and 21.3

The relationship between these two provisions is not clear. In particular, it is not clear why article 19, dealing only with piracy provides for liability towards the "State" of the seized ship if the seizure has been effected "without adequate grounds", whereas article 21.3, dealing with piracy and other crimes, provides for compensation to the "vessel" if "the suspicions prove to be unfounded".

#### Article 22

It should be made clear that the right of pursuit may be exercised by State vessels other than warships, such as customs, police and fishery patrol vessels. It should also be made clear whether the right of pursuit may be exercised by aircraft.

#### Articles 24-33

The Norwegian Government concurs in the view that—because of the great economic importance of fisheries for the world at large and for the particular nations engaged in fishing, and in view of the danger of over-

exploitation involved in unlimited and uncontrolled fishing—it is imperative that international co-operation in this field should be further developed and safeguarded.

The Norwegian Government is in favour of the settlement of international disputes by arbitration, and would welcome the introduction of arbitration into this new field, in so far as it is practically possible. However, if questions relating to the regulation of fisheries are to be decided by arbitration, it is essential that the criteria upon which the arbitration is to be based should be defined precisely and exhaustively. Otherwise the interested States might hesitate to accept the jurisdiction of the commission, and the commission itself would have great difficulties in discharging its duty.

The draft appears to envisage arbitration awards based upon biological criteria. In this connexion the Norwegian Government wishes to draw attention to two important difficulties.

During the Rome Conference on the Conservation of the Living Resources of the Sea it was demonstrated that very detailed and extensive investigations will often be necessary in order to determine the need for conservation measures, and that further development of maritime research will be required to provide sufficiently reliable scientific evidence. But even if these conditions were met, the scientists would probably still find ample room for doubt in regard to the conclusions to be drawn from such findings and in regard to the measures of conservation they might indicate.

If the scientific evidence establishes beyond doubt the need for measures of conservation, such measures cannot be adopted on the basis of scientific evidence alone. Account must also be taken of *the technical and economic conditions of the fishing industries* of the countries concerned, as has been done in the existing fisheries conventions and the regulations adopted under these. The matter is further complicated by the great differences which exist in the various countries in regard to methods of fishing and fish processing, consumption habits and marketing conditions. Thus, one particular restriction may hit one country hard, while it may affect other countries to a lesser extent. Consequently a regulation may be discriminating in fact, even if it is not discriminating in law.

The Norwegian Government is not convinced that it will be possible to establish satisfactory general criteria whose relative importance are clearly determined, and it should be noted that if a general system for safeguarding the regulation of fisheries is to serve its purpose, it must gain *general acceptance*.

In view of these difficulties and the fact that no conclusion has been arrived at in regard to the breadth of the territorial sea, the Norwegian Government must reserve its position on the proposal that the coastal State be empowered to adopt measures of conservation unilaterally.

The Norwegian Government considers it premature at this stage to enter into details. As pointed out by the International Law Commission in the report on its fifth session,<sup>18</sup> only a detailed convention or conventions can translate the general principles drawn up by the Com-

mission into a system of working rules. The drafting of such a convention cannot be undertaken until the main principles have been agreed upon.

The Norwegian Government therefore reserves the right to revert to the details of chapter II when it shall have become clear to what extent its basic principles command general approval.

At this stage it merely wishes to point out that it is not clear whether the arbitration procedure prescribed, in case the states concerned do not reach agreement (articles 26.2, 27.2, 28.2 and 30.2), also applies when the parties to an existing convention for the regulation of fisheries fail to agree in regard to proposals for the adoption or modification of specific measures of conservation within the framework of that convention.

It does not clearly appear, from the draft articles whether they are also intended to apply to whaling and seal-catching. An application of a general convention to these industries would give rise to particular problems. And it should be taken into account that whaling has already been made the subject of an effective regulation on a global basis. It is difficult to form a valid opinion on these problems until they have been submitted to further examination by experts, notably by the International Whaling Commission.

#### *Articles 34, 35 and 38*

Power cables should be added in article 34.1, and article 35 should be amended accordingly.

It is not clear why pipelines have not been mentioned in articles 34.2 and 38.

#### *Régime of the territorial sea*

The Norwegian Government has noted with appreciation that some of the suggestions made in its comments to the 1954 draft have been complied with by the International Law Commission. Referring to the general points of view presented in its previous comments,<sup>19</sup> the Norwegian Government would like to present the following specific comments on the revised draft concerning the régime of the territorial sea.

#### *Article 1*

It should be stated expressly that the draft articles do not apply to internal waters.

#### *Article 3*

The Norwegian Government notes that the International Law Commission recognizes that international practice is not uniform as regards the breadth of the territorial sea. The Norwegian Government wishes to support efforts to prevent unreasonable extensions of the breadth of the territorial sea. In its opinion a close proximity to the territory is inherent in the very concept of *territorial sea*. In the judgement in the Anglo-Norwegian Fisheries Case it was emphasized by the Court that one of the "basic considerations inherent in the nature of the territorial sea" is "the dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal

<sup>18</sup> *Ibid.*, p. 18.

<sup>19</sup> *Ibid.*, Tenth Session, Supplement No. 9, annex, section II.

state a right to the waters off its coasts".<sup>20</sup> Exorbitant claims in regard to the breadth of the territorial sea are incompatible with this basic concept.

On the other hand the Norwegian Government would consider it futile to seek general agreement on rules governing the extent of the territorial sea which would deprive any country of territorial sea over which today it enjoys uncontested jurisdiction. Thus the Norwegian Government would find it impossible to accept a breadth of less than four miles for its own coasts.

#### Article 5

The first three periods of article 5, as amended, seem to reflect principles of international law which were enunciated by the International Court of Justice in the Anglo-Norwegian Fisheries Case. The last sentence of paragraph 1 of article 5, however, still maintains the arbitrary rule that drying rocks and drying shoals cannot be used as points of departure for the drawing of straight base lines. This sentence should be deleted. The International Court of Justice, in the above-mentioned judgment, recognized the Norwegian base line system where some of the straight base lines are drawn from drying rocks.<sup>21</sup> The proposal to exclude the use of drying rocks as points of departure for straight base lines is therefore contrary to obtaining principles of international law. Nor can it be considered a desirable development of international law.

#### Article 7

This article is not clear. None of the paragraphs reflect obtaining principles of international law and it is highly doubtful whether the proposed article would constitute an improvement. The exception made in paragraph 5 of article 7 as to the straight base line system would, at any rate, have to be made applicable to the article as a whole.

#### Articles 14 and 15

While supporting the principle of the median line laid down in these articles, the Norwegian Government wishes to draw attention to the fact that, in their present wording, the articles do not seem to take into consideration that the two States concerned may have territorial seas of different breadth.

Thus, if in the case of two *opposing* coasts one State claims six miles and the other three miles, and the total distance between the opposing coasts is eight miles, the breadth of the territorial sea of each State in the area concerned would be four miles under the proposed rule. One of the States would consequently get a broader territorial belt than it actually claims. On the other hand, if the total distance between the two opposing coasts is ten miles, the proposed article would not apply, and the States would obtain breadths of six and three miles respectively. The territorial waters of the State claiming six miles would then extend *beyond* the median line.

Similar difficulties arise in the case of two *adjacent* States, if the angle between their coasts, or base lines, is

less than 180°, and especially if their common land frontier meets the sea at the inland end of a bay.

In view of the fact that the problems treated in articles 14 and 15 are essentially similar, it would, perhaps, be just as well if the two articles were merged into one. This article might provide that, in the absence of special agreement, no State is entitled to extend the boundary of its territorial sea beyond the median line.

#### Article 16

It should be made clear that the right of innocent passage applies only in time of peace (cf. the comments of the International Law Commission and of the Norwegian Government on article 17 of the 1954 draft).

#### Article 18

The interests which the coastal State is authorized to protect have not been exhaustively specified in "the present rules". Rights in respect of fishing, among others, are not mentioned. At the end of paragraph 1 it would therefore seem necessary to add the words "or other rules of international law" in conformity with the corresponding formulation in article 19.

#### Article 21.1 (a)

The jurisdiction of the coastal State should perhaps be limited to those cases where the consequences of the crime extend to its land or sea territory. At any rate, the coastal State should not be entitled to assume jurisdiction in cases where the consequences of the crime extend merely to the territory of the State the nationality of which is possessed by the ship.

#### Article 22

The Norwegian Government is not in a position to accept paragraph 3 of this article in so far as it sanctions the arrest of a vessel other than that in respect of which the maritime claim arose. It is especially for this reason that the Norwegian Government has been unable to ratify the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, concluded at Brussels on 10 May 1952. The Norwegian Government would find it easier to accept the corresponding provision in the last sentence of article 24.1 of the 1954 draft of the International Law Commission, with the addition that the owner of the vessel shall be entitled to compensation if the arrest is not upheld by the courts.

## 19. Philippines

### Document A/CN.4/99

NOTE VERBALE DATED 20 JANUARY 1956 FROM THE PERMANENT MISSION OF THE PHILIPPINES TO THE UNITED NATIONS

[Original: English]

The Permanent Representative of the Philippines to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to refer to the latter's communication (LEG 292/9/01;

<sup>20</sup> *I.C.J. Reports 1951*, p. 133.

<sup>21</sup> *Ibid.*, pp. 128 and 143.

LEG 292/8/01), dated 24 August 1955, addressed to the Vice-President and Secretary of Foreign Affairs of the Philippines, drawing his attention to the report of the International Law Commission covering the work of its seventh session held in Geneva from 2 May to 8 July 1955, and inviting the Philippine Government to submit observations on the drafts contained in chapters II and III.

The Philippine Government is in general agreement with the technical and scientific aspects of the provisions of chapter II (régime of the high seas), the annex to chapter II, and the "Draft articles on the régime of the territorial sea" in chapter III. However, on certain specific provisions in the report, the following observations are submitted:

[Provisional articles concerning the régime of the high seas]

1. *On the "Definition of the high seas", article 1.*

As already stated, in this Mission's *note verbale* of 7 March 1955, in response to the Secretary-General's telegram LEG 292/9/01 of 3 February 1955:

"All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act. No. 4003 and article 1 (this was inadvertently given as article 2 in the *note verbale* of 7 March 1955) of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters."

In view of the foregoing considerations, and in line with this article, the Philippine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Philippines as set down in the international treaties referred to above. In case of archipelagos or territories composed of many islands like the Philippines, which has many bodies of water enclosed

within the group of islands, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas.

[Draft articles on the régime of the territorial sea]

2. *On chapter II (Limits of the territorial sea), article 3 (Breadth of the territorial sea).*

The Philippine Government considers the limitation of its territorial sea as referring to those waters within the recognized treaty limits, and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States. It would seem also that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of a coastal State. The Philippine Government is of the opinion that certain provisions should be made taking into account the archipelagic nature of certain States like the Philippines.

## 20. Sweden

### Document A/CN.4/99

LETTER DATED 4 FEBRUARY 1956 FROM THE  
MINISTRY FOR FOREIGN AFFAIRS OF SWEDEN

[Original: French]

By letter dated 24 August 1955 you invited the Swedish Government to submit its observations on the drafts—contained in the report of the International Law Commission covering the work of its seventh session—relating to the codification of certain parts of international law, i.e., the provisional articles concerning the régime of the high seas (chapter II of the report) and the draft articles on the régime of the territorial sea (chapter III of the report).

The Swedish Government has studied the Commission's drafts with the greatest interest, and would like to express the following views.

I. As regards the "provisional articles concerning the régime of the high seas", the Swedish Government wishes to confine itself for the time being to the following comments.

With respect to the right to fish (articles 24 *et seq.*), the Swedish Government considers that the conclusion of an international convention concerning fishing on the high seas would be particularly desirable, and believes that the establishment of an arbitral commission, as proposed in article 31, might serve a useful purpose.

The provisions of article 29 granting the coastal State the right unilaterally to adopt measures of conservation are open, in the Swedish Government's view, to the most serious reservations. How will it be possible to prove that there are fully appropriate scientific findings to show that certain measures are necessary or advisable? That is a question which may justifiably be asked. The measures adopted could, of course, be examined by an international

organ; but such an organ might be long in coming to its decision, and the delay might entail considerable losses. The provision proposed in article 29 might lead to abuse, and in the Swedish Government's view should be deleted.

Article 34 concerns the right of States to lay telegraph or telephone cables and pipelines on the bed of the high seas. But by modern technical methods electric power too may be transmitted beneath the sea, through high-tension cables. The Swedish Government considers that this possibility should be taken into account in drafting a provision on the subject.

II. As regards the rules of international law concerning the territorial sea, the first questions that arise are those relating to the breadth of the territorial sea and the base line for measuring it. The Swedish Government stated its position on these matters in its letter of 12 April 1955, and it still holds the same views.

With respect to the new draft prepared by the International Law Commission at its seventh session, the Swedish Government desires to add the following observations.

There are marked differences of opinion among States on these questions, and experience has shown that a generally acceptable solution will be difficult to achieve. Nor has the International Law Commission succeeded in embodying a definitive text on the breadth of the territorial sea in its latest draft; it has merely set forth the following considerations:

1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles;

2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles;

3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.

In formulating these propositions, the Commission's apparent intention was to take into account the divergent opinions which have been expressed on the matter. Since, however, these opinions are actually irreconcilable, the Swedish Government considers that the Commission's propositions cannot be accepted as a statement of existing law, or as a useful basis for future solutions.

The Swedish Government supports the Commission's view that the limitation of the territorial sea to three miles is not based on uniform international practice, since besides the three-mile limit international law also recognizes other limits, for instance four miles and six miles. The Swedish Government believes that Sweden's four-mile limit may as justifiably be considered traditional as the three-mile limit fixed by some countries; and presumably the same applies to the six-mile limit applied by some other countries. The Commission states in its comment that the extension of the territorial sea to twelve miles does not constitute a violation of international law; but this can only mean one thing: that such an extension is justified under international law. If that were so, however, these limits would clearly have to be respected by

other States. The territorial sea is part of the coastal State's territory, and, as stated in article 1 of the Commission's draft, is subject to its sovereignty. One of the fundamental rules of international law is that States are bound to respect the territories of other States. It is hard to conceive of any State territory which a few States would be bound to respect while other States would not. The Commission says in its comment that the claim to a territorial sea up to twelve miles in breadth may be supported *erga omnes* by any State which can show a historical right in the matter. This rule is so important that it might well have been embodied in the actual text of the rules formulated by the Commission, which, as it now stands, it really contradicts.

The Swedish Government shares the Commission's view that any extension of the territorial sea beyond twelve miles infringes the principle of freedom of the seas, and is therefore contrary to international law. In connexion with the twelve-mile limit, the Swedish Government would point out that until recent years a territorial sea of twelve miles in breadth has been applied only in a few isolated instances, and to waters of little importance for international shipping. The Swedish Government feels that any extension of the territorial sea to twelve miles must be considered an exception, and that six miles is a maximum breadth claimed by enough States, and over a sufficient period of time, to be considered the breadth of the territorial sea recognized in international practice. Moreover, it should be borne in mind that the extension of the territorial sea to twelve miles practised in recent years by some States has elicited protests from other States.

Similarly, the Swedish Government does not believe that the views set forth by the Commission are calculated to provide a basis for a future solution of the question. A solution along these lines would mean that while each State would acquire the right to extend its territorial sea to twelve miles, the other States would not for their part be bound to recognize any extension of the territorial sea beyond the three-mile limit. A solution of this kind might be termed a compromise, in that it would meet the conflicting views at present held. However, it would be no real solution, for it would tend to perpetuate rather than to reconcile the existing divergencies. The present state of uncertainty on the subject would therefore persist, and constant disputes would arise, disputes which would indeed defy solution because both of the two mutually exclusive positions would be declared to be in conformity with international law. Let us assume, for instance, that a State fixes the breadth of its territorial sea at six miles and prohibits foreigners from fishing within the zone thus delimited—a step which it would clearly be entitled to take if we follow the Commission's view—and let us assume further that fishermen who are nationals of a State which refuses to recognize any limit in excess of three miles engage in fishing in the disputed zone. If these fishermen are arrested and fined by the coastal State, the other State will undoubtedly protest and support its nationals. How will an international court be able to rule on a dispute of this kind if both parties are able to base their case on international law? In the Swedish Government's view, it is essential that the territorial sea

to which a State is entitled should be respected by other States.

The Swedish Government wishes to reiterate the opinion expressed in its letter of 12 April 1955: that the solution most likely to meet the conflicting views would be one which would grant States a certain freedom in establishing the breadth of their territorial sea themselves, while at the same time restricting that freedom within rather narrow limits.

The Swedish Government considers that the maximum breath for the extension of the territorial sea should be fixed at six miles, perhaps with the proviso that States which can show a historical right should be entitled by way of exception to claim a larger territorial sea. The Swedish Government feels that such a solution would be reasonably well in keeping with the present position in law.

However, the outer limit of the territorial sea depends not only on the breadth of the territorial sea but also on the base line from which it is measured. Article 5 of the Commission's draft, concerning straight base lines, is of particular importance in this connexion.

The Swedish Government considers this article to be a distinct improvement over the draft prepared by the Commission at its sixth session, particularly because the provisions of paragraph 2 of the article, concerning the maximum length for such base lines, have not been retained. However, the Swedish Government still feels that the article is unduly complicated, and that it contains several conditions and reservations which serve no useful purpose. The most important provision in the article, in its view, is that which states that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. This provision is based on the fact that it is primarily geographical conditions that make "internal waters" of a stretch of sea, and that these conditions are bound to have legal consequences. Stretches of water which are geographically linked to the land domain must obviously be treated juridically as part of the land domain; in other words, the geographical and the juridical concepts of internal waters are identical. It follows, in the Swedish Government's view, that the lines constituting the outer limits of internal waters must also, and on the same grounds as the land domain, serve as the base lines for measuring the territorial sea. If that be so, however, it is difficult to see how the other conditions laid down by the Commission for the drawing of straight base lines can be of any value. If the straight lines do not form the limits of internal waters, no economic interests peculiar to a region can, according to the provisions of the article in question, justify their use as base lines. If, on the other hand, the straight lines do form the outer limits of internal waters, it follows *ipso facto* that they must be employed as base lines for measuring the territorial sea. As the Swedish Government pointed out in its letter of 12 April 1955, any other solution would lead to absurd consequences. The fact of the straight lines constituting the limits of internal waters is therefore both a necessary and a sufficient condition for their use as

base lines for measuring the territorial sea; and any mention in this connexion of circumstances necessitating a special régime is superfluous. Hence, it would be sufficient for article 4 to state that the breadth of the territorial sea is measured from the low-water line along the coast or from the straight lines constituting the outer limits of internal waters. Article 5 would then be redundant, and the same applies, in principle, to the provisions concerning bays, ports and the mouths of rivers. It might be useful to have a definition of "internal waters"; this could be extracted from article 5 "sufficiently closely linked to the land domain" etc.) and inserted in article 4.

The Commission naturally attached considerable significance to the judgement of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway. However, the Swedish Government ventures to draw attention to article 59 of the Statute of the Court, which provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Hence, while a judgement of the Court is law so far as the parties are concerned, it does not constitute international law. As for the general reasons and considerations upon which a judgement of the Court may be based, they affect other cases only in so far as they reflect generally recognized principles of international law. In the case in point, for instance, the geographical reasons may be accepted without accepting the economic reasons.

The Swedish Government believes that in drawing base lines geographical considerations alone should be applied, not economic factors. To draw base lines for the purpose of extending the territorial sea to a point which would satisfy the coastal State's economic interests could only lead to abuse. Such a method of delimiting internal waters has no foundation in existing law, nor can it be accepted from the standpoint of *lex ferenda*. The Commission's stipulation, that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters, would preclude the coastal State from arbitrarily drawing base lines by which sea areas that are not internal waters geographically would become internal waters.

Unlike the territorial sea, which is a purely juridical concept—from the geographical standpoint the territorial sea naturally forms part of the high seas—the term "internal waters" is essentially a geographical concept. To turn part of the high seas into internal waters on economic grounds can no more be condoned, surely, than to change internal waters into high seas or the territorial sea by applying a maximum length of, say, ten miles.

The Swedish Government sees no need for a definition of the term "bay", since this is a purely geographical concept which corresponds to the general acceptance of the term. It would be more to the point define the conditions under which a bay could be considered internal waters. The Swedish Government considers that a bay should not be regarded as constituting internal waters unless it is a well-marked indentation and its coasts belong to a single State. The definition of the conditions under which a bay could be regarded as constituting internal waters might be taken from the provisions of article 7,

paragraphs 1 and 2, concerning the term "bay",<sup>22</sup> Accordingly, the Swedish Government considers that the term "historical bay", which implies that a certain limit is set on the breadth of bays, is both redundant and unwarranted.

The Commission raised a question concerning the measuring of the territorial sea in bays the coasts of which belong to several States. In this connexion, the situation on the frontier between Sweden and Norway is of some interest. The frontier crosses a bay and then an archipelago situated outside the entrance to the bay. Under the terms of certain Swedish Orders on fishing and customs control, the base line for measuring the territorial sea outside the archipelago is constituted by a straight line connecting the outermost islet on the Swedish side with the outermost islet on the Norwegian side. However, this is a rather special case.

As regards the other provisions of chapter II of the Commission's draft concerning the régime of the territorial sea, the Swedish Government refers to its letter of 12 April 1955.

In conclusion, the Swedish Government wishes to point out that several provisions in both of the Commission's drafts can obviously apply only to peacetime conditions. This point should be clarified in future conventions. In this connexion, article 8 of the Barcelona Statute of 20 April 1921 on freedom of transit might serve as a model.

## 21. Turkey

### *Document A/CN.4/99*

NOTE VERBALE DATED 2 MARCH 1956 FROM THE PERMANENT MISSION OF TURKEY TO THE UNITED NATIONS

[*Original: English*]

The Permanent Representative of Turkey to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's note of 24 August 1955, No. LEG 292/9/01, LEG 292/8/01, concerning the provisional articles on the régime of the high seas and on the régime of the territorial sea formulated by the International Law Commission.

The Representative of Turkey will be grateful to His Excellency the Secretary-General if he would kindly transmit the following observations to the members of the Commission.

#### I. GENERAL

In the view of the Turkish Government the work of the International Law Commission has already contributed precious data on many important aspects of international maritime law. Part of these preliminary data might form a valuable basis for discussions on a future international

convention concerning the régimes of the high seas and of the territorial sea.

However, in the opinion of the Turkish Government, other parts of the Commission's work have already shown that the subject matter of a certain number of the provisional articles does not lend itself to general codification. The foremost among these are the provisional articles in which an attempt has been made to insert some general principles regarding the régime of straits.

In opposition to the general conditions affecting the application of the régime of the high seas, and in certain cases of the territorial sea, which may provide, to a certain extent, common criteria all over the world, the conditions affecting the régimes of straits are, and by nature ought to be, widely divergent.

Indeed, the impossibility of working out general rules applicable to all straits is not only illustrated by the divergent practices at present applicable in various straits but is also recognized by doctrine.

The Preparatory Committee appointed in 1924 by the Council of the League of Nations to report on certain aspects of international law which might lend themselves to a solution by international conventions, had attempted to render this task easier by setting down distinctions on the characteristics of various straits. It was suggested that the question should be approached from the basis of whether the straits are subject to treaty regulations, whether the entrances are wider or narrower than twelve nautical miles, whether the straits are less than twelve miles wide at their entrances and exceed this limit at their subsequent course. In this latter case, a further distinction was made on such salt-water areas which exceed the twelve-mile limit but whose coasts belong to a single State, in which case they were recognized as internal waters.

However, even this detailed method of approach has not made it possible to reach agreement on general rules regarding the régime of straits.

The Turkish authorities are well aware that the International Law Commission has not attempted a general codification of the régime of straits, and that the provisional articles under consideration are only aimed at dealing with certain general aspects regarding passage. But the difficulties involved in having to choose only some of the general principles admitted in international law, and of stating them out of the general context of rules and regulations which condition and modify their essence, are noticeable in the present text.

For example, although existing rules of international law, provisions of special conventions, precedent and State practice admit freedom of innocent passage in the best interests of international commerce and navigation, there is no case where such freedom might be interpreted to disregard the security, public order, sanitary well-being and other duties of the coastal State towards its own people. On the contrary, wherever written rules have been set down, special attention has been given to protect the sovereignty, security, public order, sanitary well-being, economic, fiscal and other interests of the coastal State, as well as to safeguard the legitimate interests of international commerce and navigation.

For the particular implementation of this general rule

<sup>22</sup> The Swedish Government feels that in principle no limit should be placed on the breadth of bays which can be considered as internal waters.

in régimes of passage through different straits, the individual characteristics of the straits concerned, the degree of their importance to the security of all the territory of the coastal State, the proximity of the routes of passage to the coasts, the size and importance of the towns and cities situated on the shores of the straits, established practices existing by virtue of historical precedent and of international treaties, and numerous other considerations have formed the basis upon which final rules of practice have been agreed.

In view of the considerations stated above, the Turkish authorities are doubtful that any useful purpose can be served by an attempt to formulate provisional articles on passage through straits, even though these articles may only attempt to deal with certain of the more general principles, and even though the special circumstances affecting the régime of certain straits which are of vital importance to the security and well-being of the coastal State, may be noted by amending these articles. It is, therefore, considered that the provisional articles regarding certain aspects of passage through straits should not be included in the final report of the International Law Commission to the General Assembly. If the Commission considers it to be useful, a compilation of the various régimes applicable in different straits might be added as an appendix to the above-mentioned report.

Having stated their preference for a change of method in dealing with some of the subjects included in the provisional articles, the Turkish authorities would like, however, to make certain suggestions in an attempt to render the present text, as far as possible, more harmonious with certain aspects of international law.

As the work of the Commission at this stage is considered to be exploratory and preliminary, and as any final interpretation of the various articles will be possible only when the Commission's work is ready as a whole, the Turkish Government wishes to state that it does not consider itself committed in any way by the opinions expressed by it at this stage on the work of the Commission.

PROVISIONAL ARTICLES ON THE REGIME OF THE  
TERRITORIAL SEA

*Article 2. Juridical status of the air space over the territorial sea and of its bed and subsoil.*

Add the following paragraph:

"The provisions of the following articles regarding passage by sea are not applicable to air navigation of any kind."

Comment: Although the addition of this provision might seem superfluous in a set of provisional articles dealing exclusively with maritime law, the fact that in the present text the sovereignty of the coastal State over the air space is defined as an extension of its sovereignty over its territorial sea, makes it necessary to specify that any conditions which may exist on the exercise of this latter sovereignty are not applicable by extension to navigation by air, which is regulated by other rules of international law.

*Article 3. Breadth of the territorial sea.*

Delete paragraph 3.

Comment: Paragraphs 2 and 3 of the present text of article 3, summarizing the views of the Commission on the breadth of the territorial sea, are contradictory. According to paragraph 2, international law admits the extension of the territorial sea up to twelve miles. This indeed is a correct assertion as numerous States have already accepted the twelve-mile limit for their territorial seas. Paragraph 3, however, asserts that international law does not require States to recognize a breadth beyond three miles and, therefore, not only contradicts paragraph 2 but also constitutes a future source of conflict, as the Commission is indicating the acceptance as well as the negation of the same principle. The Turkish authorities are of the opinion that the twelve-mile limit has already obtained the general practice necessary for its acceptance as a rule of international law.

*Article 7. Bays.*

1. Change the title of this article to "Bays and internal seas".

2. Add the following paragraph as paragraph 2:

"For the purpose of these regulations an internal sea is a well marked sea area which may be connected to high seas by one or more entrances narrower than twelve nautical miles and the coasts of which belong to a single State. The waters within an internal sea shall be considered internal waters."

Comment: The twelve-mile limit of the breadth of the entrances has been retained from the work of the Preparatory Committee of the League of Nations. It may be changed to two belts of the territorial sea.

*Article 12. Delimitation of the territorial sea in straits.*

Paragraph 4: After "... straits which join two parts of the high seas..." add "except where the connexion passes through an internal sea...".

*Article 18. Rights of protection of the coastal State.*

Paragraph 4: Begin the paragraph with the words "In peace time...".

Add the following sentence:

"The rights of the coastal State to enforce appropriate measures in times of war or when it considers itself under the menace of war or in conformity with its rights and obligations as a Member of the United Nations are reserved."

*Article 19. Duties of foreign vessels during their passage.*

Re-number first sentence as paragraph 1. After the end of sub-paragraph (e) add the following sentence as paragraph 2:

"Submarines shall navigate on the surface."

Comments: This provision exists in the present text under article 25 regarding the passage of warships. However, the eventuality of the passage of non-military submarines, such as those which may be used for scientific or other purposes, is not covered by paragraph 3 of the

present article 25. As article 25 in its entirety should be conceived subject to the provisions of articles 16 to 19, it would be preferable to delete the paragraph on the passage of submarines from article 25 and add it to article 19. Under the provisions suggested here below to be included for a re-drafting of article 25, other restrictions on the passage of submarines existing at present in certain areas cannot be affected by the provisional articles and shall, therefore, continue to be enforced.

*Article 20. Charges to be levied upon foreign vessels.*

Paragraph 2: Delete the words "rendered to the vessel." Add the following paragraph:

"The right of the coastal State to demand and obtain information on the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the perception of charges is reserved."

Comments: The present wording of this paragraph is in contradiction to régimes now being applied in various parts of the world. By deleting the words "rendered to the vessel" more elasticity will be given to the text so that it might be applied in various ways in accordance with international agreements or other forms of established precedent. The additional third paragraph is also necessary in view of existing practices.

*Article 23. Government vessels operated for commercial purposes.*

After the words "...shall also apply to..." add the word "unarmed".

*Article 25. Passage (Warships).*

Comments: In the view of the Turkish authorities, paragraph 2 of the present text will have to be completely re-drafted in order to reflect rules of international law now being applied in connexion with the innocent passage of warships through straits.

The report of the International Law Commission for 1955 mentions the fact that "this article does not affect the rights of States under a convention governing passage through the straits to which it refers."<sup>23</sup> However, having taken note of this assertion, the Turkish authorities still do not consider the present text of the paragraph as an accurate and realistic description of the actual practice existing today regarding the innocent passage of warships through straits.

In the first place, the texts of paragraph 2 and paragraph 3 of the article are, in themselves, contradictory. Paragraph 2 in its present form might be interpreted to imply that, except in cases where international conventions have established different procedures, the innocent passage of warships through straits is in general entirely independent of any considerations regarding the security and well-being of the coastal State which "may not interfere in any way" with such passage. In opposition to this statement, paragraph 3 stipulates that "submarines shall navigate on the surface", thereby admitting that the security of the coastal State cannot be ignored. Having

thus admitted a principle which reflects more accurately present day practices, the question remains whether the navigation of submarines on the surface is the only rule affecting the innocent passage of warships through straits. As it is known, the régime applicable in certain straits eliminates completely the passing of submarines whether on the surface or not, except in special circumstances well defined in international conventions. Furthermore, the special nature of certain straits has made it necessary to set special rules and regulations affecting the innocent passage of warships other than submarines. In this category, for example, international law provides in certain cases rules which limit the tonnage of individual warships as well as that of the global forces which may effect simultaneous passage.

Further rules exist to regulate the time of the day when passages are allowed, and the general conditions under which they may be effected. The preceding regulations cited as examples, and other norms which are applicable at present in connexion with the innocent passage of warships through straits, show clearly that the present text of paragraph 2, article 25, does not reflect existing rules of international law. It is, therefore, deemed necessary to consider a re-drafting of the paragraph in order to reflect the general principles upon which have been based the various régimes now being applied.

In the second place, the present wording of the article is rather vague on the fact that the provisions of articles 16 to 19, which are applicable in the case of the innocent passage of ships through the territorial sea in general, are equally applicable in connexion with the innocent passage of warships through straits as far as the waters of such straits form a part of the territorial sea of the coastal State. The rights of the coastal State to demand previous notification and authorization in certain cases, as noted in paragraph 1, are also dealt with vaguely in connexion with paragraph 2. While re-drafting the paragraph, special care should be taken to eliminate any ambiguities in these matters.

In the third place, the general principles regarding the innocent passage of warships through straits are in themselves based upon different premises according to whether the passage is effected in times of peace, in times of war, in times when the coastal State considers itself to be under the menace of war, or in certain conditions which might exist in conformity to the provisions of the Charter of the United Nations. A new paragraph should be added to take note of this situation.

The comments submitted above are aimed to render the present text of article 25, concerning the general principles of the innocent passage of warships through straits, more harmonious with present-day rules of international law. However, as the subject is one of vital importance in many respects, and as the details of application are very intricate in certain cases, it is suggested that, apart from re-drafting the article in the manner submitted above, a further paragraph should be added with direct reference to the fact that régimes which are applied by virtue of international treaties or conventions shall not be affected by the provisions of this article. The substantial discrepancies existing between the French and

<sup>23</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, p. 22.*

English texts of paragraph 2 should also be noted.

*Addition of a new article:*

Add the following text as article 27:

“Nothing in the preceding article shall be construed as affecting the rights and obligations of States resulting from the provisions of the Charter of the United Nations.”

Comment: While paragraph 2 of article 1 refers to “other rules of international law”, it does not cover clearly the implications of the text submitted above. It is considered necessary to make a specific reference to the provisions of the Charter and to situations which may arise through the application of these provisions within the scope of the United Nations.

PROVISIONAL ARTICLES ON THE REGIME OF THE  
HIGH SEAS

*Article 1. Definition of the high seas.*

After the words “...not included in the territorial sea...” and before the words “...or in the internal waters...” insert the words “...or in the internal seas...”.

Comments: The necessity of inserting internal seas in this article is due to the fact that no satisfactory definition or enumeration of internal waters exists in the present text of the provisional articles on the régime of the high seas and the régime of the territorial sea. If such a definition, which would specifically include internal seas, were to be added to the present text, it might be possible to leave the text of article 1 in its present form. However, until proper amendments are made elsewhere, the addition suggested above is considered as essential to the text.

*Article 10. Penal jurisdiction in matters of collision.*

The Turkish authorities appreciate the fact that the International Law Commission has made an endeavour in this article to find a solution to the question of competing and conflicting juridical authorities in problems arising out of collisions and similar incidents of navigation on the high seas. However, the present text of article 10 does not seem to bring a satisfactory solution to the problem involved. No legal basis can be found to substantiate the assertions of this article which are contradictory to existing practices and to the judgement rendered by the Permanent Court of International Justice on 7 September 1927 in the “*Lotus*” case. Furthermore, the present text does not take into account some of the basic general principles of penal law.

The subject is considered as one in which further studies might be of special value. For example, the possibility of establishing some kind of international penal court competent to deal with these cases or of extending such competence to existing bodies of international jurisdiction might be studied.

However, if such competence is left to national jurisdiction, the Turkish authorities are of the opinion that the following rules should be adopted:

(a) In the event of a collision on the high seas between

ships from different ports of registry, judicial and administrative competence shall be recognized to the State whose authority extends over that port of registry from among those of the ships concerned which is the nearest to the scene of the collision.

(b) In the event of an incident of navigation on the high seas (such as damage to a submarine telegraph or telephone cable or pipeline) judicial and administrative competence shall be recognized to the State whose authority extends over the port of registry of the vessel involved, or to the State whose authority extends over the country to which the damaged property belongs, depending on which one of these two lies the nearest to the scene of the incident.

COMMENT ON SOME IMPORTANT DISCREPANCIES BETWEEN  
THE ENGLISH AND FRENCH VERSIONS OF THE PROVISIONAL  
ARTICLES

Some important discrepancies between the English and French versions of the provisional Articles render particularly difficult the interpretation of the intentions of the Commission. Foremost among these is the substantial difference in the scope and the meaning of the French and English versions of article 25, paragraph 2, of the provisional articles on the régime of the territorial sea. The words “ne peut entraver le passage inoffensif” of the French text appear as “may not interfere in any way with innocent passage” in the English text. It is considered that a divergence exists in the meaning of these two texts. However, as the comments submitted above regarding this article apply equally to both texts which, in the view of the Turkish authorities, should be re-drafted, this example has been furnished only as an indication to facilitate the work of the Commission.

22. Union of South Africa

*Document A/CN.4/99*

A. TRANSMITTED BY A LETTER DATED 23 FEBRUARY 1956  
FROM THE PERMANENT MISSION OF THE UNION OF  
SOUTH AFRICA TO THE UNITED NATIONS

[Original: English]

COMMENTS ON THE DRAFT ARTICLES ON THE  
REGIME OF THE TERRITORIAL SEA

*Chapter II. Limits of the territorial sea*

*Article 3*

The Union Government concurs with the view expressed in the fourth paragraph of the Commission’s comment, that the task of harmonizing divergent views regarding the delimitation of the territorial sea between three miles and the maximum of twelve miles which the Commission is prepared to recognize, could best be entrusted to a diplomatic conference.

Pending the adoption by international agreement of a common standard—which should be binding without exception on all contracting States—the Union Government considers that the rules enunciated in draft article 3 embody as good an interim solution of the problem as can be expected at the present stage.

The Union Government supports the view of the Commission that the breadth of the territorial sea should not exceed twelve miles.

#### Article 4

The Union Government adheres to the view expressed in its comment on the 1954 draft, namely that the seaward edge of the surf should in certain cases be taken as the point of departure in measuring the breadth of the territorial sea.

#### Article 5

The amendments embodied in the present draft of this article appear to be an improvement on the 1954 text.

#### Article 7

Paragraph 5 of this article is to the effect that "the provisions laid down in paragraph 4 shall not apply to so-called 'historical' bays...". In its comment, the Commission explains that "paragraph 5 states that *the foregoing provisions shall not apply to 'historical' bays.*"

It seems clear that there is a contradiction, arising possibly from a misprint, between the text of paragraph 5 and the Commission's explanatory comment.

Article 7 would be acceptable to the Union Government only if it were amended in such a way as to leave no doubt that the so-called "historical" bays were to be treated as *sui generis* and excluded not only from the operation of the rule contained in paragraph 4 but also from the application of criteria laid down in the rest of the article.

As the draft stands, it would appear that "historical" bays which do not conform to the definition contained in paragraph 1—i.e., whose area is less than that of a semi-circle drawn on the closing line of the indentation—must lose their status as bays. It seems doubtful, both from the tenor of the draft articles as a whole and from the explanatory comment given by the Commission, whether this was the intention. A small amendment to the wording of paragraph 5 would suffice to remove any ambiguity about the special status of historical bays, in regard to which international law has always recognized, and must continue to recognize, more elastic criteria than are laid down in article 7.

#### Article 10

It is noted that the Commission did not take up the Union Government's suggestion for a modification of the 1954 draft, the effect of which would have been to eliminate narrow enclaves of high seas between the outer limit of the territorial sea of the mainland and that of an island lying offshore at a distance equivalent to twice the breadth of the territorial sea.

Article 12, paragraph 3, provides that:

"if as a consequence of this delimitation (of the territorial sea in a strait separating two or more States) an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea."

While the analogy is not an exact one, the principle underlying this rule appears to be that an isolated enclave of the high seas would be of little value to navigation; and it has felt that the same consideration would apply to narrow wedges of the high seas lying between an island and the mainland.

The Union Government is still inclined to the view that a modification of article 10 on the lines suggested might be of practical value.

#### Article 11

The Union Government adheres to the view, expressed in its comments on the 1954 draft of this article, that States should be permitted to take the surf-line to seaward of a drying rock or shoal which lies within the territorial sea as the point of departure for measuring the territorial sea, rather than the rock or shoal itself.

The minor drafting changes which have been introduced in the revised text of this article are regarded as an improvement.

#### Chapter III. The right of innocent passage

The arrangement of articles in the present version represents a distinct improvement on the 1954 text. The following points, however, appear to call for further comment.

#### General

It is suggested that suitable provision should be made in this chapter, requiring submarines to navigate on the surface when passing through the territorial sea of another State.

#### Article 19

This article imposes on foreign ships exercising the right of passage the duty to observe the laws and regulations of the coastal State, particularly where they relate to the matters specified in paragraphs (a) to (e).

The new paragraph (c) is regarded as an improvement on the old text in that it refers specifically to "living" resources whereas the 1954 draft refers merely to "products", a term which is open to various interpretations. The Union Government feels, however, that a reference should also be made to the duty of foreign ships to respect laws and regulations of the coastal State designed to conserve or protect mineral or other resources of the territorial sea and of the sea-bed and subsoil beneath it. Such provision could be made either by way of an addition to paragraph (c) or by means of a new paragraph. It is urged that the right of the coastal State to make regulations to protect mineral and other resources in the territorial sea, and the corresponding duty of foreign vessels to observe such regulations, is sufficiently important to warrant inclusion even though the list contained in paragraphs (a) to (e) is not intended to be exhaustive.

#### Article 21

In the revised text the arrangement of chapter III has been changed by introducing the following headings:

A. General rules (articles 16 to 19)

- B. Merchant vessels (articles 20 to 22)  
 C. Government vessels other than warships (articles 23 and 24)  
 D. Warships (articles 25 and 26).

In view of these specific headings, and on the assumption that it is necessary to have a separate section to cover Government vessels, it is suggested that for the sake of clarity the heading to section A should be amended to read:

“A. General rules relating to all vessels”.

If this amendment is agreed to, as section B applies only to “merchant vessels”, the word “merchant” appearing in article 21 (1) might be deleted.

In any case, it is not clear why the phrase “foreign merchant vessel” is used in paragraph 1 but not in paragraph 2 or in article 22, where the phrase “foreign vessel” is employed. It is felt that in the interests of consistency the same phrase should be used throughout unless it is desired to draw a distinction between merchant vessels and others.

### *Document A/CN.4/99/Add. 1*

B. TRANSMITTED BY A LETTER DATED 12 MARCH 1956 FROM THE PERMANENT MISSION OF THE UNION OF SOUTH AFRICA TO THE UNITED NATIONS

[*Original: English*]

#### COMMENTS ON PROVISIONAL ARTICLES CONCERNING THE REGIME OF THE HIGH SEAS

##### *Article 1*

The definition of the high seas contained in this article appears to be satisfactory.

##### *Article 2*

No comment.

#### *Chapter I. Navigation*

##### *General*

As presently framed the draft articles appear to apply to submarines, irrespective of whether they are warships, only when they are navigating “on” the high seas. It is felt that specific provision should be made in the appropriate article, to apply the provisions of the draft code to submarines at all times when such vessels are “in” the high seas, whether they are navigating on the surface or submerged.

##### *Article 3*

No comment.

##### *Article 4*

The Union Government is inclined to agree with the Commission’s view that the flag of an international organization cannot be assimilated to the flag of a State for the purpose of conferring exclusive jurisdiction over a vessel flying such flag on the high seas. It is felt that the whole question of jurisdiction over ships flying the flag of international organizations requires further study and

the decision to defer consideration of the matter is therefore welcomed.

##### *Article 5*

The Union Government agrees with the Commission’s view that the framing of criteria, based on the nationality of the captain and crew, which would entitle a vessel to fly its flag can best be left to individual States. Should it become necessary at some future date to include an article of this nature, consideration might be given to a provision that the State in which a ship is registered should license the captain and certain crew members or, if they have been licensed by another State, should validate such licenses. This system has been found to work well in the field of civil aviation.

With regard to paragraph 2, sub-paragraph (c), it is felt that in order to qualify for registration in a particular country a ship should have its principal place of business in that country.

It is suggested that it would be more in accord with the intention which appears to underlie paragraphs 2(a) and 2(b) if paragraph 2(c) were expanded by the addition of the following words:

“... provided that more than half the issued share capital of such company is registered in the names of nationals or of persons legally domiciled in the territory of the State concerned and actually resident there”.

##### *Article 6*

The principle underlying this article is accepted, but the Commission may wish to consider whether the drafting might be revised in order to bring out the meaning more clearly. The phrases “nationalities in question” and “with respect to other States” could perhaps be made more specific.

##### *Article 7*

No comment.

##### *Article 8*

The situation might arise where a State-owned ship is employed on a commercial basis and engaged in ordinary trading activities. Although such a ship might be owned by the State and technically employed on Government service, it does not seem desirable that it should be assimilated to a warships and enjoy the immunities granted to warships. It seems to be implicit in article 8 that it is intended to cover Government-owned and operated ships which are employed otherwise than for commercial gain. It is felt that the article should be re-phrased to make this clear—for example, by adding the words “and otherwise than for commercial gain” after the words “on Government service”.

##### *Article 9*

No comment.

##### *Article 10*

As the Commission explains at the end of its comments, the draft article is designed “to spare vessels and their

crews the risk of criminal proceedings before foreign courts in the event of collision on the high seas”.

The Union Government agrees with the principle that proceedings should not be instituted *as a matter of right* against the captain or a crew member, in the circumstances envisaged in this article, in the courts of any State other than the flag State or the State of which the officer or crew member is a national.

As it stands, however, the draft article makes no provision for the case where the State of which the person concerned is a national waives its jurisdiction in favour of another State. Provision is made for such waiver in South African legislation and no doubt in that of other countries.

It is therefore urged that the article be amended (e.g. by the addition of a sentence at the end of paragraph 1) to make it clear that there is nothing to preclude a State from waiving its jurisdiction, either generally or in a particular case, over its own nationals who may be involved in penal or disciplinary responsibility for collision on the high seas.

#### Articles 11-13

No comment.

#### Article 14

In the fourth paragraph of its comments the Commission explains that acts committed by one aircraft against another aircraft cannot be regarded as acts of piracy, and adds the rider that such acts are in any case outside the scope of the draft articles.

It is not clear why acts committed by one aircraft against another over the high seas should be outside the scope of the draft articles, while acts committed by an aircraft against a vessel on the surface are covered. According to article 2, the freedom of the high seas includes the freedom to fly above them.

It was felt that the study of the régime of the high seas might have provided the Commission with the opportunity to fill in some of the admitted lacunae in international law relating to the régime of the airspace above the high seas.

In its comment on article 8, the Union Government expressed the view that a ship owned and operated by a State, but engaged in normal trading activities, should not in principle be assimilated to a warship.

Once having been assimilated to a warship, such a vessel could only assume the status of a private vessel—and thus become capable of committing acts of piracy—if the crew mutinied (article 15).

It is felt, however, that there is no valid reason why a ship owned and operated by a State but engaged in commerce should be regarded as incapable of committing acts of piracy. This lends further support to the view that such ships should be assimilated to private vessels.

In numbered paragraph 6 of its explanatory notes, the Commission concludes that “Acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel cannot be regarded as acts of piracy”.

It is not unknown for passengers on a ship to engage in acts of robbery and violence in concert with vessels, known to be engaged in piracy, which are not in the immediate vicinity. Although such action as is envisaged in paragraph 1 of article 14 cannot be classed as piracy when committed by the crew, it seems possible that similar action instituted by the passengers in concert with pirates might, in certain circumstances, be so construed.

#### Articles 15-19

No comment.

#### Article 20

It is felt that this article is justified by necessity despite the fact that it tends to favour pirate vessels *vis-à-vis* States with small fleets and a long coastline. Under article 8, State ships which are assimilated to warships “for all purposes connected with the exercise of powers on the high seas by States other than the flag State” would presumably also have the right to effect a seizure because of piracy.

It is noted that no specific provision is made for the case where legitimate self-defence against piracy results in a combat during which the pirate vessel and its crew are overcome. In such a case the master of the vessel against which the act of piracy was committed would presumably be entitled to seize the vessel and its crew pending the arrival of a warship or military aircraft.

The Commission may wish to consider whether a specific provision should be made to cover such cases, which are not uncommon in areas where piracy is still prevalent.

#### Article 21

It is suggested that paragraph (b) should be extended to cover the high seas generally.

Reasonable ground for suspicion that a vessel is engaged in the slave trade should be sufficient justification for exercising the right of visit, even if the vessel concerned is not encountered in one of the “maritime zones regarded as suspect in international treaties for the abolition of the slave trade”.

The Union Government agrees that anything less than absolute liability for damages if a vessel is boarded without justification, would be a derogation from the principle of the freedom of the high seas.

#### Article 22

The Union Government agrees with the view of the Commission as explained in numbered comment 3, that orders given by radio should not be admitted. There would presumably be no objection to the use of radio as ancillary to the other recognized methods of signalling.

#### Article 23

The Commission remarks that “almost all maritime States” have laid down regulations to prevent the pollution of their internal waters and their territorial sea. The intention of article 23 appears, therefore, to be to place upon States the obligation to draw up regulations

to combat pollution of the high seas as well. The Union Government feels that while this intention emerges from the heading of the article and from the Commission's comments, the text of the article itself should include a reference to the high seas.

*Articles 24 and 25*

No comment.

*Article 26*

In the interests of clarity, it might be advisable to add the words "in such area" at the end of paragraph 1.

*Articles 27-30*

No comment.

*Article 31*

As it stands at present, the article provides for the appointment of an arbitral commission by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The wording implies that the Secretary-General of the United Nations and the Director-General of FAO will be *ad idem*, and makes no provision for the event of their not agreeing on the personnel of the commission. It is suggested, therefore, that either the Secretary-General be empowered, *after* consultation with the Director-General, to appoint the commission; or that machinery providing for the case of a disagreement between the Secretary-General and the Director-General be included.

*Articles 32-38*

No comment.

**23. United Kingdom of Great Britain and Northern Ireland**

*Document A/CN.4/99/Add. 1*

A. TRANSMITTED BY A NOTE VERBALE DATED 15 MARCH 1956 FROM THE UNITED KINGDOM DELEGATION TO THE UNITED NATIONS

[*Original: English*]

INTRODUCTION

Her Majesty's Government in the United Kingdom stated in their comments transmitted to the United Nations on 1 February 1955, that they found the Commission's report a valuable contribution towards the codification of the law of the sea. They wish to reiterate this expression of their interest in the work of the Commission and welcome the present draft articles upon the régime of the high seas and the régime of the territorial sea, particularly article 3 of the latter, which they consider to be a valuable contribution.

In accordance with the terms of General Assembly resolution 899 (IX) of 14 December 1954, Her Majesty's Government have thought it fit to suggest certain amendments also to the draft articles upon the continental shelf

and the contiguous zone drawn up at the 1953 session of the International Law Commission. The present comments do not however cover the subject of fisheries. A commentary on this matter will be forwarded later.

REGIME OF THE HIGH SEAS

A. *Comments of substance*

*Article 2*

1. It would be preferable for the first sentence in this article to read

"the high seas being open to all nations, no State may purport to subject any part of them to its jurisdiction".

2. The United Kingdom Government have received evidence that a number of learned and scientific bodies are concerned lest recent developments should impede the freedom of research, exploration and experiment. They would accordingly propose to add a fifth item to those listed in article 2, reading:

"5. Freedom of research, experiment and exploration".

3. The penultimate paragraph of the Commission's comments lists certain matters in which the coastal State is permitted to exercise forms of control outside the territorial sea. The United Kingdom Government draw the attention of the Commission to the fact that certain States (including the United Kingdom) allow vessels to engage in their coastal trade, while claiming the right to board and search such vessels engaged in that trade, whether they are in or out of the territorial sea. To take account of the exercise of this right, the United Kingdom Government suggest the addition of a further item to those set out in the paragraph referred to, to read as follows:

"6. The right to regulate the operation of foreign vessels in the coastal trade in those cases where such ships are permitted to engage in that trade".

*Articles 4 and 5*

Her Majesty's Government approve the provision that ships shall be subject to the exclusive jurisdiction of the flag State on the high seas, subject to the exceptions mentioned in article 4.

It is stated in article 4 that ships possess the nationality and shall fly the flag of the State in which they are registered, from which it might appear that registry was the criterion of the national character of all ships. The conditions governing registry are, however, an internal matter for each State and they will vary widely from one country to another and may, indeed, not exist at all. Even highly developed maritime States will not always require the registration of every ship. For example, warships, to which this article appears to apply, will not be registered, and many types of Government vessel may be exempt from registry but nonetheless entitled to fly a national flag. Small ships may be exempt from registry but may use the national flag.

As regards the draft provisions in article 5 stating the conditions which must be observed for the purposes of recognition of the national character of a ship, the

United Kingdom Government consider that any attempt to reduce the criteria governing recognition of a national flag to a few simple rules is bound to be extremely difficult, and it may well prove impossible to draft rules which are not in conflict with national law in one country or another. In the present draft, for example, the provisions or article 5 are wide enough to permit the establishment of "flags of convenience" even where the country of flag has no relationship to the country of real ownership, but at the same time are too narrow to permit the recognition of a large number of bona fide British ships on the British register.

Also, as the articles are at present drafted, they do not provide for the control and jurisdiction which, according to the Commission's comment to article 5, should be effectively exercised by the flag State. For example, the draft provisions in article 5 in respect of ownership of ships by persons or partnerships would be fulfilled if a ship were owned as to nearly half by foreigners living outside the flag State and the remainder by foreigners living in the flag State; whereas in the view of the United Kingdom Government effective control over ships owned by persons or partnerships can only be exercised if all the persons owning the ship or all the partners are nationals of the flag State. Again, in the case of corporate bodies (which may include other bodies than joint stock companies), it is not sufficient merely to require a registered office in a State if it is desired to establish effective control. If the business of the body corporate owning the ship is conducted away from the flag State, and the ship itself does not call at the ports of the flag State, the ship may well be beyond the control of that State.

Conversely article 5 is too narrowly drawn at present to permit recognition of ships sailing as a matter of historical right or custom under the flag of another State. In the British Commonwealth it has always been possible (subject to the laws of any particular Commonwealth country) for a ship wholly owned in and controlled from one of the countries of the Commonwealth to be registered in any of those countries and to fly its flag. This is done without any loss of the effective control and jurisdiction which is stated by the Commission to be a requirement of national character and permission to fly a flag.

The criteria set down in article 5 governing the recognition of nationality appear to be a statement of the factors found by the Institute of International Law to be common to the registration systems of a number of countries in 1896, and therefore represented a lower common factor than the standards adopted by any of the individual countries. Any such common standards are likely to omit important provisions peculiar to individual countries for establishing control and jurisdiction, such as those concerning the location of the principal place of business or the controlling interest of shareholders. A detailed statement of the criteria governing nationality by reference to the standards found to be common to all countries is, therefore, unlikely to be satisfactory in principle, and may well encourage the adoption of inferior standards.

Her Majesty's Government therefore suggest that it

would be preferable for the articles to be confined to broad principles which are established in international law to read as follows:

*" Article 4*

" Save in exceptional cases expressly provided for in international treaties or in these articles, ships shall be subject to the exclusive jurisdiction on the high seas of the State under whose flag they sail.

*" Article 5*

" A ship has the nationality of the State whose flag it is entitled to fly. A State may not, however, allow a ship to fly its flag, nor need others States recognize the ship as entitled to do so, unless, both under its own domestic law and under international law, the flag State is in a position to exercise, and does exercise, effective jurisdiction and control over ships flying its flag, and the right to fly its flag is limited and regulated accordingly by its domestic law. A State may permit a ship that would be entitled to fly its own national flag under domestic law, to fly the flag of another State, provided the requirement of the exercise of effective jurisdiction and control on the part of that other State is fulfilled."

*Article 8*

1. The purpose of this article would be clearer if the words "shall be assimilated to" were replaced by the words "shall have the same immunity as".

2. The question arises here of how a warship shall be entitled to verify the flag of a vessel if that vessel claims to be government-owned or operated. This difficulty arises because there is no way in which a warship can verify the title of a merchant ship operated by a State and used on government service to fly its flag, other than by boarding it in order to establish that it is being used on government service only.

3. The phrase "other ships" in the last sentence of the Commission's comment is somewhat ambiguous in this particular context. The United Kingdom Government therefore suggest the substitution of "foreign" for "other".

*Article 18*

This article can be read, at present, as not dealing with the problem of the disposal of the pirate ship or aircraft itself, after seizure. The Commission may wish to consider inserting some provision on this point, e.g. that it will be for the original owner to have the opportunity of putting in a proprietary claim in the courts of the country which has taken the vessel or aircraft.

*Article 21, paragraph 3*

Instead of "shall be compensated for the loss sustained" it would seem better to say "shall be compensated for any loss sustained". Unless a very long delay were entailed, it is doubtful whether any loss would have been sustained. It is, however, for consideration whether the word "damage" should not be mentioned as well as "loss".

*Article 22, paragraph 1*

The United Kingdom Government consider the last sentence of this paragraph to be based on an erroneous conception of the nature of the contiguous zone and they would propose its omission. The contiguous zone is not part of the territorial sea, but part of the high seas. It is not, like the territorial sea, under the sovereignty or jurisdiction of the coastal State. The laws of the coastal State are not, as such, applicable in the contiguous zone, as they are in the territorial sea. The coastal State is, however, permitted to exercise certain powers within the contiguous zone, not because an infraction of its laws is at the moment taking place, but in order to prevent an *eventual* infraction of its laws when the vessel actually arrives within the territorial sea, or comes into port. Thus the position in the contiguous zone is entirely different from that in the territorial sea. The United Kingdom Government consider that the doctrine of hot pursuit should only be applicable in those cases, where, at the moment when the pursuit starts, the vessel is within the jurisdiction of the coastal State and there has actually been an infringement of its laws or it is suspected that such an infringement has occurred. This cannot be the position in the contiguous zone and consequently the doctrine of hot pursuit should have no application to a vessel within the contiguous zone.

This paragraph should also, in the opinion of the United Kingdom Government, make clear that the infringement for which the pursuit is being undertaken need not still be taking place at the precise moment it is begun. It is clear that in the case of, for example, oil pollution, the actual infringement may take only a matter of a few moments, during which it would be quite impossible for the pursuit to be begun.

*Article 22, paragraph 3*

The United Kingdom Government suggest that this paragraph should include also a provision that the pursuing vessel must establish the position of the vessel pursued, e.g., by the dropping of a buoy.

## Use of aircraft for purposes of hot pursuit

Some States employ aircraft in co-operation with vessels for the purposes of fishery protection. The United Kingdom Government agree that this practice is lawful in principle, but only if it is carried out under the correct conditions, to ensure compliance with the principles contained in article 22 of the International Law Commission's draft. They therefore suggest that the International Law Commission should at its next session study the implications of a pursuit initiated by an aircraft.

The preliminary views of the United Kingdom Government are that the following principles should apply:

(1) The essence of pursuit is that the offending vessel shall have been made aware that it is required to stop. An aircraft, acting by itself, must therefore be capable of issuing a visible and comprehensible order to stop to the offending vessel when the latter is still within the territorial sea. Only from the moment of such an order can pursuit as properly to be understood, and for the pur-

poses of justifying its extension on to the high seas, be said to commence.

(2) Since pursuit must be immediate, hot and continuous, an aircraft, having given the order to stop, must itself actively pursue the vessel until a vessel summoned by the aircraft arrives and takes over the pursuit. It would not be an appropriate exercise of the right of pursuit that a vessel should be able to arrest another vessel outside the territorial sea merely because that vessel had been sighted as an offender when in the territorial sea, by an aircraft.

## Chapter II. Fishing

The United Kingdom Government will comment separately at a later date upon the articles contained in this chapter.

## Chapter III. Submarine cables and pipelines

The United Kingdom Government approve the articles in this chapter, but suggest that both they and the comments be amended where necessary (as follows) to include electric cables generally.

*Article 34, paragraph 1*

For "telegraph or telephone" read "electric".

*Article 34, comment*

In paragraph 2, after "pipelines" insert "and power cables".

*Article 35*

In line 7, after "communications" insert "or of electric power", and in the comment, after "pipelines" insert "and power cables".

## B. Drafting points

*Article 1*

For "which are not included" substitute "that are not included".

*Article 3*

For "shall have" substitute "has".

*Article 6*

The United Kingdom Government suggest that this article be redrafted to read:

"A ship that sails under the flags of two or more States may not, with respect to any other State, claim either or any of the nationalities in question, and may be assimilated to ships without a nationality".

*Article 7, paragraph 2*

Insert commas after words "Government" and "military fleet".

*Article 10, paragraph 1*

Insert a comma after the words "flying the flag" in the penultimate line.

*Article 12*

Insert after the word "vessel", the words "of any State".

*Article 14, paragraph 1*

Insert a comma after the word "depredation". In line 2 of paragraph 1 (a) for "on" insert "by".

*Article 16*

Certain of the expressions used in this article are not usual in English. It is suggested that the word "devoted" should be deleted and the word "utilized" be inserted; this requires the insertion of "for" for "to" in the following line. "Dominant control" is also not usual; "control" by itself would be sufficient. If an additional word is necessary, something like "actual" or "effective" would be more appropriate.

*Article 20*

For "because of" substitute "on account of".

*Article 21, paragraph 1 (b)*

Redraft this paragraph to read: "That while in the maritime zones indicated as suspect in the international treaties for the abolition of the slave trade, the vessel is engaged in that trade."

*Article 22*

Comment, point 3: for "spotted" insert "sighted" and for "hoisting" insert "making".

*Article 23*

"Fuel oil" is used as a technical term; the plain "oil" is therefore preferable.

## Régime of the territorial sea

The following represent the comments of substance that Her Majesty's Government desire to make. Certain purely drafting comments may follow at a later date.

*Article 1*

The United Kingdom Government approve this article.

*Article 2*

The United Kingdom Government approve this article.

*Article 3*

In their comments submitted to the International Law Commission on its 1954 report (1 February 1955) the United Kingdom Government set out fully their view that the problem of the breadth of the territorial sea demands a uniform world-wide solution and that, while special historical grounds may provide a valid reason for claims to a wider limit in certain cases, there is no geographical or economic justification for claims to more than the traditional three-mile belt. The United Kingdom Government accordingly welcome the statement by the Commission in paragraph 3 of this article that States are not required to recognize claims to a breadth of territorial sea of more than three miles. They urge the Commission

to restate this view more strongly in the revised text, and would stress in this connexion the pronouncement of the International Court of Justice in its judgement upon the Anglo-Norwegian Fisheries Case, in which the Court asserted that the limitation of the territorial sea always has an international aspect.

In the second paragraph of its comment upon article 3, and discussing paragraph 2 of the article, the Commission states that it considered that extensions of the territorial sea beyond a twelve-mile limit infringe the principle of the freedom of the seas. The United Kingdom Government would point out that this principle was established during the period which witnessed also the general acceptance by States of the three-mile limit for the territorial sea. Attempts to derogate from the principle have largely taken the form of claims to wider belts of territorial sea than three miles. Since the principle of the freedom of the seas is incompatible with claims to exercise exclusive jurisdiction over large areas of sea, the United Kingdom Government suggest that the recognition of the principle must entail the limitations to territorial waters to the belt of three miles which experience has shown to be both necessary, and at the same time sufficient, to serve the legitimate needs of coastal States.

The United Kingdom Government wish to recall that in their comments to the Commission of 1 February 1955, they put forward various arguments in favour of a uniform breadth of territorial waters throughout the world. They request the Commission to consider again these arguments and to take into account certain recent developments in international co-operation in maritime matters and in the work of the Commission itself, which in their view have strengthened the case for a uniform three-mile limit of territorial sea.

In the first place, the Commission has provided a set of articles upon the conservation of the living resources of the sea. The United Kingdom Government welcome these articles in principle, and consider that a set of articles upon this subject should allay the often legitimate fears of coastal States for the conservation of fishery resources outside the three-mile limit—fears which have motivated many excessive claims to wide belts of territorial sea. They believe that such a set of articles should provide a basis for future agreements upon the conservation of the living resources of the sea. It will henceforth be clear that States disregarding the principle underlying these articles, yet continuing to base their claim to a wider belt of territorial sea upon a desire to preserve or conserve fishery resources, are seeking, without legitimate ground, to assert exclusive jurisdiction and rights of exploitation over areas that should be open for the use and benefit of all countries.

In the second place, the United Kingdom Government have already expressed their readiness to accept a "contiguous zone" of up to twelve miles in width measured from the low-water mark or base-line, in which the coastal State shall be entitled to exercise certain specific rights. They reaffirm their readiness to accept such an arrangement upon the conditions set out when the proposal was first made in the comments of the United Kingdom Government dated 2 June 1952, and restated in those of

1 February 1955. The rights laid down under such an arrangement meet the desire of the coastal State to exercise a measure of control in customs, fiscal and sanitary matters in a wider belt and thereby also serve to render unnecessary any claims to wider limits of territorial sea, based upon a desire for greater control in these matters.

In the third place, the United Kingdom Government wish to recall that the articles of the International Law Commission on the continental shelf drawn up at its 1953 session provide for sovereign rights by the coastal State over the sea-bed and subsoil of the continental shelf around its coast. The United Kingdom Government are commenting separately upon these articles but consider that they also serve to provide a safeguard for certain interests of the coastal State, without involving any question of an extension of the territorial sea of the coastal State.

They hold that these considerations meet all the arguments of substance put forward by States as reasons for the extension of their territorial sea.

On the purely juridical aspects, the United Kingdom Government have nothing to add to the arguments set out in their comments of 1 February 1955, to which they would again call attention. They would conclude by recalling the statement made in the comments submitted by the United States Government, on 3 February 1955, to the effect that all States are agreed that they are entitled to a territorial sea of at least three miles. The way to final agreement upon this whole complicated question lies therefore in accepting this fact, and in catering for whatever exceptions to it may be thought necessary in particular cases by making provision for international arbitration and agreement directed to meeting those exceptional cases when they are found to be justified.

#### Articles 4 and 5

In their comments of 1 February 1955, the United Kingdom Government expressed and explained the view that the use of base lines cannot be justified by economic considerations *alone*. They therefore regret the embodiment of a clause to this effect in article 5, and, for the reasons given in their previous comments, and in the comments upon article 3 above, they cannot agree with it.

The United Kingdom Government also consider that the reference to economic factors in article 5 of the Commission's draft is based on an incorrect reading of the judgement of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway. The "economic interests" taken into account in the judgement were viewed solely in the context of the historical and geographical factors under discussion, and were not intended to constitute a justification *per se*. The particular passage on which the relevant part of article 5 is based can, in the context of the judgement, be seen to relate solely to the question of in what particular way, in certain circumstances, a base line in a specific locality could be drawn, and not to the question of whether any base line in that locality was justifiable at all. It was only if *some* base line was otherwise justifiable in principle,

that purely local economic considerations in that particular region might then justify drawing it in a certain way.

The United Kingdom Government would therefore propose that the wording of paragraph 1 of article 5 of the 1954 draft be reinstated in the present article 5, and that the present article 4 be amended to make clear that only the considerations set out in the earlier article 5 can be taken as a justification for departure from the use of the low-water mark.

The United Kingdom Government also consider it essential that some greater precision be introduced into the type and length of base line permissible. The International Court only laid down very general criteria, which, in the absence of more precise definition, are not easy to apply. The United Kingdom Government therefore regret the omission of the previous second paragraph of this article as set out in the 1954 report. This paragraph contained such definitions, and the United Kingdom Government suggest its reintroduction in some form.

The United Kingdom Government suggest further that the Commission might consider stating explicitly in the articles the principle that base lines cannot be drawn across frontiers between States, by agreement between these States, in a bay or along a coastline, in such a way as to be valid against other States. Although the consequences of the sovereignty of the State over internal waters are such that any attempted agreement of this kind would in fact lead to extremely complex legal difficulties, and probably prove impracticable, the United Kingdom Government nevertheless consider that the illegality of the process should be made explicit.

Finally, the United Kingdom Government again draw the Commission's attention to the problems relating to the status of waters enclosed by base lines, in particular the matter of the right of innocent passage through newly-enclosed waters in front of the coastline which were previously territorial (or even high seas), and have now become "internal" or national. This enclosure may nevertheless not have altered their intrinsic character as waters affording access to the coast and its ports and estuaries. It is precisely in the approaches to a coast that passage rights are most important, since there may be no alternative route.

#### Article 6

The United Kingdom Government approve this article.

#### Article 7

The United Kingdom Government, while agreeing that there should be a definite limit on the closing line for bays, cannot accept the figure of twenty-five miles proposed by the Commission as a maximum line. It has been maintained that the so-called "ten-mile rule" has no basis in international law; but this is true equally for a twenty-five-mile rule, and in the light of the considerations set out above in the comments upon article 3, the United Kingdom Government do not consider that the interest of the coastal States affords any justification for such a distance.

The United Kingdom Government also suggest that

paragraph 2 of article 7 would be clarified by the addition of the sentence to the effect that islands fronting a bay cannot be considered as "closing" the bay if the usual route of international traffic passes shoreward of them.

It is the view of the United Kingdom Government that paragraph 5 of article 7 might be open to the interpretation that a twenty-five-mile closing line is a minimum distance. To avoid this ambiguity, they suggest that all the words after "'historical' bays" should be deleted.

The United Kingdom Government consider also that paragraph 1 of the comment on this article is in need of amendment since the definition is not in keeping with the terms of the article itself. It paraphrases it in such a way that the criterion becomes distance while in the article it is area.

Finally, the United Kingdom Government wish to draw attention to the fact that certain configurations of the coastline may give rise to difficulties in the application of the definitions in paragraph 1 of this article, and that difficulties may also arise as a result of the discrepancy between paragraph 3, which mentions the low-water mark, and paragraph 1, which does not.

#### Article 8

The United Kingdom Government would draw the Commission's attention once more to the observations on this article made in their comments of 1 February 1955.

#### Article 9

The United Kingdom Government approve this article.

#### Article 10

The United Kingdom Government approve this article. They do not consider that there is any need to make special provisions for groups of islands as such, and agree in principle with the last sentence of the Commission's comment upon this article. They consider that the ordinary rules, in conjunction with the judgement of the International Court in the Anglo-Norwegian Case, are adequate to cover this case.

On a point of drafting, they would prefer the substitution of "near" for "off" in the last sentence of the Commission's comment.

#### Article 11

The United Kingdom Government approve this article.

#### Article 12

The United Kingdom Government approve this article.

#### Article 13

The United Kingdom Government approve this article, save in relation to the use of the twenty-five-mile closing line permitted by the reference (in paragraph 2) to article 7, and on the assumption that base lines cannot be drawn across the frontier between States (see under articles 4 and 5 above).

#### Article 14

The United Kingdom Government have the following

comments on the provisions of paragraph 1 of this draft article:

1. The adoption of a boundary along the median line would appear to depend on the absence of agreement on some other solution. In practice, however, the solution of a median line would itself usually depend on an agreed method of application (e.g. it might be necessary to agree on how the boundary should take account of islands); and, in the circumstances, such agreement might be difficult to obtain.

2. The application of an exact median line, which is a matter of considerable technical complexity, would in many instances be open to the objections that the geographical configuration of the coast made it inequitable, and that the base lines (e.g. the low-water mark of the coast) were liable to physical change in the course of time.

3. In the experience of the United Kingdom Government, the most satisfactory course will usually be to apply the *principle of the median line*: that is, an approximate or simplified median line based as closely as circumstances allow on an exact median line and drawn on a specific chart of specific date. For these reasons, the United Kingdom Government propose that the Commission should amend paragraph 1 of article 14 in the terms of the revised provisions suggested below. This revision would accord with the approach to the analogous problem dealt with in paragraph 1 of article 15.

#### "Article 14

"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 usually determined, unless another boundary line is justified by special circumstances, by the application of the principle of the median line, every point of which is equidistant from the nearest points on the base line from which the width of the territorial sea of each country is measured.

"2. .... (unchanged)."

#### Article 15

The United Kingdom Government approve this article.

#### Chapter III. Right of innocent passage

The United Kingdom Government oppose in principle the separate treatment of warships in these articles in respect of the right of innocent passage (but see under article 25).

#### Article 16

The United Kingdom Government consider that in paragraph 2 of this article the wording "any act prejudicial to the security of the coastal State" is still open to the objections to it pointed out by the United Kingdom Government in their comments of 1 February 1955; and that without some qualifying phrase this wording may be open to abuse. The United Kingdom Government consider that this paragraph should make clear that the burden of proving that the passage is "prejudicial, etc." is one which must be discharged according to the criteria

of international law, rather than the law of the coastal State. They consider that there is a real danger that a vessel on genuine innocent passage may be interfered with; on the other hand, they are aware that it is difficult to cover in the articles the conception of "hovering" for the purposes of smuggling, in the terms of paragraph 3, while at the same time not giving pretext for interference with genuine innocent passage. They therefore propose the addition in paragraph 3 of the article after the words "coastal State" of the words "or for the purpose of avoiding import or export controls or customs duties of the coastal State".

#### Article 17

The United Kingdom Government welcome the declaration in the first sentence of paragraph 1 of this article.

#### Article 18

Paragraph 1 of this article covers substantially the same ground as paragraph 3 of article 16. It is not necessary to have both. In either case the comment made above under the head of article 16 applies.

#### Article 19

The United Kingdom Government approve this article.

#### Article 20

The United Kingdom Government approve this article, but suggest that paragraph 1 of the comment upon it in the 1954 report should be reinstated.

#### Article 21

The United Kingdom Government approve this article, and welcome the greater emphasis now given to the needs of navigation in paragraph 3 and in the comment.

#### Article 22

In their comments on the corresponding article in the draft articles on the régime of the territorial sea produced by the International Law Commission at its sixth session, the United Kingdom Government drew attention to the possibility of some incompatibility between the article in that draft, and the 1952 Brussels Convention on the Arrest of Sea-going Ships. The United Kingdom Government consider, however, that to extract short sections of that Convention in an attempt to summarize it in the draft articles is likely to lead to even greater difficulties, because of the danger of inconsistency between the terms of the summary included in the draft articles and the Convention itself, and the impossibility of covering the whole Convention in the draft articles. The United Kingdom Government therefore suggest that paragraphs 2 and 3 of article 22 would be better omitted from the draft articles. If desired, reference could be made in the commentary to the fact that under the Convention civil arrest, even in port, is only possible in certain cases.

#### Article 23

The United Kingdom Government wish to reaffirm their view that the question of the vessels to which state immunity should apply requires very careful study.

Pending definition of the position of such vessels, therefore, the United Kingdom Government consider themselves still obliged to reserve their position upon this article. They reaffirm, however, that they have, in principle, no objection to government ships employed on commercial service being covered by the provisions of articles 16, 19, 20, 21 and 22.

#### Article 24

The United Kingdom Government will await the Commission's draft text of this article.

#### Article 25

If the Commission consider this convenient the United Kingdom Government are prepared in the last resort to agree to a separate article covering the passage of warships. Moreover, they do not dispute the right of the coastal State, in accordance with article 18, to regulate the passage of warships through the territorial sea. They cannot, however, accept the provisions of paragraph 1 of this article, which they regard as unnecessary and unjustifiable.

In their view the following main considerations should govern the treatment of warships by the Commission:

1. The law relating to the right of passage is based on the assumption that such passage, whether of warships or merchant ships, is innocent: if it is not, there is no right.

2. The general rights of the coastal State are embodied in articles 18 and 19: these apply equally to warships and merchant vessels and all the safeguards necessary to protect the coastal State.

3. The present practice of States, recognized in 1930 by the Conference for the Codification of International Law, does not require that the passage of warships should be subject to previous authorization or notification.

4. The present tendency of some countries to claim large extension of the territorial sea emphasizes the desirability of the Commission confining its recommendation on this matter to the strict limits of the law as it stands. In accordance with the above considerations, the United Kingdom Government propose the following redraft for paragraph 1 of this article:

"Subject to the provisions of the present rules, the coastal State may not normally forbid the innocent passage of warships through the territorial sea nor require a previous authorization or notification."

#### Article 26

Subject to the considerations set out in the comments on article 25, the United Kingdom Government accept this article, although they think its practical value is small.

#### CONTINENTAL SHELF AND CONTIGUOUS ZONE

(Articles contained in the report of the International Law Commission on its fifth session)<sup>24</sup>

#### The continental shelf

#### Article 1

As they stated in their comments upon the International

<sup>24</sup> *Ibid.*, Eighth Session, Supplement No. 9, chap. III.

Law Commission's earlier report (transmitted to the United Nations on 2 June 1952), the United Kingdom Government are prepared to accept the 200 metre line as a criterion for the outward edge of the continental shelf, but they still consider that the 100 fathom line would be preferable on practical grounds, since this line and not the 200 metre line is the one already marked on most of the ocean charts of those countries that produce charts covering the whole world.

The United Kingdom Government consider that the special nature of the exceptions mentioned in paragraph 66 of the report would be appropriately emphasized by the insertion of the word "immediately" before the word "contiguous" in line 3 of the article.

#### Article 2

In connexion with this article the United Kingdom Government wish to reaffirm the view they expressed in their 1952 comments, i.e. that the rights of the coastal State over the continental shelf must be of the same general nature as those over its land territory, subject of course to the provisions of the succeeding articles.

They wish to point out, however, that certain scientific societies are concerned lest the terms of these articles should enable the coastal State to place unnecessary restrictions upon bona fide scientific research upon the shelf itself. They therefore suggest that the Commission consider inserting some provision safeguarding the general right to undertake such exploration and research.

#### Articles 3 and 4

The United Kingdom Government approve these articles and cannot accept any convention on the continental shelf which does not contain such articles. They suggest that it might be advisable for the Commission at its 1956 session to consider whether it would not be desirable to state even more explicitly that a claim to the continental shelf can only extend to the sea-bed and subsoil of the shelf itself, and not to the waters above it, except within the territorial sea; and that a claim to the continental shelf cannot confer either jurisdiction over, or any exclusive rights in, the super-adjacent waters outside the territorial sea, which are and remain the high seas.

#### Article 5

The United Kingdom Government approve this article but suggest that it should mention pipelines as well as submarine cables. This would be in keeping with article 34 of the régime of the high seas contained in the 1955 report; the Commission might in fact consider inserting a cross reference to that article.

The United Kingdom Government suggest that a further item i.e. "or exploration in the waters above the shelf" should be added to the end of this article.

#### Article 6, paragraph 2

The United Kingdom Government would prefer the establishment of a definite distance for the safety zone envisaged rather than the vague term "a reasonable distance". While they agree that, in view of the likely conflict of interests, these articles must maintain a certain

flexibility, they consider that the question of a safety zone is not one upon which there should be a difference of opinion. Since the margin of safety for shipping must at all times be generally the same, regardless of whether the installation concerned is on an open stretch of sea or in a narrow strait, they propose tentatively that the words "at a reasonable distance" should be followed by the words "not exceeding 400 metres".

The United Kingdom Government propose the insertion of a new paragraph 5 to this article (the present paragraph 5 becoming paragraph 6), to read as follows:

"If such installations are abandoned or disused, they are to be removed entirely".

They also suggest that, in the present paragraph 5, the reference to "sea lanes" may prove too restrictive, and propose the insertion of the words "or where interference may be caused in" before those words.

#### Article 7

The United Kingdom Government have the following comments on the provisions of paragraph 1 of this draft article:

1. The adoption of a boundary along the median line would appear to depend on the absence of agreement on some other solution. In practice, however, the solution of a median line would itself usually depend on an agreed method of application (e.g. it might be necessary to agree on how the boundary should take account of islands); and, in the circumstances, such agreement might be difficult to obtain. It would, in any event, be useful to include a provision in this article similar to that in paragraph 2 of article 14 of the draft articles on the régime of the territorial sea.

2. The application of an exact median line, which is a matter of considerable technical complexity, would in many instances be open to the objections that the geographical configuration of the coast made it inequitable, and that the base lines (i.e., the low-water mark of the coast) were liable to physical change in the course of time.

3. In the experience of the United Kingdom Government, the most satisfactory course will usually be to apply the *principle of the median line*: that is an approximate or simplified median line based as closely as circumstances allow on an exact median line and drawn on a specific chart of a specific date.

For these reasons the United Kingdom Government propose that the Commission should amend article 7 in the terms of the revised provision suggested below. The revised paragraph 1 would accord with the approach to the analogous problem dealt with in paragraph 2 of the article.

#### "Article 7

"1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is usually determined, unless another boundary line is justified by special circumstances, by the application of the principle of the median line every point of which is equidistant from

the nearest points on the base line from which the width of the territorial sea of each country is measured.

"2. .... (unchanged)

"3. Lines shall be marked on the largest scale charts available which are officially recognised."

#### The contiguous zone

The United Kingdom Government note that paragraph 111 of the Commission's report states that the term "immigration" is taken in the article upon the contiguous zone to include "emigration". In view of the powers which this provision would therefore give to a coastal State, e.g. to prevent political refugees from leaving a country, the United Kingdom Government consider that the term "immigration" should be deleted.

They cannot accept the use of the word "punish" in line 3 of the article since, as they have pointed out in their comments upon article 22 of the régime of the high seas, they cannot accept that the coastal State is entitled to exercise anything more than purely preventive control in its contiguous zone.

Following from this, they would also like to see a second paragraph added to this article in the following terms: "The above-mentioned faculty shall not affect the status of the waters in which it is exercised outside the territorial sea, nor shall it entitle the coastal State to claim any general jurisdiction over, or exclusive rights in, such waters, which are and remain high seas".

They consider also that a further amendment is desirable to ensure that only *reasonable* demands are made upon vessels as a result of this article.

Finally, they wish to call attention to the comments they submitted upon article 16 of the régime of the territorial sea in the 1954 report, and to the conditions upon which they are prepared to accept the contiguous zone, set out in their comments of 2 June 1952, and restated in their comments of 1 February 1955. They consider that these comments remain applicable.

#### Document A/CN.4/99/Add. 5

B. TRANSMITTED BY A NOTE VERBALE DATED 19 APRIL 1956 FROM THE UNITED KINGDOM DELEGATION TO THE UNITED NATIONS

COMMENTS ON THE ARTICLES ON THE CONSERVATION OF THE LIVING RESOURCES OF THE SEA CONTAINED IN CHAPTER II OF THE REPORT OF THE SEVENTH SESSION OF THE INTERNATIONAL LAW COMMISSION<sup>25</sup>

1. Her Majesty's Government have stated in their comments touching the articles upon the régime of the territorial sea that they welcome in principle the set of articles upon the conservation of the living resources of the sea and consider that they should provide a basis for future agreements in that sphere and allay the often legitimate fears of States for the conservation of fishery resources in coastal waters outside the three-mile limit.

2. The conservation of living resources is a concept which almost by definition requires the scientific and

especially the biological approach. The scientific requirements were clarified and formulated at the International Technical Conference on the Conservation of the Living Resources of the Sea and a wide area of agreement was reached among the forty-five States represented there. The Commission has been able to take fully into account the report of that Conference and Her Majesty's Government consider that in consequence the present articles are a very decided improvement over those which the Commission adopted at its fifth session in 1953. There is one especial aspect in which Her Majesty's Government nevertheless consider that the present articles do not sufficiently embody the content of the report of the International Technical Conference. That report contained in chapter II a statement of the objectives of fisheries conservation, the scientific content of which was unanimously agreed at the Conference. Scientific conservation is the theme of the articles, which are essentially concerned with the application of measures of conservation and appropriate modes of procedure. Yet the articles contain no definition of the term. This would seem to be an avoidable imprecision and Her Majesty's Government would propose the addition of a second paragraph to the first of the articles, namely, article 24 in the following terms:

"For the purposes of this and succeeding articles the conservation of the living resources of the sea is to be understood as the conduct of fishing activities so as, immediately, to increase or at least to maintain the average sustainable yield of products in desirable form and, ultimately, to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products."

3. Within the framework of such a definition Her Majesty's Government would agree without reserve with these basic propositions of articles 25 to 28 inclusive:

(i) that fishing activities within any area of the high seas should be regulated at need for conservation purposes;

(ii) that all States fishing any area of the high seas should undertake to seek to reach agreement upon the conservation measures that may be required;

(iii) that a State newly entering or seeking to enter a high seas fishery should be initially bound by any measures of conservation already in force;

(iv) that a State which is a coastal State in relation to any high seas fishery should be enabled to participate, whether or not it is currently engaged in that fishery, on an equal basis with other States in any plan of research or system of regulation of the fishery for conservation purposes. Her Majesty's Government furthermore accept in principle, subject to the comments which follow, that where States have failed to reach agreement on any matter arising from the propositions stated in (i) to (iv) above, they should be required to resort to arbitration of an appropriate character.

4. As regards article 28, however, Her Majesty's Government would observe that the expression "a special interest" requires definition or clarification if it is to be employed and that the phrase "contiguous to its coasts" is too restrictive since it implies that the whole of any stock of fish in which the coastal State may have an

<sup>25</sup> *Ibid.*, Tenth Session, Supplement No. 9, pp. 9 ff.

interest will be found at all times very close to the coast of that State. This does not properly allow for the widely varying characteristics of the movements of different species of fish. A better formulation of the first paragraph of this article might be:

“A coastal State whose nationals are not actively engaged in a high seas fishery but which is able to demonstrate a latent or potential interest in the maintenance of the productivity of that fishery is entitled to take part on an equal footing in any plan of research or system of regulation in regard to that fishery.”

Her Majesty's Government would suggest the amendment of article 30 in the same sense. In suggesting that a coastal State should actually demonstrate its interest Her Majesty's Government have in mind evidence of economic interest rather than detailed scientific arguments.

5. Articles 26 to 28 contain the further proposition that resort to arbitral decision should be obligatory upon States if in a particular situation they should be unable to agree together within a reasonable period of time whether measures of conservation are required or what measures should be applied or whether a particular coastal State may claim the rights allowed under article 28. Her Majesty's Government find this proposition fully acceptable in each of its several parts and are equally ready to accept the principle of article 33, namely, that an arbitral decision shall be binding upon the States concerned.

6. As regards article 31 which deals with the appointment, composition and procedure of the proposed arbitral commission, Her Majesty's Government attach the greatest importance, as the Commission itself clearly does, to speed of decision. Unsettled controversy over the conservation of fish stocks may if at all prolonged easily bring about harm and loss to the fishermen as well as to the fish stocks. Her Majesty's Government are therefore glad to note the proposals for short time-limits in respect of action upon a request for arbitration, the constitution of a commission to consider the request, and the rendering of the arbitral decision.

7. They note with the more concern the suggested provision for the commission to extend the period within which its decision is to be given. There is certainly a difficulty here. A commission consisting predominantly, as Her Majesty's Government agree that it should, of qualified experts in conservation may not only be strongly tempted in any event to subordinate and sacrifice quickness of decision to exhaustiveness of evidence; such a body may actually find that a conclusive decision covering all the grounds of argument between the parties cannot be given without further and prolonged scientific research. The period of three months which the Commission envisages might easily become three years unless the arbitral commission is required to give the best decision it can, even though it must be of an interim nature, within a fixed limit of time. These considerations would be of even more crucial importance in the event of the coastal State being given a right to take unilateral measures of conservation as proposed in article 29 which could only be upset by subsequent arbitration, and the commission deciding not to suspend the measures of the coastal State

pending its arbitral award as it would be empowered to do under paragraph 2 of article 32.

8. These remaining and related articles 29 and 32 need to be examined together as regards both principle and application. They are, of course, designed to meet what are conceived to be the particular needs and fears of the coastal State in regard to the safeguarding of the stocks of fish and other living marine resources. Her Majesty's Government recognize the existence of both the needs and the fears which may be legitimate whether or not the coastal State has yet begun to share in the harvesting of those resources. Their recognition is the keener because Her Majesty's Government are themselves responsible for the interests of many such territories in various parts of the world who are now engaged in expanding their fishing industries in order to augment their food supplies. At the same time, Her Majesty's Government consider that articles 29 and 32 require further study by the Commission from various technical fishery aspects before it can be judged whether, and if so in what circumstances, an acceptable formulation can be devised for the fundamentally new principle that article 29 advances, which is that individual States may apply measures, and on the high seas, that are operative against other interested States without their agreement and in advance of arbitration on the merits of the measures in question. This principle would be an innovation of potentially radical effect upon the fishing economies of the States that were not parties to the measures, and their rights and interests are no less to be considered, always within the limits of what the conservation of the living resources of the sea demands, than those of the State which would be unilaterally acting in pursuance of its interests.

9. Her Majesty's Government have noted the Commission's special request that Governments should include in their comments information on all points of a technical nature which might be of use in the final drafting of this set of articles. The technical fisheries aspects are of much significance in relation to article 29, which appears to be universalizing two sets of assumptions that may only be valid in some situations. The first of these is what might be termed the assumption of localized stocks of marine resources. The second might be called the assumption of the oceanic frontier.

10. As to the first, fish and other marine resources often have migratory movements extending over great distances. A stock may be local to a particular State at one period of the year and local to another State or entirely oceanic at other periods. “The area where this interest exists”, within which article 29 envisages the coastal State having a unilateral power of conservation, might be extensible far beyond local waters into those which are local to other States or are oceanic. To confine the action of a coastal State to “contiguous” waters may make that action quite ineffective; to permit its extension further may be demonstrably unwarrantable. There will be a wide range of situations, depending upon the species or the stock of fish or other marine resource in question. Where is the line to be drawn beyond which unilateral conservation is impermissible; and if it cannot be clearly drawn to cover all situations and a coastal State over-

passes it in the subsequent estimation of the arbitral commission, what remedy have the States whose interests have been improperly damaged?

11. As to the second, a distinction between a coastal State and other States, where the technical problem just discussed does not arise, will present no difficulty where, for instance, the coastal State directly fronts a wide expanse of ocean. But that is not the general, and may not even be the most usual, situation. Very many countries are grouped or clustered around the margins of seas, sometimes relatively small in area, across which they face each other. In Europe, the North Sea, the Baltic Sea and the Mediterranean Sea are examples. There are somewhat similar situations in parts of Asia and North East Africa, and a comparable one in the Caribbean. This geographical factor has to be considered, moreover, along with the migratory characteristics of fish and other marine resources referred to in the preceding paragraph. The inescapable conclusion is that in many parts of the world there may well be several countries in a given area which could properly regard themselves as coastal States within the compass of article 29 as at present drafted and could take conflicting unilateral action which might well bring about a state of chaos in the fisheries.

12. The Commission should have it in mind also that there are international conservation bodies in existence for certain areas, or for certain kinds of marine resources, which apply specific measures for the conservation of stocks and of which coastal States concerned are free to become members and commonly are members. There will be occasions when such a body is not empowered to apply a particular kind of measure which a member State may think necessary. That State would appear to have its remedy under article 26: it can negotiate for the extension of the powers of the international conservation body, and failing success can take the matter in dispute to arbitration under article 26. The present draft of article 29 would appear, however, to allow a State, able to demonstrate that it was a coastal State in this context, which was in a minority within an international conservation body over the scientific necessity of a particular measure, or which did not wish to go so far in regulating catches for conservation purposes as other member States, to leave that body and take action of its own in the belief that it might hope to establish a sufficient case before the arbitral commission, which would thereby be made a court of appeal against the measures applied by the international conservation body. That would not seem to Her Majesty's Government to be a situation which the Commission really intends or one in which the arbitral commission should be placed.

13. There are three comments that Her Majesty's Government wish to make on the requirements set out in paragraph 2 of article 29 which it is proposed the unilateral measures of the coastal State should have to satisfy for them to be valid against the nationals of other States. Firstly, the requirement at (a) of that paragraph might bring about great confusion and controversy if the term "conservation" were not given exact definition in scientific terms; and Her Majesty's Government have

already suggested in this commentary how they consider that definition should be framed. Secondly, the word "appropriate" at (b) would not seem apt in expression or clear in intention. "Acceptable" would be a more fitting word: the State taking unilateral action should at the least be required to show that there is a wide measure, though not necessarily perhaps a universal measure, of scientific acceptance of the findings on which its action is based. Thirdly, the requirement at (c) should take account of the capacity to give the appearance of non-discrimination against foreign fishermen when the measures in question may in fact have a wholly opposite effect. This can be achieved, for example, by prohibiting particular forms of fishing, or the use of particular gears, ostensibly on conservation grounds, which the fishermen of the country initiating the measures do not employ but which those of other States concerned are alone equipped to practise. There should be non-discrimination in fact as well as in form if unilateral action is to be sanctioned.

14. The final comment that Her Majesty's Government desire to make at this stage concerns the proposal in article 29 that the unilateral measures should be valid as to other States, in advance of reference to arbitration, if the stated requirements are fulfilled and should remain obligatory pending the arbitral decision. If this is to be an effective provision the implication is that not only shall other States concerned undertake to see that their nationals observe the measures in question but also that the enforcement of those measures shall be policed, and on the high seas where they are to be observed. By whom are the measures to be policed? Are the "other States" expected or are they to be required to enforce the unilateral measures of the initiating State, from which they may dissent and about which they may be intending to go to arbitration, against their own nationals? Is that practical politics? Or is it intended that the State introducing the unilateral measures should be entitled to enforce them against vessels of other flags on the high seas; that fishery protection vessels of that State should, for example, be authorized to inspect the nets of foreign fishing vessels in order to enforce a unilateral measure affecting mesh sizes or turn foreign vessels away from the fishing grounds in order to enforce a unilateral measure regulating the amount of fishing effort? The collective or the international enforcement of agreed fishery conservation measures has so far proved a plant of slow growth and the omens for the unilateral enforcement of controversial measures would therefore not appear promising.

15. While Her Majesty's Government feel that these considerations of a technical and practical nature to which they have drawn attention require that material amendment should be made to the draft articles on the conservation of the living resources of the sea, they wish in conclusion to reaffirm their belief that a set of articles on this subject is imperatively needed in the interests of the conservation of marine resources and would prove an invaluable addition to the corpus of international law, and to state again that the basic principles of the articles have their support.

## 24. United States of America

*Document A/CN.4/99/Add.1*

TRANSMITTED BY A NOTE VERBALE DATED 12 MARCH 1956  
FROM THE UNITED STATES MISSION TO THE UNITED  
NATIONS

[*Original: English*]

I have the honour to refer to note No. LEG 292/9,01, dated 24 August 1955, from the Legal Counsel, concerning the report of the International Law Commission covering the work of its seventh session, 2 May to 8 July 1955.

Chapter II of the report contains provisional articles concerning the régime of the high seas, and chapter III contains draft articles on the régime of the territorial sea. The Commission has invited comments on these drafts.

I. PROVISIONAL ARTICLES CONCERNING THE  
REGIME OF THE HIGH SEAS

Article 1 defines the high seas and article 2 affirms the principle of freedom of the high seas. There follows thereafter three chapters: Chapter I — Navigation; Chapter II — Fishing; and Chapter III — Submarine cables and pipelines.

*Articles 1 and 2*

The Government of the United States is in agreement with the definition of high seas in article 1 and with formulation of the principle of freedom of the seas in article 2.

*Chapter I. Navigation*

The Government of the United States believes that the articles in this chapter constitute as a whole a sound exposition of the principles applicable to problems of navigation.

*Chapter II. Fishing*

So far as concerns the articles in this chapter, the Government of the United States submits the following comments:

*Article 26*

The first paragraph of this article would enable a State operating only occasionally in a fishery to insist that a State with a substantial operation in the same fishery enter into negotiations with it for a conservation programme; failing such negotiations an arbitral procedure would be invoked. In order to remove the possibility of abuse, the United States suggests the insertion of the word "substantial" before "fishing" in paragraph 1.

Also under this paragraph, a State could request another State to enter into negotiations even though their nationals were not engaged in fishing the same stock of fish. In the view of the United States, the right of a State to request such negotiations, and consequently to initiate the arbitral procedure contemplated in the next paragraph, should be limited to instances where their nationals are engaged in fishing the same stock of fish. It is suggested,

therefore, that the words "fishing in any area of the high seas" be replaced by the words "substantial fishing of the same stock or stocks of fish in any area or areas of the high seas", and that the words "conservation of the living resources of the high seas" be replaced by the words "conservation of such stock or stocks of fish".

Under paragraph 2 the scope of the authority of the arbitral body in making determinations under article 26 is not clear. For example, the role of the arbitral body with regard to conservation proposals that may have been made by one or more of the disagreeing States is not indicated. Nor is it indicated whether the arbitral body would be authorized to originate proposals for conservation measures. The United States is of the opinion that, so far as proposals are concerned, the authority of the arbitral body should be limited to consideration of conservation proposals of the parties to the dispute; and that the arbitral body should not be empowered to initiate conservation proposals or to enlarge upon any that originate with the parties.

Moreover, it would seem advisable and appropriate to specify criteria for the guidance of the arbitral body in making determinations under this article.

In the view of the United States, the arbitral procedure contemplated by the second paragraph of article 26 should be based on criteria specifically set forth in this article. These criteria should be:

"If these States do not, within a reasonable period of time, reach agreement upon the need for conservation or as to the appropriateness of conservation measures proposed by any of them, any of the parties may initiate the procedure contemplated in article 31, in which case the arbitral commission shall make one or more of the following determinations, depending upon the nature of the disagreement:

"(a) Whether conservation measures are necessary to make possible the maximum sustainable productivity of the concerned stock or stocks of fish;

"(b) Whether the specific measure or measures proposed are appropriate for this purpose, and if so which are the more appropriate, taking into account particularly:

"(i) The expected benefits in terms of maintained or increased productivity of the stock or stocks of fish;

"(ii) The cost of their application and enforcement; and

"(iii) Their relative effectiveness and practicability.

"(c) Whether the specific measure or measures discriminate against the fishermen of any participating State as such.

"Measures considered by the arbitral commission under paragraph 2 (b) of this article shall not be sanctioned by the arbitral commission if they discriminate against the fishermen of any participating State as such."

*Article 27*

The comment of the United States on paragraph 1 of article 26, in so far as it relates to identifying the fishing

with stocks of fish as against areas, applies also to paragraph 1 of article 27.

Likewise, the comment on paragraph 2 of article 26, that the scope of the authority of the arbitral body should be limited and that specific criteria should be set forth, applies to paragraph 2 of article 27. The criteria suggested for article 26 should be incorporated in article 27.

Furthermore, the United States believes that the operation of article 27 should be subject to an important qualification, the principle of abstention. This principle is described in detail hereinafter.

#### *Article 28*

The United States understands the special interests of the non-fishing contiguous coastal State to be of two principal types.

First, the coastal State is interested in seeing that the living resources in high seas near to its coast are maintained in a productive condition, since its nationals might at some future time desire to participate in these resources. Such an interest would be protected by assurance that an adequate conservation programme is being carried forward.

Second, the coastal State has an interest in conservation measures applied to high seas contiguous to its territorial waters in so far as these specific measures affect, directly or indirectly, resources lying inside territorial waters. Furthermore, in most instances, a fishery resource occurring in contiguous high seas will extend into the territorial waters. For these reasons the nonparticipating coastal State may have an interest in the specific conservation programme referred to above. The interests described in this paragraph can be safeguarded by giving the coastal State, upon satisfactory showing of a special interest, a right to participate fully in the conservation programme.

#### *Article 30*

The United States understands that this article is intended to safeguard the interests of the nonfishing States whose nationals may depend on the products of the fishery or who might some day desire to participate in fishing the resource. Specifically, the interest is in the continued productivity of the resource and should be exercisable through assurance that such States have an opportunity to challenge the fishing States as to the adequacy of the over-all conservation programme for the resource, as distinguished from a voice in the specific conservation measures. In this connexion, specific criteria should be established for the guidance of the arbitral body, as well as language which would clearly except from challenge the programmes of States within their own boundaries, for example, the erection of dams which might affect the runs of anadromous fish.

The United States suggests that the words "If no agreement is reached within a reasonable period, such State" in the second paragraph of article 30 be replaced by the words "If satisfactory action is not taken upon such request within a reasonable period, such requesting State...". The United States also suggests that the following criteria be incorporated in this article:

"The arbitral commission shall, in procedures initiated under this article, reach its decision and make its recommendations on the basis of the following criteria:

"(a) Whether scientific evidence shows that there is a need for measures of conservation to make possible the maximum sustainable productivity of the concerned stock or stocks of fish; and

"(b) Whether the conservation programme of the States fishing the resource is adequate for conservation requirements.

"Nothing in this article shall be construed as a limitation upon the action a State may take within its own boundaries."

#### *Article 31*

With respect to the appointment of an arbitral commission when the parties have not agreed upon a method of settlement, the United States would suggest the following modifications:

The Commission should be composed, in any combination, of seven members well qualified in the legal, administrative or scientific fields of fisheries, depending upon the nature of the dispute.

Three of these members should be from countries neutral to the dispute and might be appointed, at the request of any State party to the dispute, either by the Secretary-General of the United Nations or as follows: one, who shall act as chairman, by the Secretary-General of the United Nations; one by the President of the International Court of Justice; and one by the Director-General of the Food and Agriculture Organization.

If the dispute involves only two States, each should appoint two members of the arbitral commission. If there is more than one State on either side of the dispute, each side, irrespective of the number of States on that side, should appoint a total of two members of the arbitral commission. If either side fails to appoint its members within three months of the date of the original request for settlement, these appointments should be made by the Secretary-General of the United Nations.

Under this proposal, a situation could conceivably arise, for example, under article 26, where the dispute would involve a divergence of views of three or more States, thereby creating an issue not clearly divisible into two sides. The opportunity to initiate an arbitral procedure should not be defeated by this fact. In the view of the United States, it is essential that any State should be enabled to challenge, bilaterally, in turn if necessary, any of the other States in disagreement.

#### *Article 33*

The determinations of the arbitral commission should be by a simple majority of four votes and should be based on written or oral evidence submitted to it by the parties to the dispute or obtained by it from other qualified sources.

#### *Additional comments*

The United States desires to call to the attention of the

International Law Commission the absence from the draft articles of two propositions which the United States feels are essential to their completeness. The first of these concerns a definition of the term "conservation" as applied to the living resources of the sea. Since the principal purpose of these articles is to codify a set of rules to guide States in their relations with one another in regard to the conservation of such resources and it is proposed that States accept certain responsibilities and commitments in order to assure adequate conservation régimes, it would be essential to define specifically the key term "conservation" in the context of the articles. The International Technical Conference on the Conservation of the Living Resources of the Sea considered this matter and concluded that the "principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products" and that "when formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast." It will be noted that the "special interest" aspect of this conclusion has been worked into and given expression by the proposed articles themselves, thus obviating any necessity for defining or clarifying that particular term. The following draft article would cover the balance of the definition of conservation for the purpose of the International Law Commission articles on high seas fisheries.

"For the purpose of these articles, conservation of the living resources of the sea is defined as making possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."

The second proposition relates to situations where States have, through the expenditure of time, effort and money on research and management, and through restraints on their fishermen, increased and maintained the productivity of stocks of fish, which without such action would not exist or would exist at far below their most productive level. Under such conditions and when the stocks are being fully utilized, that is, under such exploitation that an increase in the amount of fishing would not be expected to result in any substantial increase in the sustainable yield, then States not participating, or which have not in recent years participated in exploitation of such stocks of fish, excepting the coastal State adjacent to the waters in which the stocks occur, should be required to abstain from participation.

This proposed rule takes into account the fact that under the stated conditions the continuing and increasing productivity of the stocks of fish is the result of and dependent on past and current action of the participating States and that the participation of additional States would result in no increase in the amount of useful products. Rather than increasing production the advent of additional States is almost sure to stimulate the abandonment of such conservation activities through removing the incentive for maintaining expensive and restrictive conservation programmes. In fact, such advent very probably would encourage the idea that if the resource declined to a less productive level, it would offer

less inducement to distant States. In recognition of a "special interest" on the part of a coastal State, the adjacent coastal State could be excepted from the operation of the rule. Strict and precise criteria should be laid down in the qualifications of a fishery for the rule, and questions arising as to qualifications made arbitative. These criteria should include (a) whether the stock is subject to reasonably adequate scientific investigation with the object of establishing and taking the measures required to make possible the maximum sustainable yield; (b) whether the stock is under reasonable regulation and control for the purpose of making possible the maximum sustainable yield, and whether such yield is dependent upon the programme of regulation and control; and (c) whether the stock is under such exploitation that an increase in the amount of fishing will not reasonably be expected to result in any substantial increase in the sustainable yield.

### *Chapter III. Submarine cables and pipelines*

The articles in this chapter appear to state principles which are, generally speaking, already applied by the United States. The Government of the United States, however, would question whether it is necessary to include in the draft the specific requirement in article 37 that every State shall regulate trawling. In the view of the United States, it would be preferable that this article, instead of being a mandate, be a recommendation, and that the recommendations be couched in general terms and not single out trawling gear.

## 2. ARTICLES ON THE REGIME OF THE TERRITORIAL SEA

This draft is organized in three parts: Chapter I — General; Chapter II — Limits of the territorial sea; and Chapter III — Right of innocent passage.

### *Chapter I. General*

The Government of the United States has no particular comments to make with respect to the articles in this chapter.

### *Chapter II. Limits of the territorial sea*

The Government of the United States has the following comments to make with respect to articles 3, 5 and 7:

#### *Article 3*

This article concerns the breadth of the territorial sea. The Government of the United States agrees with paragraph 1 of this article as a statement of fact. However, the Government of the United States does not agree with it as a proposition of law, except in so far as it recognizes that the traditional limitation of territorial waters is three miles. For the reasons indicated in its previous comments, the Government of the United States considers that there is not valid legal basis for claims to territorial waters in excess of three miles. Since it considers that claims in excess of three miles are not justified under international law *a fortiori* it agrees with the statement of law in the second paragraph that international law does not justify an extension of the territorial sea beyond twelve miles.

Consistently with these views the United States is also in agreement with the statement of law in the third paragraph that international law does not require States to recognize a breadth of territorial waters beyond three miles, i.e., that it does not require recognition of claims based on unilateral determination and lacking common acceptance. The United States practice has been uniformly consistent with this position as witness its formal protests against claims of foreign Governments to territorial waters in excess of three miles, except where such claims could be justified on an historical basis.

#### Article 5

This article deals with straight base lines. The Government of the United States was in agreement with the draft of this article previously adopted by the Commission. In the view of the Government of the United States the article as now drafted is too broad and lacks the safeguards which were present in the former draft. The removal of the ten-mile limit on the length of the base lines which may be used, and the removal of the requirement that the base lines should not be further away from the coast than five miles, open the way for abuses of a principle which should be restricted to extraordinary cases as was made clear by the International Court of Justice in the Fisheries Case between the United Kingdom and Norway.

Furthermore, it seemed to be implicit in the previous draft that, aside from historical reasons, the only circumstances which would justify use of straight base lines were a deeply indented coast or islands in its immediate vicinity. With reference to the latter the previous comments of the United States are apposite.

Although it appears to have been the intention of the Commission to predicate this article on the decision of the International Court of Justice in the Fisheries Case, the article as now drafted appears to go beyond that decision in that it recognizes as grounds for using straight base lines *either* a deeply indented coast *or* the presence of islands in its immediate vicinity *or* the existence of peculiar economic interests, whereas the Fisheries Case was not based on any one of these factors but on a combination of factors.

With respect to the sea areas lying within straight base lines, article 5 proposes that they must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. This amounts to no more than saying that water cannot be treated as inland unless such treatment is justified, an impractical and completely circular standard.

With the provision that base lines shall not be drawn to and from drying rocks and drying shoals the United States is in agreement.

#### Article 7

This article is concerned with bays. The Government of the United States cannot agree to the proposal in paragraph 3 that the entrance to bays not exceeding twenty-five miles could be closed by a straight line drawn across their mouth. The Commission indicated in its comments on this paragraph that the twenty-five miles

length was chosen because it was slightly more than twice "the permissible maximum width of the territorial sea as laid down in paragraph 2 of article 3." Even if it agreed that the permissible width of the territorial sea could be twelve miles, which it does not, this Government does not see why it necessarily follows that the opening of a bay susceptible of closing by a straight line should be twenty-five miles.

It would seem to this Government that since there has been no serious objection in the past to the ten-mile principle, this limit should be maintained.

#### Chapter III. Right of innocent passage

The Government of the United States has no specific comments to make with respect to the articles in this chapter.

### 25. Yugoslavia

#### Document A/CN.4/99/Add.1

TRANSMITTED BY A LETTER DATED 20 MARCH 1956 FROM THE PERMANENT MISSION OF YUGOSLAVIA TO THE UNITED NATIONS

[Original: English]

The Secretariat of State for Foreign Affairs of the Federal People's Republic of Yugoslavia presents its compliments to the Secretary-General of the United Nations and, with reference to his letter LEG 292.9/01 of 24 August 1955, has the honour to inform him that the Secretariat of State has studied the draft of the regulations on the régimes of the high and territorial seas, prepared by the International Law Commission at its seventh session in Geneva from 2 May to 8 July 1955.

With great respect to the efforts made by the International Law Commission, and to the results it achieved, the Government of the Federal People's Republic of Yugoslavia has the honour to make the following remarks on the draft on the régimes of the high and territorial seas:

#### I. Régime of the high seas

##### Article 1

The Yugoslav Government proposes to amend this article to read as follows:

"For the purpose of these rules the term 'high seas' means all parts of the sea which are not included in inland waters, territorial sea or contiguous zone."

##### Comment

According to some provisions of these rules the right of examining and searching private merchant vessels in high seas, and even the right to punish a vessel if it sails under two or more flags; the immunity right of the State merchant vessels, etc., have been provided for.

However, in the draft provisions on the contiguous zone, the coastal State has been recognized as having the right of controlling jurisdiction in case of a breach of customs, immigration, fiscal and sanitary regulations (see *Official Records of the General Assembly, Eighth Session, Supplement 9*).

Even if coastal States would be satisfied with exercising the rights provided for in the draft on contiguous zone, it does not seem to the Yugoslav Government that the rights recognized on the high seas would be compatible with the rights recognized to third States in the contiguous zone.

If the viewpoint of most of the States, concerning fishing in the area of the sea contiguous to the territorial sea, is taken into consideration amendment is even more justified.

#### *Article 3*

The Yugoslav Government proposes to amend this article by inserting the word "equal" before the word "right".

#### *Comment*

The Yugoslav Government considers that the equality of all flags on the high seas should be emphasized in this article, to avoid the possibility of claiming some historical rights.

The proposed amendment is in the spirit of the United Nations Charter.

#### *Article 4*

The Yugoslav Government considers the expression "international treaties" as vague, as it is not clearly shown whether treaties between two or more interested parties are concerned or treaties concluded under auspices of the United Nations or both.

The Yugoslav Government feels that the expression "international treaties" means treaties concluded under the United Nations auspices, but this should be stated clearly.

As far as the right of vessels to sail under the United Nations flag is concerned, the Yugoslav Government feels that this should be given to United Nations vessels or vessels of its special agencies, if and when they sail in their service.

#### *Article 5*

The Yugoslav Government proposes to amend this article to read as follows (first paragraph):

"Each State prescribes the conditions under which a ship can obtain its nationality and sail under its flag, unless provided otherwise in these rules. Nevertheless, for the purposes of recognition of its national character by the other States, a ship must either;"

Points 1 and 2 no change.

A new point 3 should be added as follows:

"3. If the charterer is a national of the State concerned or a juridical person established under the legislation of the State concerned and has its effective seat in the territory of that State."

#### *Comment*

The legislation of some countries provides the possibility of a temporary registration of ships bought abroad in the register of the consulate of the country under whose flag it sails. Therefore, it is the opinion of the Yugoslav

Government that the words "in its territory" should be omitted.

The legislation of some countries provides that foreign ships must be registered in the register of the country. The Special Rapporteur, Mr. J. P. A. François, correctly stated that the Yugoslav legislation provides that in this case foreign merchant ships have to be registered in the Yugoslav register. However, the Yugoslav Government has to state that the Special Rapporteur, Mr. J. P. A. François, was wrongly advised that Yugoslavia is not a coastal State (see A/CN.4/SR.326, para. 61).

In the Federal People's Republic of Yugoslavia the ships used for commercial purposes are either people's common property or the property of co-operative organizations or individuals, nationals of the Federal People's Republic of Yugoslavia.

People's common property is different from state ownership both in title and nature, and does not correspond to state ownership found in the legislation of other countries. In view of an easier determination of rules which would be acceptable to all countries, the Yugoslav Government would be prepared for the purpose of these rules to accept the term "state property" for ships used for commercial purposes which are people's common property.

The Yugoslav Government considers that the equivalent of the term "siège effectif", used in French, and of the term "registered office" used in the English text in article 5, paragraph 2 (c), should be examined.

#### *Article 6*

The Yugoslav Government proposes to amend article 6 by adding a new paragraph which is to read as follows:

"Ships sailing without a flag or under a false flag may also be assimilated by other States to ships without a nationality."

#### *Comment*

The draft rules do not regulate the case of ships sailing under a false flag or without a flag. It appears to the Yugoslav Government that this question is important and that it should be dealt with.

#### *Article 6 bis*

The Yugoslav Government proposes the adoption of a new article to read as follows:

"1. A ship must change the flag of the State in whose register it was originally entered, for the flag of another state, if the conditions provided for in article 5 of these rules are validly fulfilled.

"2. The State in whose register the ship is entered shall cancel the registration within ninety days, from the day on which such a request was submitted, provided any of the conditions of article 5 of the present rules are validly fulfilled and there is no mortgage or other charge on the ship. This does not affect the right of the State in whose register the ship was entered to have the first choice to buy if the legislation of the State concerned provides for a priority of purchase.

"Until the registration of the vessel is canceled or

until the ninety days term has elapsed the ship is to sail under the flag of the State from the register of which the cancellation was requested.

"3. If the State concerned does not cancel the registration within ninety days from the day of the submission of the request, and has not, within that term, used its right of first choice in buying the ship, the other State may authorize the entry of the ship concerned into its register and give it the right to sail under its flag if any of the conditions of article 5 of these rules are validly fulfilled and if there is no mortgage or other charge on the ship.

"This entry and change of flags have legal effect in all other States."

#### *Comment*

The legislation of some States, including Yugoslavia, provides that a ship which was foreign property cannot be entered into the register of the State concerned prior to its cancellation from the original register. Similar provisions can be found in some bilateral agreements. On the other hand there are a number of States whose legislation makes cancellation in their registers difficult. There are also a number of States whose legislation does not condition the entry into their register on a prior cancellation of the original registration.

A variety of solutions given to this question in different countries is, in the opinion of the Yugoslav Government, the reason for the occurrence of fictitious flags and it considers that the adoption of this article will greatly reduce the use of fictitious flags.

#### *Article 7*

The Yugoslav Government proposes that paragraph 2 should be amended by adding, after the word "vessel", the words "bearing a visible sign of a warship".

#### *Comment*

Articles 3 and 4 of The Hague Convention of 1907 dealing with the transformation of ships into warships, and from which the International Law Commission took the definition of a warship, while enumerating the fundamental characteristics of a warship, place the usual signs of a warship in the first place.

#### *Article 9*

The Yugoslav Government proposes that the second sentence should read as follows:

"Such regulations must not be inconsistent with the existing rules on safety of life at sea, accepted by the majority of Members of the United Nations."

#### *Comment*

The suggested amendment is similar to the formulation given by the International Law Commission used in article 23 of these rules.

In the opinion of the Yugoslav Government the rules "accepted by the greater part of the tonnage of sea-going vessels" cannot be used as a criterion to determine which rule on the safety of life at sea should be applied, but the

rules recognized by the majority of States should be considered as rules of international law.

Besides the fact that Yugoslavia has ratified the International Convention on the Safety of Life at Sea, Yugoslavia has adopted in her legislation the provisions of Annex B of the said Convention and prescribed penalties even for foreign vessels contravening these Regulations while in Yugoslav waters.

According to the data available to the Yugoslav Government, forty-nine States have ratified or acceded to Annex B, which means that these provisions are accepted as international rules by the majority of the States. In view of the purpose of these rules, it is difficult to suppose that a Member of the United Nations would disagree with their acceptance. Besides, it is obvious that if States, Members of the United Nations, would adopt these rules in their respective legislation States non-members engaged in international trade would be compelled to accept the international rules on safety of life at sea.

#### *Article 10*

The Yugoslav Government proposes to amend paragraph 1 in the following manner:

1. The term "or any other incident of navigation" should be added to the title;

2. The term "or any other incident of navigation" should be added after the words "involved in the collision";

3. The word "either" in paragraph 1 should be deleted and a full stop put after the word "flag";

4. The words "or of the State of which such persons are nationals" should be omitted and instead of them a new paragraph inserted, containing the provision of article 3 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions and other Incidents of Navigation, Brussels, 10 May 1952, which reads:

"Nothing contained in this Convention shall prevent any State from permitting its own authorities, in cases of collision or other incidents of navigation, to take any action in respect of certificates of competence or licences issued by that State or to prosecute its own nationals for offences committed while on board a ship flying the flag of another State."

#### *Comment*

The jurisdiction in penal and disciplinary matters does not extend merely to collisions but to other incidents of navigation as well. For that reason the Yugoslav Government considers that the draft text should be amended as proposed. Without the amendment the text of the draft could be understood to mean that the captain or members of the crew of the ship are responsible only for collision and not for other incidents of navigation, or that the question of other incidents of navigation is not regulated in international law. It is not clear from the wording of paragraph 1 whether there is a jurisdiction of the court of the country under whose flag the vessel sails, or of the court of the State whose nationality the person concerned possesses, whether the jurisdiction of one court excludes

the jurisdiction of the others. This uncertainty could be eliminated by inserting the provision of paragraph 3 of the above-mentioned international convention.

As far as the Yugoslav Government is concerned, it is in favour of a dual competence.

#### Article 11

The Yugoslav Government proposes that this article be amended as follows:

1. After the word "collision" in the second sentence, the term: "or any other incident of navigation", should be added;

2. That a new paragraph be added reading as follows:

"He is also bound, within his possibilities, to give the other vessel the name of his vessel, her port of registration and the nearest port in which she will call."

#### Comment

The Yugoslav Government considers that the captain of the vessel is obliged to give help in the same way in case of any other incident of navigation, as the Yugoslav Government is not certain that this case is included in the wording of the draft.

The Yugoslav Government is of the opinion that the Commission, while accepting paragraph 1 of article 8 of the International Convention for the Unification of Certain Rules of Law respecting Collisions between Vessels and Assistance and Salvage at sea (Brussels, 1910), should also insert paragraph 2.

The Yugoslav Government considers that this provision could be of a great practical value. If a vessel in collision or other incident of navigation is unable to continue sailing and her crew and passengers are picked up by the vessel with which she collided, or any other vessel, an opportunity should be given to the crew of the damaged vessel to report to the authorities of their country the name and the port of registration of the vessel that picked up the passengers and the crew as well as her nearest port of calling, to enable another vessel of the country concerned to pick up the passengers and the crew of the damaged vessel at the most suitable place.

#### Article 15

The Yugoslav Government proposes that after the word "warship" the following should be added: "or any of the ships mentioned in article 8 of these rules".

#### Comment

When acts of piracy committed by a warship are assimilated to the acts of piracy committed by a private ship, there is no reason for not considering as such, acts committed by a ship which, as far as immunity on the high sea is concerned, is assimilated to warships.

#### Article 21

The Yugoslav Government considers that, parallel with the protection of free navigation on high seas, the international order should likewise be protected. For that reason the search of merchant ships by warships should not be discouraged by too strict sanctions. It is necessary therefore to consider whether a provision should be

inserted freeing the warship from *damnam emergens*, if *dolus* or *culpa lata* cannot be charged to the warship.

#### Article 22

The Yugoslav Government proposes that for the purpose of making the text more clear the words: "or contiguous zone" should be added after the words "the territorial sea" in paragraphs 1 and 2.

#### Article 25

The Yugoslav Government proposes to amend this article by adding two paragraphs to read as follows:

"2. The measures adopted will be based on appropriate scientific findings or other expert findings and should not discriminate against foreign fishermen.

"3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 29 of these rules."

#### Comment

Fishing on the high seas gains in importance from day to day as a resource of food and other needs for humanity. Therefore, in the opinion of the Yugoslav Government, it would be necessary to base the adopted measures on scientific or other expert findings so as to prevent the destruction of the living resources of the sea.

#### Article 26

The Yugoslav Government proposes that the following be added to the end of paragraph 1: "The measures adopted shall not be contrary to the provision of article 25, paragraph 2, of these rules".

The comment given for article 25 is also applicable here.

#### Article 27

Article 27, paragraph 2, should be amended so as to substitute article 29 for article 31. The last sentence of article 27, paragraph 2, reading: "Subject to paragraph 2 of article 32 . . . arbitral decision", should be deleted.

These amendments are proposed because the numerical order of the following articles is changed as it will be further seen.

The Yugoslav Government proposes to readjust the numerical order of the articles so that article 30 will become article 28, article 31 will become article 29, article 33 will become article 30, and articles 28 and 29 will become article 31; article 32 should be deleted.

The following articles will be considered in this new proposed order.

#### Article 28

Due to the change in the order of articles, the Yugoslav Government proposes that in paragraph 2 "29" should be substituted for "31".

#### Article 29 (former article 31)

The Yugoslav Government proposes to amend this article as follows:

1. In paragraph 1, between the numbers "27" and "28", insert "and", and leave out the numbers "29" and "30";

2. In paragraph 2, instead of "four or six" put "three", and instead of "one expert in international law" put "two experts in international law".

#### *Comment*

Because of the change of sequence of articles the numbers "29" and "30" should be omitted.

The Yugoslav Government is of the opinion that in possible disputes the technical side of the matter will not be the only aspect to be considered but also legal questions, and it would be more in favour of three experts on the conservation of the living resources of the sea and two experts on international law.

#### *Article 31 (former articles 28 and 29)*

The Yugoslav Government proposes that the Commission should solve the question of the right of coastal States to regulate the protection of the living resources in that part of the sea which is adjacent to their territorial sea, together with the solution of the question of the breadth of the territorial sea, the contiguous zone and the continental shelf.

In case the Commission does not accept the above-mentioned suggestion, the Yugoslav Government suggests that articles 28 and 29 should form one single article, to be article 31, and to read as follows:

"1. A coastal State may in any part of the high sea, which is adjacent to its territorial sea, adopt unilaterally any measures for regulating and controlling the exploitation of living resources in that part of the sea up to a distance of twelve nautical miles, counting from the base line of its territorial sea. If a part of the high sea, adjacent to the territorial seas of two or more States whose coasts are opposite one another, is less than twenty-four nautical miles, the border of the part of the high sea, up to which a State may unilaterally adopt measures for regulating and controlling the exploitation of living resources of the sea, is, in the absence of an agreement between these States, the geometrical line every point of which is at an equal distance from the outside line of the territorial sea of every State concerned.

"2. Any disputes which might occur between the coastal States concerning the application of this paragraph, will be submitted to arbitration at the request of any of the coastal States if no settlement has been reached by diplomatic means."

#### *Comment*

The Yugoslav Government is of the opinion that the question mentioned in this paragraph would best be solved with the question of the breadth of the territorial sea, the contiguous zone and the continental shelf. Any attempt to solve any of the questions independently of one another, may only complicate the issue and hinder the solution of these questions.

In the proposed amendment the words "its territorial

sea" are substituted for "its coast", because of the fact that the high sea is adjacent to the territorial sea of a country, and not to its coast. The suggested amendment is in accordance with the expression used by the Commission in the provision concerning the contiguous zone.

The twelve-mile area is taken from the provision on the contiguous zone adopted by the International Law Commission. The Yugoslav Government does not insist on adoption of the twelve-mile area but considers that the area should be fixed precisely.

It appears to the Yugoslav Government that the Commission, while regulating the living resources of the sea, imposed more severe conditions upon the coastal States than upon States for those parts of the sea that are not adjacent to the territorial sea of any country. The Yugoslav Government is of the opinion that a greater freedom should be given to the coastal States for that part of the high sea which is adjacent to their territorial sea, than to other States, if no acceptable solution is found to the question of the breadth of the territorial sea, the breadth of the contiguous zone and the continental shelf as well as for the kinds and scope of rights of the coastal States in that area.

#### *Former article 32*

Since article 31 contains a provision on arbitration in case of a dispute arising out of its application, the Yugoslav Government proposes that article 32 should be deleted.

#### *Article 36 (former article 38)*

The Yugoslav Government proposes that this article should be amended by putting a comma instead of a full stop at the end, and by adding the following: "under the condition that the owners of the ships have taken all preliminary and reasonable measures of precaution".

#### *Comment*

The cables and pipelines are entered in nautical charts, and all changes are published in the official nautical journal. Accordingly, the shipowners are able to obtain information on the location of cables and pipelines. If the shipowner nevertheless decides to undertake any action in that part of the sea, which might damage either the cable or equipment of the ship, the Yugoslav Government is of the opinion that no compensation should be recognized to the shipowner because he has sacrificed the complete equipment or a part of it to avoid damage to cables or pipelines.

## II. *Régime of the territorial sea*

### *Article 1*

The Yugoslav Government proposes that this article should be amended so that in paragraph 1, after the word "coast", the words "or to its internal waters" be added, and in paragraph 2 the words "and other rules of international law" be omitted.

#### *Comment*

The territorial sea can be, but need not be, adjacent to

the coast. Where internal waters exist, the territorial sea is adjacent to them.

The coastal States have the same right of sovereignty over their territorial seas as over the other parts of their national territory, by respecting the right of innocent passage in accordance with their legislation and existing rules of international law.

It appears to the Yugoslav Government that all the rights are enumerated in these rules, which today, according to the generally recognized rules of international law, are enjoyed by vessels of one State while passing through the territorial sea of another.

The Yugoslav Government further considers that in the codification of these rules every limitation of sovereignty should be avoided by provisions which are not included in the codification, even more so as the purpose of codification is a complete regulation of a subject.

This appears even more justified if different views are considered on whether something is admitted in international law or not. Therefore, the Yugoslav Government suggests the omission of the words: "and other rules of international law".

If the Commission finds that, in addition to the quoted rights, foreign vessels enjoy some other rights as well in territorial seas of other States then, according to the opinion of the Yugoslav Government, it would be better if those rights were entered into the corresponding articles of these rules.

### Article 3

The Yugoslav Government does not consider the provisions of this article as the introduction of a rule, but merely as a statement to the effect that a different practice is applied by various States.

If the findings of the Commission are carefully analysed, as well as the comments and the discussions at its meetings, it appears that the Commission finds the breadth of territorial sea of three miles to be the only juridically valid one from the point of view of international law.

The Yugoslav Government considers that this conclusion of the Commission does not correspond either to the existing international law or to the historical development of international law in this field.

From historical documents it follows that the breadth of four to six miles has a historical precedence over the three miles breadth of territorial sea.

As early as in the seventeenth century, Sweden has, for the purpose of customs control, used the German "licue" which is four miles.

In 1736, Great Britain, for the purpose of customs control, defined the limit at six miles.

Denmark and Norway defined the limit of the territorial seas at four miles in 1745.

Spain, in 1760, defined the breadth of the territorial sea at six miles.

The breadth of territorial seas of three miles appears, for the first time, in the State Department note of

8 November 1793, addressed to the British and French Legations for the purpose of American neutrality.

Great Britain introduced the three miles breadth of her territorial sea only in 1878.

Russia, in 1912, defined the breadth of the territorial sea at twelve miles.

The conclusions of the Commission are not in accordance even with the endeavours made so far for the elaboration of general rules on the breadth of the territorial sea.

Towards the end of the nineteenth century, the Institute for International Law suggested the breadth of six miles for the territorial sea.

At the International Fishing Congress, at Bergen in 1898, the resolution was carried by 43 votes to 4, according to which the opinion was expressed that in the interests of sea fishing, the breadth of the territorial sea of ten miles, eventually six miles, should be fixed.

At The Hague Conference in 1930, thirty-five States participated with USSR as observer. Seventeen States out of the total number of participants requested a breadth of over three miles for the territorial sea. Denmark, which had the breadth of four miles, abstained from voting; eight States agreed to three miles breadth for territorial sea, provided the control and jurisdiction were granted them over a belt of high seas adjacent to the territorial sea; nine States only requested three miles breadth. Accordingly, in 1930, of the thirty-five represented States, twenty-six were not satisfied with the breadth of three miles for the territorial sea. It should be added here that some States of Latin America, which had a breadth beyond three miles, did not participate.

It follows from the minutes of the International Law Commission that only one-quarter of the Members of the United Nations have a three-mile breadth of territorial sea and three-quarters of the Members a breadth over three miles. After admission of new Members to the United Nations, this proportion seems even more unfavourable for the number of States that have a three-mile breadth of territorial sea.

For a rule to become a rule of international law, it is necessary that it should be universally accepted and that States consider it binding.

The Yugoslav Government is of the opinion that the breadth of the territorial sea of three miles, which is of a later date than the breadth of four to six miles, and which is not recognized by three quarters of the Members of the United Nations, cannot be recognized as a rule of international law.

Considering the foregoing, it appears to the Yugoslav Government that the statement: "That international law does not request the acknowledgement of a larger breadth than three miles for the territorial sea, by States that have a territorial sea of three miles", would be more appropriate to the actual situation.

A difference should be made between "three miles" as a rule, and the "three miles" as number contained in a number larger than three. "Smaller" right contained in a "larger" right may be a right but not a rule too.

Finally, the Yugoslav Government is of the opinion that

the Commission, while defining the breadth of the territorial sea, should have started from the practice of the majority of States as well as from the opinion of the International Court of Justice, according to which the definition of the limit of the territorial sea is a unilateral act of States.

#### Article 5

The Yugoslav Government suggests that this article be amended so that two new paragraphs are added after paragraph 1 whereby paragraph 2 of the draft will become paragraph 4.

"2. If a group of islands (archipelago) is situated along the coast the method of straight base lines joining appropriate points on the islands facing the high sea will be applied. The parts of the sea closed in by these lines, islands and coast of the mainland will be considered as internal waters.

"3. If the provision of paragraph 2 of this article cannot be applied to the group of islands (archipelago) due to a great distance from the mainland, the method of base lines will be applied which join appropriate points of the coast towards the high seas. Parts of the sea enclosed by these lines and islands will be considered as internal waters of the archipelago."

4. Paragraph 2 becomes paragraph 4.

#### Comment

According to the opinion of the Yugoslav Government, the suggested amendments are in accordance with paragraph 1 of this article and solve the question of groups of islands that are located along the coast, and of groups of islands at a distance from the mainland.

#### Article 7

The Yugoslav Government reserves the right to make comments on this article at a later date.

#### Article 14

The Yugoslav Government suggests that this article should be amended by omitting the following sentence:

"In the absence of agreement between those States, or unless another boundary line is justified by special circumstances."

#### Comment

Existing rules of international law do not approve "special circumstances" as a reason for the permitted breadth of the territorial sea of one State to be narrowed for the benefit of another State whose coast is on the opposite side. Besides this, the question of the existence of "special circumstances" is too undefined and might only introduce an element of uncertainty in a clear rule of international law. Therefore the sentence "or unless another boundary line is justified by special circumstances" is unnecessary. It is logical that the sentence "in the absence of agreement between those States" becomes superfluous.

#### Article 15

The Yugoslav Government suggests that this article should be amended by omitting the sentence "in the absence of agreement between those States or unless another boundary line is justified by special circumstances".

The same comment as on the amendment to article 14 is applicable to this article as well.

The common shortcoming of articles 16 to 19 is that the interests of navigation of foreign ships through territorial seas is put before the interests of the coastal States. The Yugoslav Government has stated its view concerning this question in the comment to article 1, and will, therefore, stress only specific shortcomings of these articles.

The view of the Commission on the precedence of the navigation of foreign ships over the rights and interests of the coastal State is also reflected in the order of articles it adopted. Instead of stipulating first the rights of coastal States and then its duties, the Commission acted differently. The Yugoslav Government, however, feels that it would be more logical if the text of article 19 became article 17 and the text of article 17 became article 19, and that this would correspond better to the right of sovereignty of a coastal State over territorial sea. This is the order in which these articles will be analysed here.

#### Article 16

The Yugoslav Government suggests that this article be amended as follows:

1. Paragraph 4 should become paragraph 3, and paragraph 3 should become paragraph 4.

2. Paragraph 4 should read:

"Passage is innocent so long as the vessel does not use the territorial sea for preparing, attempting or committing any act prejudicial to the security or public order of the coastal State, or so long as it does not violate its customs and sanitary regulations or other interests, or does not endanger the security of navigation."

#### Comment

The last sentence of paragraph 3 of the draft may leave the impression that these rules are the only provisions regulating the sovereignty of a coastal State over territorial sea, and that only what is contrary to these rules is illegal. According to the opinion of the Yugoslav Government, a coastal State exercises sovereignty over territorial sea according to its own laws. If an act committed by a foreign vessel within the territorial sea would be contrary to these rules, it should not be qualified as an offence if no similar qualification is provided for in the legislation of the coastal State. The Yugoslav Government feels that the words "or contrary to these rules" should be omitted.

It also appears to the Yugoslav Government that the limitation of the sovereignty of a coastal State by some

unclear formulations, is not the best procedure for the codification of international law. Therefore, according to its opinion, the words "or by other rules of international law" should be omitted. Considering that sometimes there is an attempt at presenting something as a rule of international law, though it is not, it appears to the Yugoslav Government that adding words: "or other rules of international law" into this or any other article would only represent an element of uncertainty and lack of clarity.

Since the definition of "passage" given in paragraph 4 is different from the one in paragraph 2, which may also prove harmful, it appears to the Yugoslav Government that it would be better if paragraph 4 becomes paragraph 3, and paragraph 3 becomes paragraph 4. The Yugoslav Government is of the opinion that a foreign ship is not making an innocent passage when it uses territorial sea for the preparation of or an attempt to commit a criminal offence. The Yugoslav Government is also of the opinion that a broader definition of "innocent passage" should be given.

#### *Article 17 (article 19 of the draft)*

The Yugoslav Government suggests that this article be amended to read as follows:

"Foreign vessels that use the right of innocent passage through the territorial sea must comply with the laws and regulations of the coastal State unless otherwise provided by these rules, concerning especially:

- "(a) Flying the national flag;
- "(b) Following the fixed international navigation route;
- "(c) Complying with the regulations on public order and security as well as customs and sanitary regulations."

Provisions of sub-paragraphs (a) to (e) would remain by becoming sub-paragraphs (d) to (h).

For reasons given in the comment on article 1, the Yugoslav Government is of the opinion that the words: "and other rules of international law" should be omitted. It further appears to the Yugoslav Government that the first duty of a foreign vessel, when sailing through the territorial sea of another State, is to comply with the regulations on flying the national flag, follow the fixed international navigation route and comply with the regulations on public order and security as well as with customs and sanitary regulations. The duty of flying the national flag, if provided for by the regulations of the coastal State concerned, and the following of the fixed international navigation route makes easier the control exercised by the coastal State for the purpose of protecting its rights and interests. Besides, the following of the fixed route of navigation would make the traffic and fishing in the territorial sea much safer.

#### *Article 18*

The Yugoslav Government proposes to amend this article to read as follows:

"1. A coastal State may take necessary steps in its territorial sea to protect itself against any endangering of its security and public order, security of navigation, customs, sanitary and other interests."

Comments on article 16 are, in general, applicable in this case.

#### *Article 19 (article 17 of the draft)*

The Yugoslav Government proposes that in paragraph 1 the words "principle of the freedom of communication" be replaced by the term "innocent passage".

#### *Comment*

Since the term "innocent passage" is used in all cases, the Yugoslav Government suggests that this term be used instead of the term "principle of the freedom of communication". The Yugoslav Government suggests that for the purpose of clarification the Commission should explain, at least in its comments, what it understands under the term of "rights of other States".

#### *Article 21*

The Yugoslav Government reserves the right to comment on this article at a later date.

#### *Article 22*

The Yugoslav Government has no remarks on paragraph 1 of this article.

The Yugoslav Government is of the opinion that in the codification of international rules, it is much better to use the method of taking certain rules from international conventions, which rules are considered international law, than the method of referring to the conventions themselves. Such a method is more acceptable, especially for States that have not ratified a convention to which reference was made.

In the opinion of the Yugoslav Government the shortcoming of these provisions is reflected also in the fact that the Commission did not state whether it accepted the definition of "arrest" as formulated in article 1 of the International Convention relating to the Arrest of Sea going Ships. The commission also omitted to state the reasons why the provision of article 3, paragraph 4, of the Convention under reference should be adopted in these rules.

For all these reasons the Yugoslav Government could not accept the present provisions of paragraphs 2 and 3.

#### *Article 24*

The Yugoslav Government is waiting for the text of the new draft to give its comments.

#### *Article 25*

The Yugoslav Government suggests that this article be amended as follows:

1. "Articles 18 and 19" should be read "articles 17 and 18".

## DOCUMENT A/CN.4/100

**Comments by inter-governmental organizations on articles regarding fishing embodied in the provisional articles concerning the régime of the high seas adopted by the International Law Commission at its seventh session in 1955<sup>1</sup>**

[Original text: English]  
[13 March 1956]

LETTER DATED 13 OCTOBER 1955 FROM THE EXECUTIVE SECRETARY OF THE INTERNATIONAL COMMISSION FOR THE NORTHWEST ATLANTIC FISHERIES

In your letter of 24th August 1955 (LEG 292/8/01) I am invited to submit possible observations to articles 24-33 of the report of the International Law Commission covering the work of its seventh session held in Geneva from 2nd May to 8th July 1955. In this connexion I beg to submit the following comments:

Article 24 "concerning conservation of the living resources of the high seas". Here, as elsewhere in the articles, the term "conservation" is used in defining the aim for the regulations that could be introduced. However, there are certain reasons to consider that conservation in itself is no longer the sole aim for the regulations introduced as to fisheries over the world. We have passed that period when solely conservation of the stocks was to be considered, and we have entered upon a period where we, through our regulations, are trying also to develop useful fish stocks over their present or, say, natural strength. For instance, when we introduce regulations for the protection of the spawning places, for spawning individuals of a certain species, we are often aiming at giving that special species exceptionally good conditions for thriving compared to that of other, less valuable, species. This means that we are not just conserving the stock of this useful species, but are trying to develop it and to increase it. Other regulations of this kind exist and it can be visualized that several more will be introduced in the future when we shall have to increase the food supply from the sea very considerably.

When we, in future years, are faced with the

<sup>1</sup> Official Records of the General Assembly, Tenth Session, Supplement No. 9, pp. 9-15.

introduction of such regulations, there might arise difficulties through the constant use of just the word "conservation" in the articles. It might possibly be objected by some country that the regulations which we, for the development of the fishery, are trying to introduce are not covered by the international law as they do not only deal with conservation of resources but with their development above the natural, present stage. Thus, the possibility exists that the use of the term "conservation" in the law might well act as a barrier to the proper regulations for the necessary development of the fisheries. I should submit that it be considered to add, when using this term, an explanation that would make it possible for the law to cover also any regulations aiming at further development of stocks.

In the comment to article 24 "sedentary fisheries" is used. I admit that I am not quite aware of what exactly is understood by this term, and others might be in the same position. I understand it to be some kind of fishery by means of fixed gears or from fixed fishing stations, or even from anchored vessels. (The paper referred to in the footnote is not available to me.) From the results of the experimental work carried out in many places during recent years, it is obvious that a kind of sedentary fishery will be developed in the near future based on the fact that fish can be attracted by various devices (electricity, light) to a certain fixed gear. Such a fishery could very well be regarded as covered by the term "sedentary fisheries". This kind of fishery is already being carried out on a commercial scale in fresh water, and experiments on a commercial scale are being carried out also in the open sea. With the development during recent years of factory fishing vessels and floating fishing plants, it might well be imagined that a fishery along these lines will be a common feature in the not too distant future. I would think that some explanation of the term "sedentary fisheries" should be introduced in order that it may be clear whether or not fishery of the above-described kind is included in this term.

## DOCUMENT A/CN.4/103

**Supplementary report by J. P. A. François, Special Rapporteur on the right of international organizations to sail vessels under their flags**

[Original text: English]  
[8 May 1956]

1. In the course of the International Law Commission's seventh session, at the 320th meeting on 27 June 1955, the Special Rapporteur, after the adoption of article 4 of the Commission's provisional articles concerning the régime of the high seas, read to the Commission a letter from Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations, relating to the flag and registry of ten fishing vessels owned by the United Nations (A/CN.4/SR.320, para. 68). The vessels had been recently

built in Hong Kong for the United Nations Korean Reconstruction Agency (UNKRA), taken to Pusan, Korea, and turned over to Korean nationals. They had been navigated from Hong Kong to Pusan under the United Nations flag and registry, British or Korean registry being unavailable by reason of the vessels' ownership, while it was deemed inappropriate to register the vessels in, for instance, Liberia, where registry could easily have been obtained, but with which country the vessels had no link whatsoever. In this connexion, and in view of the possible occurrence of future cases of this kind, Mr. Stavropoulos thought it desirable that the Com-

mission's provisional articles concerning the régime of the high seas should at least not exclude the possibility of registration by an international organization of its own ships. At the same time, he called the Commission's attention to the questions of jurisdiction and of the law applicable aboard vessels under international registration.

2. The Commission thereupon heard a number of statements by several of its members and its Secretary regarding the points thus raised (A/CN.4/SR.320, paras. 69-104).

3. Finally, a proposal by the Chairman to include in the report covering the work of the Commission's seventh session a comment to the effect that the Commission proposed to examine the question raised in Mr. Stavropoulos' letter at a later date was adopted by 10 votes to 1 with 1 abstention. The relevant comment appears in the Commission's report.<sup>1</sup>

4. The questions to be answered seem to fall into three categories, viz: (a) those connected with the possibility of the United Nations or other international organizations owning vessels, (b) those relating to the flag, registration, nationality and protection of vessels owned by the United Nations or other international organizations, and (c) those concerning the law applicable to such vessels and the persons and chattels aboard.

5. When replying to the questions thus summarized, it may be helpful to keep in mind the advisory opinion of the International Court of Justice of 11 April 1949 on reparation for injuries suffered in the service of the United Nations, where it is stated that:

"It must be acknowledged that [the Organization's] Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

"Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties . . . ."<sup>2</sup>

6. No doubt can exist regarding the question whether the United Nations has or not the right to own ships. The Organization certainly has that right, since otherwise, in the words of the International Court, it may not be in a position to "effectively discharge its functions." The situation described in Mr. Stavropoulos' letter is an eloquent example. And the same conclusion necessarily applies to all international organizations of comparable capacity.

7. Again, no difficulty can arise over the question

whether the United Nations may register the ships it owns with a particular State and have them fly the flag of that State. But if no convenient registration, or no registration at all, is available, has the Organization then, or should it have, the right to register them with itself and fly the United Nations flag on them?

8. It is clear that the problem would not be solved by creating a "United Nations registration". For the legal status of a United Nations ship not registered with a State, whether on the high seas, in territorial waters or in a port, would be highly problematical, and the same applies to the crew and possible passengers. The legal system of the flag State applies to the vessel authorized to fly the flag, and in this respect the flag of the United Nations or of another international organization cannot be assimilated to the flag of a State. Especially with regard to the civil and criminal law applicable aboard ship, there would be no solution of the problem.

9. The United Nations, being unable to offer the same guarantees as States for the orderly use of the seas, under general international law is not entitled to register its own ships. This does not necessarily mean that the vessels mentioned in Mr. Stavropoulos' letter were illegally taken from Hong Kong to Pusan. There is little doubt that in the present case a plea of emergency was fully justified. However, in the light of this new experience, the United Nations should now look for a solution of the problems involved. The following proposal may be taken into consideration:

(a) The Members of the United Nations recognize a special United Nations registration which entitles the ship to fly the United Nations flag and to special protection by the United Nations;

(b) The Secretary-General of the United Nations is authorized to conclude, as the need arises, a special agreement with one or more of the Members by which these Members allow the vessels concerned to fly their flag in combination with the United Nations flag;

(c) The Members of the United Nations undertake in a general agreement to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in paragraph (b), may have been concluded, and to assimilate such ships to their own ships, in so far as that would be compatible with the United Nations' interests;

(d) The Members of the United Nations declare in the same general agreement that they recognize the special agreements between the Secretary-General and other Members of the United Nations, referred to in paragraph (b), and extend to the United Nations all international agreements relating to navigation to which they are a party.

10. In the event of the views expressed in the present report being accepted by the Commission, it would seem proper to insert a paragraph in the comment under article 4 of the articles concerning the régime of the high seas, indicating the views of the Commission on this subject.

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, p. 4.

<sup>2</sup> *I.C.J. Reports 1949*, p. 179.

# LAW OF TREATIES

## DOCUMENT A/CN.4/101

Report by G. G. Fitzmaurice, Special Rapporteur

[Original text: English]

[14 March 1956]

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**INTRODUCTION**

**A. Basis and scope of the present report**

1. The first task of the present Rapporteur was to decide whether to adopt the work of his distinguished predecessors, so far as this had proceeded, and to take the subject up at the point where they left off, or whether to review once more the topics covered by this earlier work—to which, it should be said at once, the present Rapporteur is very greatly indebted. As these topics were left, in particular by Sir Hersch Lauterpacht, they consisted of three parts entitled "Definition and nature of treaties", "Conclusion of treaties", and "Conditions of validity of treaties". It was Sir Hersch Lauterpacht's intention to prepare in due course further sections of the work: on operation and enforcement, interpretation, termination, and so on.

2. The present Rapporteur would have preferred, if

possible, to proceed with this further work at once, and was conscious, moreover, that it might seem otiose to travel once again over ground already twice covered by earlier reports. Yet this is what he has in fact been led to do, principally for two reasons. In the first place, it was suggested to him by one or two members of the Commission that, in view of the considerable differences between certain of the articles proposed by Sir Hersch Lauterpacht and those which had been adopted by the Commission during its second and third sessions (A/CN.4/L.55), which themselves differed considerably from various articles proposed by Professor Brierly, a review and synthesis of these provisions would prove useful.

3. In the second place, the present Rapporteur, when considering in particular the topic of the making and conclusion of treaties, was struck by the following circumstance. His predecessors had presented an

admirably full and informative commentary, containing all that was necessary for an understanding of the law on the subject; but the articles themselves to which this commentary related were few in number and to some extent general in character—at any rate their authors had clearly not intended to go into much detail. Such a method has its advantages, but nevertheless it is bound to leave out of account a number of points—and more especially situations—that in practice tend frequently to occur in the process of treaty-making, and give rise to difficulty or uncertainty.

4. This raises the question of how specialized a code should be—a question not easily answered in the case of a topic such as the conclusion of treaties, where often no entirely clear dividing line can be drawn between what are matters of strict law, and what are matters of practice, common usage, or protocol. Nevertheless, basing himself on his own experience in treaty-making, the present Rapporteur believes that most chancelleries are probably reasonably familiar with the broad principles of treaty law, but that it is precisely on certain of the more specialized, but all the same important points, that they would welcome greater certainty and a more systematic treatment. He believes, accordingly, that a code on the law of treaties should deal with at any rate the more prominent of these points, without, on the other hand, going too far into what are fundamentally matters of practice that do not raise strictly legal issues.

5. The Rapporteur has therefore, in the present report, concentrated almost entirely on the topic of the framing and conclusion of treaties—apart from a section devoted to certain basic principles of treaty law, which, it may be thought, ought to figure at the outset of any code on the subject. Except for these and certain introductory and general articles, thirty out of the forty-two articles now presented deal entirely with the process of treaty-making. This compares with some six articles on the making or conclusion of treaties in each of the previous reports. The articles themselves are also fuller, so that much more space is given to this topic than before. The Rapporteur makes no apology for this more extensive treatment, which he believes to be necessary, although he thinks that after the Commission has given a preliminary consideration to the matter it may be possible to shorten the draft. There is a double aspect about many rules of treaty law that admittedly tends to cause overlapping. Nevertheless, even though it may be possible to summarize treaty law in the one sentence that anything can be done that the parties agree upon, it is still desirable to make clear what it is that will usually require specific agreement, and what is to be the position if there is none.

6. On the other hand, if the present Rapporteur has felt obliged to expand the articles, the work done by his predecessors, especially Sir Hersch Lauterpacht, has enabled him greatly to reduce the commentary that might otherwise have been called for. He has avoided repetition, and has confined himself to commenting on new points, or points that may be thought to be doubtful or especially controversial. He has also tried to draft the articles themselves in such a way that they are self-explanatory and their legal basis manifest.

## B. Scope of future reports

7. The next report will deal with the topics of the (essential or substantive) validity of treaties, and of the termination of treaties. In the same or a further report, the topics of interpretation, operation, enforcement, and the like will be covered, and this will still leave a number of matters to be dealt with.

8. Here a word may be said on the difficult subject of arrangement. The law of treaties lends itself to several different methods of arrangement. How different these can be will be apparent to anyone who, for instance, compares so well-known a text as the Harvard draft convention on the law of treaties with the arrangement adopted by Professor Charles Rousseau in volume I of his *Principes généraux du droit international public*.<sup>1</sup> Thus the topic of the making (conclusion) of treaties covered by the present report, can be regarded either as a process (*opération à procédure*) governed by certain legal rules, or as a substantive topic relating to the validity of treaties—i.e., so far as this is concerned, their formal validity. In the same way, termination can be regarded as a process, or equally as part of the topic of validity (validity of the treaty in point of time or duration). Chronologically, the two topics of the conclusion and termination of treaties are at opposite ends of the scale; but substantially they can be regarded as belonging (together with the topic of essential validity) to the general chapter of “validity”. In between them, chronologically, are the topics of interpretation, operation, and enforcement, the effect of the treaty as regards third parties, etc., all of which may be regarded as constituting a second main chapter of treaty law—the “effect” of treaties (interpretation, for instance, is closely allied to application). It is possible, up to a point, to combine these conceptions, though not entirely. Provisionally, the present report adopts, in the main, the arrangement adumbrated in the previous ones, since it is simplest, and most in accordance with the way in which things occur, to view a treaty as a process in time. Treaties are born, they live, produce their effects, and, perhaps, eventually die. But it may be thought desirable to displace the subject of termination, and make it part III of a first chapter on “Validity”, of which formal validity would constitute part I, and essential validity part II. Tentatively this is the arrangement now proposed. Most of the rest of the subject could then be grouped under a second chapter on “Effect”. However, a final decision on this question is probably best deferred until a comparatively late stage of the whole work.

9. Certain other matters of form or method may be mentioned. The first has already been touched on. So far as the process of treaty-making and conclusion is concerned, the problems connected with it cannot clearly emerge, unless the code attempts, within certain limits, to paint a picture—unless in fact it has a descriptive element. Secondly, the Rapporteur believes that any codification of the law of treaties, such as the Commission is called upon to carry out, should take the form of a *code*

<sup>1</sup> Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944).

and not of a draft convention. There are two reasons for this. First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.

10. Finally, reference may be made to certain inherent difficulties in drafting any code on treaty law, arising out of the attempt to give a unified treatment to the subject. This is the system apparently favoured by the Commission and the previous Rapporteurs, which the present Rapporteur has tried to follow. But in a sense it attempts too much. For instance, it may be *possible* to frame an article so as to apply indifferently to the case of a full treaty and also to that of an exchange of notes; but a certain artificiality is involved. Some expressions are suited to the one case and not to the other, and vice versa. A somewhat similar position exists as regards bilateral treaties on the one hand, and multilateral treaties on the other. Again, the same thing is found if treaty-making by or on behalf of States is related to the same process when effected by or on behalf of international organizations. It is for consideration whether, eventually, it may not be better to modify the attempt at a completely uniform treatment, and introduce a certain number of special sections on particular aspects of the subject. But in reading the present articles, it is necessary to bear in mind that they are intended to cover in one clause *all* the different forms of instruments and types of cases. The reader who, for instance, has mainly general multilateral conventions in mind, should remember that there are also such things as bilateral agreements and exchanges of notes, and, moreover, *that the latter outnumber the former by a very large margin.*

## I. TEXT OF ARTICLES OF CODE

### Introduction: scope and general principles

#### A. SCOPE AND RELATED DEFINITIONS

##### *Article 1. Scope*

1. The present Code relates to treaties and other international agreements in the nature of treaties, embodied in a single instrument, as described in paragraph 1 of article 2 below; and to international agreements embodied in other forms, as described in paragraph 2 of article 2; provided always that they are in writing. The present Code does not, as such, apply to international agreements not in written form, the validity of which is not, however, on that account to be regarded as prejudiced.

2. Subject to the provisions of article 2, paragraph 2,

the present Code applies to treaties and other international agreements regardless of their form or designation, and regardless of whether they are expressed in one or more instruments.

[3. The provisions of the present Code relating to the powers, faculties, rights and obligations of States relative to treaties, are applicable, *mutatis mutandis*, to international organizations, and to treaties made between them, or between one of them and a State, unless the contrary is indicated or results necessarily from the context.]

##### *Article 2. Definition of "Treaty"*

1. For the purposes of the application of the present Code, a treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law.

2. However, there being no general rule of law requiring any particular international agreement to be cast into the form of a "treaty", as such, an international agreement intended to serve the same purposes and made between any of the above-mentioned entities, may be embodied in another form than a treaty as described in the preceding paragraph—in particular in more than one instrument, such as an exchange of notes, letters or memoranda. The term "treaty", and the provisions of the present Code, shall be regarded as applicable *mutatis mutandis* to these other forms of international agreement, unless the contrary is expressly stated, or results necessarily from the language of the provision concerned, or from the character of the agreement itself.

3. For the purposes of the present Code, a treaty implies an instrument, or complex of instruments forming an integral whole, the parties to which number two or more of the entities mentioned in paragraph 1 above. A unilateral instrument, declaration, or affirmation may be binding internationally, but it is not a treaty, though it may in some cases amount to, or constitute, an adherence to a treaty, or acceptance of a treaty or other international obligation.

4. The fact that an instrument is or is not, as the case may be, regarded as a treaty for the purposes of the present Code, does not in any way affect its status in relation to the constitutional requirements of particular States regarding the treaty-making power.

##### *Article 3. Certain related definitions*

For the purposes of the present Code:

(a) In addition to the case of entities recognized as being States on special grounds, the term "State":

(i) Means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State; but this is without prejudice to the question of the methods by, or channel through

which a treaty on behalf or any given State must be negotiated—depending on its status and international affiliations;

(ii) Includes the government of the State;

[(iii) Subject to article 1, paragraph 3, includes international organizations;]

[(b) The term “international organization” means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity;]

(c) The term “party” (to a treaty) means primarily a State actually bound by a treaty which is in force; it may on occasion be used to denote States presumptively bound by a treaty not yet in force, by reason of having taken all the steps necessary for participation.

## B. CERTAIN FUNDAMENTAL PRINCIPLES OF TREATY LAW

### Article 4. *Ex consensu advenit vinculum*

1. The foundation of the treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation.

2. For the obligation to exist, the consent must be true consent. However, in certain circumstances consent is an inference from the facts, and a State may not deny the reality of its consent apparently regularly given.

### Article 5. *Pacta sunt servanda*

1. Subject to the provisions of the present Code, States are bound to carry out in good faith the obligations they have assumed by treaty.

2. All treaty rights and obligations attach to the State as an entity, and as an international personality and subject of international law, whether the treaty has actually been made in the name of the State as such, or of the Head of the State, the government, a department of government, or a Minister.

3. Since treaty obligations bind the State, they are not affected by changes of government, administration, dynasty or régime, within the State. A new government, administration, dynasty or régime, whatever its origin or the process by which it has assumed control, is bound to carry out the treaty obligations of the State, unless these can be terminated according to the terms of the treaty, or be otherwise lawfully brought to an end.

4. Territorial changes in a State, not affecting its personality as a separate international entity, do not of themselves alter its treaty rights and obligations, except in so far as these relate specifically to territory no longer under control of the State, or have otherwise become impossible of enjoyment or performance.

5. A State which has become bound by a treaty in a regular and lawful manner, is not absolved from carrying it out by reason of any requirements of, or lacunae in, its law or constitution, or any impediments resulting from its administrative or judicial system.

6. The particular form or designation of a treaty can never be a ground for not carrying it out, if it embodies

an agreement, and is valid formally, substantially and temporally.

7. Changed conditions are equally never a ground for refusing to comply with a treaty, though they may, in exceptional circumstances, cause it to be determined by operation of law.

### Article 6. *Res inter alios acta*

A treaty only creates rights, obligations or relationships for the States that are parties to it. However, in the circumstances contemplated in articles . . . of the present Code,<sup>2</sup> a State may indirectly acquire rights, come under obligations, or be placed in a relationship, by reason of a treaty to which it is not a party.

### Article 7. *The law governing treaties*

Unless the treaty itself otherwise provides, or such an intention is clearly apparent from the text, or from surrounding circumstances, all questions relating to its conclusion, validity, force, effect, application, execution, interpretation and termination, will be governed by international law.

### Article 8. *Classification of treaties*

Treaties may, on grounds of practical convenience and for certain procedural purposes, be classified in various ways, according to their form, subject matter or object, and according to whether they are bilateral, plurilateral, or multilateral contractual (*traités-contrats*) or law-making or “normative” (*traités-lois*). However, subject to the provisions of the present Code, there is no substantial juridical difference between any of these classes of treaties as regards the legal requirements governing their validity, interpretation and effect, since they are all based on agreement, and derive their legal force from its existence.

### Article 9. *The exercise of the treaty-making power*

1. Treaty-making and all other acts connected with treaties are, *on the international plane*, executive acts, and the function of the executive authority. Whatever legislative processes have to be gone through in order to make such acts effective on the domestic plane, on the international plane they are authentic.

2. On the international plane, therefore, the treaty-making power is exercised:

(a) In the case of a State, by the competent executive authority (Head of State, government): it is for each State to determine for itself what constitutional processes are necessary in order to place the executive authority in a position, on the domestic plane, to exercise this power; but, on the international plane, its exercise is the act of the executive authority;

[(b) In the case of an international organization, by such methods as are provided for in its constitution, or decided upon by its competent organs acting within the limits of their functions; but, if nothing else is indicated or decided on, by the Secretary-General of the organization.]

<sup>2</sup> The articles will figure in a later report.

3. No State is obliged, or, strictly speaking, entitled, to accept as internationally authentic the acts of another State in relation to a treaty, unless they are the acts of the executive authority; but because a State is bound to accept them if they are of this character, they necessarily bind the State whence they emanate, which, having performed them through its executive authority, may not then deny their international authenticity.

### First chapter. The validity of treaties

#### INTRODUCTORY PART: DEFINITION AND CONDITIONS OF VALIDITY

##### Article 10. Definition of validity

1. Validity is the condition necessary to give a treaty operative force and effect in law, and consists in the fulfilment of the aggregate of those requirements prescribed by the law in order that a treaty may have such force and effect.

2. Correspondingly, *mutatis mutandis*, the validity of a treaty for any particular State denotes the existence of all the conditions necessary to give a treaty, in itself valid, operative force and effect for that State.

3. Validity comprises "formal validity", "essential validity" and "temporal validity"—all of which must be present, both in respect of the treaty itself, and for any particular State said to be bound by it.

4. The term "formal validity" denotes validity in point of form, with reference to negotiation, conclusion and entry into force; "essential validity" denotes validity in point of substance, having regard to the requirements of contractual jurisprudence; "temporal validity" denotes validity in point of duration, having regard to the legal considerations governing the termination of a treaty, whether in itself or for any particular State.

##### Article 11. General conditions of the operative effect of a treaty considered in itself

1. A treaty has operative effect only if it is (a) valid, (b) in force (has temporal validity).

2. In order to be valid, a treaty must have (a) formal validity, (b) essential validity, as defined in article 10, paragraph 4, and in accordance with the requirements hereinafter specified.

3. In order to be in force (temporally valid), a treaty must (a) have entered or been brought into force; (b) remain in force—that is to say—must not have been terminated or have come to an end, according to its terms, or by operation of law as hereinafter provided.

##### Article 12. General conditions of the operative effect of a treaty for any particular State

1. A treaty is binding upon a particular State only if (a) the treaty itself has operative effect as specified in article 11 above; (b) the State concerned has the capacity to participate in the treaty; (c) there exists a valid and continuing acceptance of the treaty on behalf of that State.

2. A State has the capacity to participate in a given treaty (a) if its general treaty-making capacity is not

limited so as to exclude participation in that treaty or class of treaty; (b) if it fulfils any special conditions of participation that may be laid down by the treaty itself.

3. A continuing acceptance of a treaty on behalf of a State exists if (a) a final acceptance has been given by such means as many be prescribed by the treaty itself, or by the present Code; (b) that acceptance is (i) valid according to the provisions of the present Code, and (ii) is still in force, and has not been terminated according to the terms of the treaty, or by operation of law as hereinafter provided.

### Part I. Formal validity (framing and conclusion of treaties)

#### A. GENERAL CONDITIONS OF FORMAL VALIDITY

##### Article 13. Definitions

For the purposes of the present Code:

(a) "Negotiation", "drawing up" or "framing" is the process of *establishing* the text of a treaty; and "conclusion" is the act by which any two or more States signify, subject if necessary to eventual confirmation, their *consent* to the text as a text;

(b) "Full powers" or "credentials" means the formal instrument or document authorizing a given person to represent a State for the purpose of negotiating or concluding, or of negotiating and concluding, a treaty, as the case may be;

(c) "Establishment" or "authentication" is the act whereby the *text* of the treaty is finalized *ne varietur*;

(d) "Participation" (in a treaty) consists in having taken the final steps necessary in the particular case to become actually bound by it, if it is in force or when it comes into force;

(e) "Signature" which (subject to the provisions of article 21 of the present Code) includes initialling, is the act whereby a duly authorized representative signs or initials the text of a treaty on behalf of a State;

(f) "Signature *ad referendum*" is a signature made expressly subject to reference to the government concerned, with the consequence that it does not take effect as a full signature without subsequent confirmation by that government;

(g) A "signatory" or "signatory State" means a State on behalf of which a signature to a treaty has been given, such signature not being *ad referendum*, or, if *ad referendum*, having been duly converted by confirmation into a full signature; but the term "signatory" may sometimes be understood as denoting the individual person signing, if the context so requires;

(h) "Ratification" is the act whereby a signatory State ratifies its signature;

(i) "Accession" is the act whereby a State not a signatory to a treaty can adhere to it in certain circumstances;

(j) "Acceptance" is the act whereby, in lieu of signature, ratification or accession, or of any of these acts, as the case may be, a State "accepts" a treaty as binding, where the treaty provides for this procedure;

(k) The term "instrument of ratification", "accession" or "acceptance" denotes, as the case may be, the formal instrument embodying a ratification, accession or acceptance, transmitted to the other signatory State or States, or parties to the treaty, or deposited with the government or authority specified therein;

(l) A "reservation" is a unilateral statement appended to a signature, ratification, accession or acceptance, by which the State making it purports not to be bound by some particular substantive part or parts of the treaty, or reserves the right not to carry out, or to vary, the application of that part or parts; but it does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty;

(m) The terms "coming [or entry] into force" and "date of coming [entry] into force" mean, in relation to the treaty itself, the process by, and date on which it becomes binding and operative for the States which have already given a final acceptance of it, in whatever manner the treaty provides; and, in relation to any other State, the process by, and date on, which a treaty already in force becomes binding and operative for that particular State.

*Article 14. The treaty considered as text and as legal transaction*

1. A treaty is both a legal transaction (agreement) and a document embodying that transaction. In the latter sense, the treaty evidences but does not constitute the agreement.

2. For evidential purposes the text alone is sufficient, provided it has been duly drawn up, and established or authenticated in the manner provided for in section B below.

3. In order to be or become a legal transaction, the text, so drawn up and established or authenticated, must be concluded as an agreed text and participated in and brought into force as a legal act, in the manner provided for in section C below.

4. The process of treaty-making consequently involves four stages, though in certain cases (e.g. exchanges of notes) these may be simultaneous: (a) establishment and authentication of the text, as a text; (b) consent to the text as a potential basis of agreement (conclusion—usually by signature); (c) agreement to be bound by the text—sometimes by signature, more usually by ratification or other means; (d) entry into force of the treaty as such.

B. NEGOTIATION, DRAWING UP AND ESTABLISHMENT  
(AUTHENTICATION) OF THE TEXT

*Article 15. Drawing up of the text*

1. A treaty is drawn up by a process of negotiation which may take place through a diplomatic or other convenient administrative channel, or by means of meetings of delegates or at an international conference. Delegates and representatives must, subject to the provisions of articles 21 to 23 hereof, be duly authorized to carry out the negotiation, and except in the case of persons, such

as Heads of States, Ministers or Ambassadors, having inherent authority deriving from the nature of their functions, must furnish or exhibit credentials to that effect; but they need not be in possession of full-powers to conclude the treaty by signature or otherwise.

2. Agreement on any text or part thereof must be unanimous unless, before or at the start of the negotiation, meeting or conference, a decision has been taken, by common consent of the participants, for the adoption of texts by a majority vote.

*Article 16. Certain essentials of the text*

1. Subject to the provisions of the following paragraphs, it is not a juridical requirement of a treaty that it should contain any particular rubric, such as a preamble or conclusion, or other special clauses.

2. It is essential to the formal validity of a treaty that it should indicate the States on behalf of which it was initially drawn up. Such indication may be given by means of a preambular recital, or in connexion with the signatures affixed, or may be inferred from those signatures themselves.

3. Where a treaty is made on behalf of a dependent territory, or protected or semi-sovereign State, it must indicate the State making it, on whom will rest the international responsibility for its due execution.

4. It is conducive, but not essential, to the formal validity of a treaty that it should provide for the date and method of its entry into force, the manner of participation of the parties, the period of its duration, and for such other formal and procedural matters as may be requisite.

5. However, in the absence of any indication to the contrary in the treaty itself, or necessarily to be implied from the circumstances, or if nothing is stated or indicated, a treaty will be deemed to come into force on signature, to be binding on the signatory States *ipso facto*, to be open to participation by them alone (unless at any time they agree to admit another State or States), and to continue in force until terminated by the mutual consent of all the parties. In the same circumstances, all other questions of form or procedure will be deemed to be matters for regulation by means of *ad hoc* arrangements to be made between the signatory States, by mutual agreement.

6. In those cases where a treaty provides expressly that it shall remain open for signature, or provides for ratification, accession, acceptance, coming into force, termination or denunciation, or any other matter affecting the operation of the treaty, it must if possible indicate the methods by which, and the government or authority through whom, these processes are to be carried out and the requisite communications to the interested States are to be made. In the absence of any such indication, however, it will be for each interested State itself to carry out the necessary operations, and to furnish and request the necessary communications and information.

*Article 17. Legal consequences of drawing up the text*

1. Participation in a negotiation, even where decisions have been taken by unanimity, does not involve any

obligation to accept the text as finally agreed, or to perform or refrain from performing any act in relation to the subject matter of the text.

2. In principle, such participation equally confers no rights, other than a right to sign, if signature takes place. But, particularly where a treaty remains open for signature until a later date, or is open to accession, participation in the negotiation may confer certain ancillary or inchoate rights—e.g., a right to be consulted about any proposed reservations.

*Article 18. Establishment and authentication of the text*

1. The final establishment of the text of a treaty *ne varietur* and its authentication is effected in one of the following ways:

(a) The signature or initialling of the text on behalf of the States which have taken part in its negotiation—such signature or initialling being carried out (subject to the provisions of articles 21 to 23 hereof) by persons duly authorized to that effect;

(b) Incorporation in the Final Act of the conference at which the text was negotiated;

(c) Incorporation in a resolution of an organ of an international organization, in accordance with the constitutional practice of that organization;

(d) Such other formal means as may be prescribed in the text itself, or specially agreed upon by the negotiating States.

2. Sealing is not a necessary element of authentication or formal validity, even in those cases where a formula reciting the affixation of seals is employed.

*Article 19. Legal effects of establishment and authentication*

1. The establishment and authentication of the text of a treaty, in accordance with article 18, confer formal validity on it as a text, unless any flaw in the procedure adopted can be shown, and are a necessary condition of any further steps in connexion with it, and of its entry into force, whether immediate or eventual.

2. The text, once established, is final, and cannot subsequently be varied prior to entry into force, except by the same means as were employed for drawing it up; and after entry into force, only by such means as the treaty itself prescribes, or by the mutual consent of all the parties.

*Article 20. Signature and initialling (status)*

1. The text of a treaty may be signed or initialled. If signed, the signature may be outright (full signature) or *ad referendum* to the government concerned, by the addition of those words, or an equivalent formula, to the signature.

2. Signature *ad referendum* and initialling—except as provided in article 21, paragraph 1—have in general the same effect. They are acts of authentication, not of consent, though both may imply personal approval of the treaty on the part of the individual person signing or initialling.

3. Full signature, on the other hand, has a double

status. It is both an act of authentication of the text, and an act implying consent to the text as such, though not necessarily agreement to be bound by it. It may have a third aspect in those cases where it operates also as an agreement to be bound, and *pro tanto* brings the treaty into force.

*Article 21. Initialling and signature ad referendum as acts of authentication of the text*

1. Initialling is only equivalent to signature when carried out by persons whose status and functions will cause it to have that effect, such as Heads of States, Prime Ministers or Foreign Ministers, and provided the circumstances do not indicate a contrary intention.

2. In all other cases, initialling is equivalent to a signature *ad referendum* and is itself, *ipso facto, ad referendum*, whether stated so to be or not. In such cases the use of initialling is only justified in the following circumstances:

(a) Where the representative is acting on his own initiative in the negotiation and without specific authority from his government;

(b) Where the arrival of an authority to sign has been delayed or impeded by difficulties in transmission;

(c) Where the government concerned, although ready to participate in the establishment of a text, is not willing to be committed to the extent of a full signature.

3. Signature *ad referendum* is equally to be confined to the three cases (a), (b) and (c) specified in the preceding paragraph.

4. In the cases indicated in paragraphs 2 and 3 above, initialling and signature *ad referendum* have effect only as acts authenticating the text. They may sometimes imply a personal recommendation of the treaty by the representative concerned to his government, but do not amount to a signature on behalf of that government, and will require to be completed, either by a full signature, subsequently affixed, or by a formal intimation by the government that these acts are to be considered as a signature.

*Article 22. Authority to sign*

1. Except where made *ad referendum, signature*, which is the act of the State, can only be effected (a) under a full-power issued to the representative concerned, either specially for the particular occasion, or generally by virtue of his office as Ambassador, Minister of Foreign Affairs or otherwise; (b) by a person having inherent capacity to bind the State by virtue of his position or office as Head of State, Prime Minister or Minister of Foreign Affairs.

2. Authority to sign may be given to the representative who conducted the negotiation of the treaty, or to some other representative specially empowered to that effect, but authority to negotiate is not equivalent to authority to sign, and must, for the latter purpose, be completed or supplemented.

3. Full-powers must be communicated or exhibited, and must be verified by such means as are convenient. They must be in appropriate form, which may be Heads

of State or governmental, according to the nature of the occasion. In cases where transmission of full-powers is delayed, a telegraphic authority, or a letter from the head of the diplomatic mission of the country concerned in the country of negotiation, may be accepted, subject to eventual production of the full-powers.

4. Except in the case of exchanges of notes or letters, or of agreed minutes, or memoranda, or other cases where authority is implied by the act of signature, or is inherent in the office of the person signing, the treaty must contain a statement or recital to the effect that the representatives of the signatory States have authority to sign it, or some other indication (such as the use of the term "Plenipotentiaries") that such authority exists.

*Article 23. Subsequent validation of unauthorized acts*

The provisions of article 15 to 22 above are, wherever this is relevant, to be read subject to the understanding that the unauthorized acts of an agent are always open to validation on the part of his government, by means of a specific confirmation, or by conduct manifesting an unmistakable intention to adopt them as its own.

*Article 24. States which have a right to sign*

1. Every State participating in the negotiation of a treaty has the right to sign it, in all cases where signature is the method of authentication adopted.

2. The right of signature is, in principle, confined to the States participating in the negotiation, but other States may be admitted to sign the treaty if it so provides, or if this is agreed to by all the original signatory or (where the treaty remains open for signature) negotiating States.

*Article 25. Time and place of signature*

1. If the text of the treaty does not otherwise provide, signature takes place on the occasion of the conclusion of the negotiation, or of the meeting or conference at which the text has been drawn up. The treaty may, however, provide for signature on a subsequent occasion, or that it remain open for signature at some specified place, either indefinitely or until a certain date.

2. Unless the treaty provides otherwise, as indicated in paragraph 1 above, signature, as such, can only take place on the occasion of the negotiation, meeting or conference concerned, or on such subsequent occasion (if any) as may be specified. No further signature may thereafter be affixed, except by special agreement of the signatory States to admit it.

C. CONCLUSION OF AND PARTICIPATION IN THE TREATY

*Article 26. Conclusion of the treaty*

1. The conclusion of a treaty—which is not the same thing as bringing it into force, though the same act may do both—is the process of giving active assent to the text of the treaty as the basis of an agreement, but not necessarily a consent then and there to be bound by it.

2. Conclusion is usually effected by signature (provided it is full signature), but other acts may have a concluding aspect as provided in article 28 below.

*Article 27. Methods of participation in a treaty*

1. States take part in a treaty by an act of participation. Depending on the terms of the treaty, they may do so in the following ways:

(a) By simple signature, provided that it is full signature, or that, if given *ad referendum* or in the form of initialling, it has subsequently been converted into a full signature by confirmation; and provided it is not subject to ratification or acceptance;

(b) By signature as in sub-paragraph (a), followed by ratification or acceptance;

(c) By acceptance alone;

(d) By accession.

2. The circumstances in which any of these acts binds the State, and their legal consequences, are specified in the remaining provisions of this section.

*Article 28. Concluding and operative effect of acts of participation*

1. The same act may be concluding or operative, or both. It is concluding when it gives consent to the text, without giving the States final agreement to be bound by it. It is operative when it gives the latter. It will be both when, giving the latter, it has not been preceded by any concluding act.

2. Thus, signature subject to ratification or acceptance is concluding but not operative; signature not so subject is both concluding and operative, and is not therefore, in those circumstances, strictly an act of participation; ratification is operative but not concluding, because preceded by conclusion in the form of a signature; acceptance preceded by signature is in the same position as ratification, and finally, accession, and acceptance not preceded by signature, are acts simultaneously concluding and operative, or else are operative, in respect of a treaty already concluded *aliunde*.

*Article 29. Legal effects of signature considered as an operative act*

1. Signature brings the treaty into force:

(a) In those cases where the treaty itself specifically so provides;

(b) Where, although it is not specifically so provided, the form of the treaty or the attendant circumstances indicates an intention to bring the treaty into force on signature.

2. In general, the absence of any specific provision for, or failure to indicate any other method of, coming into force will create a presumption that the treaty is intended to come into force on signature.

3. In those cases where the representative of a State is only empowered to sign subject to ratification, and provided the conditions specified in article 32, paragraph 4, are complied with, his signature cannot bring the treaty into force for that State. However, such a limitation cannot of itself prevent the treaty coming into force for the other signatory States, except in those cases where it is a condition of the operation of the

treaty that all the signatory States shall be bound on signature.

*Article 30. Legal effects of signature considered as a concluding act only*

1. In those cases where signature does not *per se* bring the treaty into force, it has no directly operative effect, and is only concluding. In that case, it does not bind the signatory States, and does not involve for them any obligation either to ratify or finally accept the treaty, or to act in accordance with its provisions. However, the signature:

(a) Will constitute the necessary basis for any subsequent ratification or acceptance, and will involve an obligation to comply with the provisions of the treaty concerning the modalities of ratification, acceptance, and other procedural matters;

(b) May, in appropriate circumstances, imply that, subject to subsequent consideration, the government of the signatory State will, in the absence of any change in conditions or other unforeseen event, be willing to proceed to ratification or acceptance in due course, or to seek it from, or recommend it to, the competent constitutional organ;

(c) May involve an obligation for the government of the signatory State, pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty.

2. Signature not bringing the treaty into force equally confers no substantive rights under the treaty on the signatory States. But it entitles them to certain rights inherent in the status of signatory, such as—depending on the circumstances, and the terms of the treaty—a right to object to reservations, a right to object to the admission of additional signatories, and a right to insist on the due observance of the provisions of the treaty respecting ratification, the class of States admitted to accede to it, and other procedural matters.

*Article 31. Ratification (legal character and modalities)*

1. Ratification is a confirmation of a consent to a treaty already provisionally given by signature, and signifies a final intention to be bound by it. It therefore implies a previous signature given on behalf of the ratifying State, being either full and unqualified or, if *ad referendum*, having been duly confirmed. Without signature, ratification, as such, cannot take place.

2. Ratification in the international sense, and for treaty purposes, consists in the communication, exchange or depositing, by the competent executive authority of the State, of a formal instrument embodying and conveying the ratification of the State on the international plane. Domestic processes of ratification, or other domestic steps leading up to it, are not themselves a ratification of the treaty, and require to be completed by the drawing up and transmission by the executive authority, of a formal international instrument.

3. Ratification must be unconditional. Its operative effect cannot, for instance, be made dependent on the

receipt or deposit or ratifications by other States. Any condition purported to be attached to a ratification is equivalent to a reservation, and its validity and effect will be governed by the same considerations as are applicable to a reservation made on ratification.

4. Ratification, being a confirmation of a signature already given, must relate to what the signature relates to, and must therefore relate to the treaty in its entirety, and as such, and not merely to a part of it, unless the treaty itself provides that States may elect to become bound by a certain part or parts only.

5. Ratification once made cannot, as such, be withdrawn.

6. Ratification may, exceptionally, be effected by conduct, that is to say by executing the treaty; and a State which proceeds to execute a treaty it has signed will be deemed to have given its ratification.

*Article 32. Ratification (circumstances in which necessary)*

1. Ratification, on the international plane, is, in principle, discretionary, and its exercise is facultative. Subject to article 42, paragraph 5, no State, can be obliged to ratify a treaty, and its signature can imply no undertaking to do so, even in those cases where the treaty appears to make ratification mandatory, or where the full-powers of a representative to sign contain a form of words implying a promise of eventual ratification.

2. Treaties are subject to ratification in all those cases where they so specify; otherwise, in general, they are not. There is no principle or rule of law according to which treaties are tacitly to be assumed to be subject to ratification, whether this is provided for or not.

3. Since a treaty necessarily takes effect on signature if the contrary is not provided for, or clearly to be inferred from the circumstances, it is for the prospective signatory States to insert a provision for ratification if they require one—whether on account of the character of the substantive contents of the treaty, or because they are precluded by the requirements of their domestic laws or constitutions from final participation except on a basis of ratification.

4. However, in those cases where the authority of a representative is limited to signing subject to ratification, or is made subject to a condition that his signature will not constitute a final acceptance by the State, and provided the existence of this limitation or condition has been communicated to the other prospective signatories by the exhibition of the representative's full-powers, or by other formal means, the treaty will not come into force for that State on signature. The same will apply if the signature itself is given expressly subject to ratification or further acceptance. The treaty will nevertheless so come into force for the other signatory States, unless they decide to the contrary, or unless it is a condition of the operation of the treaty that all the signatory States shall be or become bound. If, in the circumstances contemplated, the signature of the representative having a limited or conditional authority is nevertheless affixed with the agreement, express or tacit, of the other signatories, this will imply a faculty for the State concerned

to deposit a subsequent ratification, and the acceptance of that State as a party if it does.

5. An unconditional signature given on behalf of a State to a treaty that comes into force on signature, binds that State.

#### *Article 33. Ratification (legal effects)*

1. Ratification which, once given, cannot, as such, be withdrawn, has the effect of making the ratifying State a presumptive party to the treaty, if the latter is not yet in force, and an actual party if it is, or as soon as it comes into force. By its ratification, the State assumes an obligation to carry out the provisions of the treaty, and acquires a right to the benefits of the treaty, and to its observance by the other parties, if the treaty is in force or comes into force subsequently.

2. In the case of ratifications given prior to coming into force, the ratifying State, while bound by the treaty *in posse*, is not yet under any duty to carry it out, nor, correspondingly, can it claim the benefits of the treaty, or the observance of it by other ratifying States. In such circumstances the ratifying State is, however, under a general duty of good faith, pending the coming into force of the treaty—and provided this is not unreasonably long delayed—to take no action calculated to impede its eventual performance, or to frustrate its objects.

3. A ratification given prior to the coming into force of the treaty constitutes a final but suspensive acceptance of the treaty. Therefore, if and when the coming into force of the treaty eventually takes place, the ratification will operate *ipso facto* and automatically to bind the ratifying State at and from that moment, without the necessity of any further action or assent on its part. Correspondingly, the ratification will operate at and from that moment to entitle the ratifying State to the benefits of the treaty, and to require its observance by the other parties. A ratification given on, or subsequent to, the coming into force of the treaty, or which itself brings the treaty into force, has these effects from the moment of its communication or deposit.

4. Unless otherwise provided in the treaty, ratification, while confirming the signature, has no retroactive effect as an operative act.

#### *Article 34. Accession (legal character and modalities)*

1. Treaties may be closed or open—i.e., limited to the signatory, or signatory and ratifying States, as the case may be, or open to participation by other States, by means of an accession.

2. Participation in a treaty by accession is not an inherent right. It can only take place where the treaty so provides, unless (a) provision for participation by accession is specially made by a separate instrument in cases where, signature of the treaty has been entirely dispensed with—as for instance those contemplated by paragraph 5 below; or (b) exceptionally, if a treaty being in force, the parties, after consultation with any States still entitled to become parties by ratification, decide to permit accession by a State which, by reason of not having signed the treaty, or because of any limitation in

the treaty itself (e.g., the expiry of a time limit), cannot otherwise become a party.

3. The treaty may limit the right of accession to certain specified States, or to a certain class of State, or it may impose a time limit after which no further accessions can take place. In such cases, subject to the provisions of paragraph 2 above, a purported accession not in accordance with the conditions specified, will be invalid and irreceivable.

4. In contrast with ratification, which implies a pre-existent signature, accession is only open to States which did not originally sign the treaty, and cannot subsequently do so because the treaty was not left open for signature. A signatory State gives it final acceptance of a treaty by ratification; and a non-signatory State, to whom signature is still open, proceeds equally by way of signature, followed, where necessary, by ratification. Accession is permissible only where these procedures are not open to the State concerned.

5. In some cases a treaty may be neither signed, nor open to signature—for instance, if its text, after being drawn up, was embodied in the Final Act of a conference, or in a resolution of an international organization, without any provision being made for its signature as a separate instrument; or where the States concerned have otherwise intended to dispense with signature. In these cases, accession, or its equivalent, constitutes the only method of participation in the treaty.

6. Accession, which is essentially an acceptance of a contract already entered into, and not a participation in the framing of the contract, implies an operative instrument to accede to. It can therefore, properly speaking, only be made to a treaty already in force, and is a method of participation that comes into play after the entry into force of the treaty. Exceptionally, however, a treaty may provide that accession can take place prior to entry into force, on the part of non-signatory States to whom signature is not open; or where signature has been dispensed with entirely, as in the cases contemplated in paragraph 5 above.

7. Accession is carried out by the transmission or deposit of a formal instrument of accession emanating from the executive authority of the State. In so far as any question of prior authorization by the competent domestic organs of the State arises, the provisions of article 31, paragraph 2, concerning ratification, apply *mutatis mutandis*, to accession.

8. The provisions of article 31, paragraphs 3 to 5, apply equally, *mutatis mutandis*, to accessions.

#### *Article 35. Accession (legal effects)*

1. Accession implies in itself a final acceptance of the treaty. It may not be made subject to ratification or other form of confirmation.

2. The legal effect of accession is the same in all respects as that of ratification and there is, in principle, no difference of any kind as regards the status, rights or obligations of States participating by way of accession, as compared with those of States participating by way of signature followed by ratification. The treaty may, how-

ever, reserve certain rights to signatory or signatory and ratifying States, such as the right to effect modifications in the text.

3. The provisions of article 33 apply *mutatis mutandis* to accessions according to whether these are effected before or after the coming into force of the treaty.

*Article 36. Acceptance (character, modalities, and legal effects)*

1. Acceptance is a method of participation that may be employed when specially provided for by the treaty. A treaty may, in addition to providing for participation by signature alone, without reservation as to acceptance, provide for participation by (a) signature with reservation as to acceptance, followed by acceptance; or (b) acceptance alone. In the first case the acceptance is equivalent to a ratification, and is governed by the same rules, *mutatis mutandis*, as apply to ratification; and in the second it is equivalent to an accession, and is governed by the same rules, *mutatis mutandis*, as apply to accession, except that the provisions of the first sentence of article 34, paragraph 6, will normally be inapplicable to the procedure by way of acceptance.

2. Acceptance is effected by the transmission or deposit of a formal instrument of acceptance, emanating from the executive authority of the State. The provisions of article 31, paragraph 2, are applicable to all acceptances.

3. Acceptance is a final act, and cannot be made subject to any further confirmation.

4. The legal consequences of acceptance are the same as for ratification and accession, and the provisions of articles 33 and 35, paragraph 2, are applicable to acceptance, in the same way as to ratification and accessions, as the case may be.

*Article 37. Reservations (fundamental rule)*

1. Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense.

2. Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference; must be brought to the knowledge of the other interested States; and, subject to articles 38 and 39 below, must be assented to expressly or tacitly by all those States.

3. In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.

4. In no case can a reservation be made or admitted to any article of a treaty providing for the settlement of differences or disputes concerning the interpretation or application of that treaty, by means of a reference to the International Court of Justice or other international tribunal, to arbitration, conciliation, or by other specified means.

*Article 38. Reservations to bilateral treaties and other treaties with limited participation*

In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree.

*Article 39. Reservation to multilateral treaties*

1. In the case of general multilateral treaties, a State may, subject to paragraphs 3 and 4 of article 37 above, make a reservation, when signing, ratifying, accepting or acceding to it:

(a) If the treaty expressly permits reservations to be made, either generally, or as regards a particular article or articles, or class of provision, and the reservation concerned falls within the terms of the treaty;

(b) Provided there is nothing to the contrary in the treaty:

(i) If the intention to make a particular reservation or reservations has been specially mentioned during the negotiation and drawing up of the treaty, and has not met with any objection (i.e., has been acquiesced in, expressly or tacitly);

(ii) If the reservation has subsequently been circulated to all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it, and the reservation has similarly not met with objection; provided that if the treaty has been in force for not less than five years, the reservation need only be circulated to and be met with absence of objection on the part of the States actually parties to the treaty at the date of circulation, so long as these number not less than twenty per cent of the States originally entitled to become parties.

2. For the purpose of these provisions, tacit acquiescence includes acquiescence *sub silentio*, and may be assumed if no objection is evinced prior to the signature of the treaty or, in the case of reservations proposed later, within three months of the date of their circulation.

3. If a reservation meets with objection, and if the objection is maintained notwithstanding any explanations or assurances given by the reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn.

4. Unless and until a reservation has been circulated, and is ascertained to have met with no final objection, and thus to have been accepted, the reserving State cannot be taken into account in any computation of the number of the parties to the treaty for example, if the treaty is to come into force on being ratified by a certain number of States, or for the purpose of determining the number of States parties to the treaty under the proviso to paragraph 1 (b) (ii) above.

*Article 40. Reservations (legal effects if admitted)*

1. If a reservation is admitted in accordance with the preceding articles, its effect is:

(a) To permit the reserving State to derogate from the provisions of the treaty to the extent, or in the manner, indicated in the reservation, but no more—the terms of the reservation being construed strictly for this purpose;

(b) To permit a similar derogation on the part of the other parties to the treaty in their relations with the reserving State, which cannot claim from them a greater degree of compliance with the treaty than it undertakes itself.

2. A reservation admitted for one party to a treaty, only affects relations between the reserving State and each of the other parties, and has no effect on the relations of the other parties *inter se*.

3. A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.

#### Article 41. Entry into force (modalities)

1. A treaty enters into force on such date, or in such events, or in such manner as it may specifically provide, so long as at least two States are bound by it. In the absence of any, or of any other, provision on the subject, the treaty must be taken to enter into force on signature.

2. In those cases where a treaty provides for ratification, but makes no express provision for coming into force, it will be deemed to come into force on the date of the exchange of ratifications, or of the deposit of the last of the ratifications required.

3. In those cases where a treaty provides for ratification by a certain date, but makes no provision for coming into force, it will come into force on that date, if all the necessary ratifications have been effected. If not, it will come into force on that date for the States which have then ratified it, provided these number not less than two-thirds of those entitled to do so, or so soon as that number is reached, unless, in this situation, the signatory States otherwise specially agree, or unless it is clear from the nature of the treaty that ratification by all the signatories is necessary, in which case coming into force will be deferred until the deposit of the last such ratification.

4. For any particular State, a treaty can only enter into force (become binding) on the date when both the treaty itself is in force, according to its terms, and according to the preceding paragraphs, and also that State has signified its final intention to be bound by the treaty, by giving its signature, ratification, accession or acceptance, whichever is applicable in the particular case.

5. A treaty may come into force whatever its terms, if the signatories proceed to execute its terms, if the signatories proceed to execute it, or, *pro tanto*, if it is put into application between a limited number of them.

#### Article 42. Entry into force (legal effects)

1. Entry into force is definitive, unless it is provided that the treaty shall cease to be in force on the non-occurrence of some event considered to be essential to

its operation. A treaty may, however, provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.

2. On entry into force, the treaty automatically binds all the States that have signed it (if entry into force takes place on signature) or that have, up to that date, ratified, accepted or acceded to it, as well as all States subsequently ratifying, accepting or acceding.

3. Up to the date of its entry into force, a treaty does not create any rights, obligations, or relationships for any State, though such States as have already ratified, accepted or acceded to it, may become subject to certain obligations of good faith, as stated in articles 33, paragraph 2, 35 and 36 above, deriving from their ratification, acceptance or accession.

4. Nevertheless, prior to its entry into force, a treaty has an operative effect, arising from the establishment of its text and its signature, so far as concerns those of its provisions that regulate the processes of ratification, acceptance and similar matters, and the date or manner of entry into force itself, these being matters precedent to such entry into force—unless, in any particular case, provision for regulating them is made under a separate instrument, taking immediate effect.

5. In those cases where a treaty purports to oblige the signatories to ratify by a certain date, or to impose on one or more specified States an obligation to ratify, but at the same time provides for its entry into force independently and irrespective of any such ratifications, it must be assumed that the signature of the treaty creates in itself an obligation for the signatory States, or for the States specially mentioned, to conform to these requirements. Failure to do so on their part will not prevent the treaty coming into force according to its terms, but will involve them in a breach of the treaty.

6. Entry into force can never be retroactive, either generally or for any particular State, in the absence of express provision to the contrary.

## II. COMMENTARY ON THE ARTICLES

[*Note.* The texts of the articles are not repeated in the commentary, but can easily be found by reference to the table of contents at the beginning of the report.]

*General observation.* In writing this commentary familiarity on the part of the reader with the reports of Professor Brierly and Sir Hersch Lauterpacht<sup>3</sup> has been assumed, as also with the basic principles of treaty law, and only those points calling specially for remark in connexion with the articles now proposed have been commented on.

<sup>3</sup> Professor J. L. Brierly prepared three reports: documents A/CN.4/23 of 14 April 1950, A/CN.4/43 of 10 April 1951, and A/CN.4/54 of 10 April 1952. Sir Hersch Lauterpacht prepared two reports: documents A/CN.4/63 of 24 March 1953 and A/CN.4/87 of 8 July 1954.

## Introduction: scope and general principles

### A. SCOPE AND RELATED DEFINITIONS

#### Article 1. Scope

1. This article is intended to make it clear that the draft Code relates to all forms of international agreements, provided they are in writing. A valid international agreement not in writing is of course possible, though today rare. But it is not a treaty.<sup>4</sup> On the other hand, there is no reason for confining the present Code to treaties *eo nomine*, or even to instruments that clearly are treaties though not so called—such as conventions. The designation is irrelevant. Equally, the Code should cover not only agreements that take the form of a single instrument—whatever its form or style—but also those that are made up of several instruments, such as exchanges of notes, letters or memoranda. This form of “treaty-making” is being increasingly utilized. Whether it is always appropriate to deal with both the single and the multi-instrument type by means of one and the same provision of a code is a question that has already been raised in the introduction to the present report (paragraph 10). The former type is, generally speaking (not invariably), negotiated and signed mediately, and comes into force by a *deferred* process of ratification or its equivalent. The latter type is the direct act of principal agents (Ministers, Ambassadors), signed as such, and having *immediate* effect, on signature. However, it is also possible for single instruments to be negotiated and signed directly by Heads of States, Prime Ministers or Foreign Ministers, and to come into force on signature.

2. Paragraph 3 has been placed in square brackets, the decision to include treaties entered into by international organizations being provisional.

#### Article 2. Definition of “Treaty”

3. “... made between ... subjects of international law possessed of international personality and treaty-making capacity ...” (paragraph 1). This formula, it is believed, includes States, and the types of international organizations that would be covered by the judgement of the International Court in the case of injuries suffered in the service of the United Nations;<sup>5</sup> but it would exclude individuals (even if these were to be regarded as subjects of international law), and all entities, private or public (including perhaps certain kinds of States<sup>6</sup>) that do not possess treaty-making capacity, and it may thus resolve some of the difficulties referred to by Sir Hersch Lauterpacht.<sup>7</sup> Since the Commission, has not excluded the idea of covering treaty-making by international organizations in the present Code,<sup>8</sup> this general formula may be

<sup>4</sup> See A/CN.4/23 (first report by Brierly), paras. 21-24. Would an oral agreement recorded (a) with the knowledge and by the intention of both parties, (b) secretly by one of them only, on a disc or tape recorder, amount to an agreement in writing?

<sup>5</sup> *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174.

<sup>6</sup> This should be read in conjunction with the definition of “State” (article 3 (a)), and with article 14, paragraph 3, and the relevant commentary.

<sup>7</sup> See A/CN.4/63, comment on article 1.

<sup>8</sup> See A/CN.4/L.55, para. 6, and A/CN.4/SR.98, paras. 1 and 20.

acceptable.

4. “... made between entities *both or all of which are* subjects of international law ...” (paragraph 1). An agreement between a State and a foreign individual or corporation, for instance, is not a treaty or international agreement, though it might in certain circumstances be governed, or might in part—or as to certain aspects—be governed by international law.

5. “... entities ...”. Where Heads of State make a treaty, they do so not in their capacity as persons but as agents of the State, which is the entity involved.

6. “... intended to ... establish relationships ...” (paragraph 1). This phrase included by Brierly, but dropped by Lauterpacht,<sup>9</sup> is re-introduced here because it seems difficult to refuse the designation of treaty to an instrument—such as for instance a treaty of peace and amity, or of alliance—even if it only establishes a bare relationship, and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles.

7. “... governed by international law” (paragraph 1). The present Rapporteur, while agreeing with much that is contained in the first report of Lauterpacht,<sup>10</sup> feels that while it may be possible to have certain agreements between States that are not governed by international law,<sup>11</sup> it is not possible to have, or admit of, a case of a *treaty* (even using that term in its widest sense) that would not be so governed. Hence, this should be explicitly stated. Not all international agreements are governed by international law, but, if they are not, or to the extent that they are not, they are not treaties within the meaning of the present Code.

8. Paragraph 3. It is obvious that a treaty must have at least two *parties*. A “treaty” within the meaning of the present Code may, of course, be constituted by two or more *instruments*, each made or given by or on behalf of one of the parties only. But a purely unilateral instrument, neither referring to or connected with any other, can never amount to an international agreement, still less a treaty. It may be the source of an international obligation<sup>12</sup> but the obligation cannot be a treaty obligation.

9. Paragraph 4. This is intended to ensure that the type of instrument considered under the domestic law of any State to be a “treaty” for the purposes of the functioning of its constitutional processes, shall not

<sup>9</sup> See A/CN.4/23 (first report by Brierly), paras. 25-30, and A/CN.4/63 (first report by Lauterpacht), comment on article 1.

<sup>10</sup> See A/CN.4/63, notes on article 1.

<sup>11</sup> Lauterpacht in his first report A/CN.4/63 is correct in saying that in the last resort all agreements between States are governed by international law. But in the intermediate sense, the agreement, or its incidents, may be governed by the domestic law of one of the parties—for instance, State A makes an agreement with State B for the purchase, for use as an Embassy, of property belonging to the public domain in State B. Furthermore such agreements although “international” may often be effected through an Ambassador or a national bank and take the form of what looks like an ordinary private law contract.

<sup>12</sup> This is arguable of course. Some would say that it cannot be so in the absence of at least a quasi-contractual element.

cease so to be *for those purposes* by reason of anything in the present Code—nor, equally, that it shall become so.

10. *Registration with the United Nations under Article 102 of the Charter.* It will be observed that the present Rapporteur has not adopted the suggestion made in Lauterpacht's second report<sup>13</sup>, that registration with the United Nations should be a partial test of whether an instrument is in fact a treaty or international agreement. There are two reasons for this, one theoretical and the other practical. Under Article 102, it is only an instrument in fact a treaty or international agreement that are registrable. They must therefore have this character before the obligation to register can arise at all. Consequently, registration cannot itself confer this character on them, though it may be some evidence that they have it. Secondly, and from the practical standpoint, such a test would have its dangers. *Either* party to an instrument can register it unilaterally, and this constantly occurs. It would be inadmissible, however, that treaty status should be conferred on an instrument merely by the unilateral act of one of the States concerned, accepted by the Secretary-General of the United Nations, who may well regard himself as not competent to reject it.

#### Article 3. Certain related definitions

11. Apart from the references to international organizations, and a definition of the same—reserved in square brackets for reasons already indicated—this article is mainly concerned to define the term "State", in order to make it clear by implication that semi-sovereign or protected States can be parties to treaties (though in many cases only mediately), while at the same time bringing out the limitations on, and modalities of this position. Apart from international organizations, only States can be parties to treaties; and only those entities are States that are capable *as such* (and not merely as part of a larger entity) of being bound by a treaty. For this reason, a constituent State of a Federation can never be a State *internationally* or, as such, party to a treaty—for the treaty will bind the Federation, and will bind the constituent State not as such, but only as an (internationally) indistinguishable part of the Federation.<sup>14</sup> But an internationally self-contained State, even if it is a protected State, can be bound as such, even if only with the consent, general or specific, or through the medium, of the protecting State.<sup>15</sup>

<sup>13</sup> A/CN.4/87, comment on article 1.

<sup>14</sup> The present Rapporteur feels great difficulty in accepting the view suggested in Lauterpacht's first report (A/CN.4/63, comments on articles 1 and 10). It may be true that in certain cases component parts of a Federal State, such as Swiss Cantons, have, or appear to have, concluded treaties with neighbouring German States. But *in law* these are really cases where the component part has simply acted as the agent to bind the Federation as a whole, in respect of a particular part of its territory, since a component part of a State cannot itself be a State (internationally) or have—except as agent—treaty-making capacity. Incidentally, Lauterpacht is mistaken in saying that the Sultanate of Muscat and Oman is a British Protectorate. (A/CN.4/63, comment on article 1). It is a fully sovereign independent principality.

<sup>15</sup> The point is more fully dealt with in an article by the present Rapporteur in *The British Year Book of International Law* 1953, pp. 2-5.

12. "...entities recognized as being States on special grounds...": this would include the Vatican State.

#### B. CERTAIN FUNDAMENTAL PRINCIPLES OF TREATY LAW

##### Articles 4-9

13. *General comment.* It is for consideration whether these articles, which may in any case require further development, should figure here or later, i.e., mainly in the sections on operation and effect which will be the subject of a future report, and to which logically they strictly belong. Yet it may seem undesirable in an international code on treaty law to defer making even a bare statement of these important general principles, fundamental to the whole subject, until a comparatively late stage of the work. However, in view of the uncertainty as to their location, the comment here offered is of the briefest, and the articles are left to speak for themselves.

14. *Article 4, paragraph 2.* One aspect of the point here involved is considered again more particularly in connexion with the topic of ratification.

15. *Article 5, paragraph 2.* This is an obvious condition of the international workability of treaties. The remaining paragraphs are really applications of the same theme.

16. *Article 6.* The articles mentioned in blank will be in the second chapter of the Code, on operation and effect. For a commentary on the point of substance involved see the last paragraph of Lauterpacht's comment on article 1 in his first report (A/CN.4/63).

17. *Article 7.* Possibly redundant, or even slightly inconsistent, in view of the definition of a treaty as an instrument governed by international law (see comment on article 2, paragraph 1, in paragraph 7 above). But something of the kind seems desirable.

18. *Article 8.* This is an attempt, while recognizing the convenience for working purposes of dividing treaties into different categories and classes, to simplify consideration of them for legal purposes by denying the existence of any fundamental juridical distinction between these categories and classes, especially as the same treaty may belong to more than one of them, under different aspects.<sup>16</sup>

19. *Article 9.* It is important to know through what organ a State or an international organization must act on the international plane, in order that its actions may be effective *vis-à-vis* other States, and, so to speak, receivable by them. Domestic processes may be necessary, but only on the domestic plane, and they only produce their direct effects on that plane. They cannot of themselves operate on the international plane, unless embodied

<sup>16</sup> For the idea of this simplification, the Rapporteur is indebted to Professor Charles Rousseau (*op. cit.*, vol. I, pp. 133-7 and 156-8). But Professor Rousseau draws attention to the *formal* distinction—in some sense also a legal one—between what he designates for his purposes as "*traités stricto sensu*" and "*accords en forme simplifiée*" (e.g., exchange of notes). This is, in effect, the distinction made in paragraphs 1 and 2 of article 2 of the present Code.

in or completed by some executive act.<sup>17</sup> The consequences of this position are (see paragraph 3 of the article) that if States are bound to accept as internationally authentic the executive acts of another State, that State (having performed such acts) may not itself subsequently deny their international authenticity, and is bound by them. By "accept as authentic" is meant of course their status as *acts of the State*, not their legal validity under treaty or general international law. The same act may be both authentic and invalid.<sup>18</sup> But if it is not authentic, it is not the act of the State at all, and the question of its validity does not arise.

### First chapter. The validity of treaties

#### General comment

20. This chapter will eventually cover all the requisites of validity, namely formal validity, conditions of essential or substantive validity, and duration (temporal validity), i.e., conditions of termination. The present report only covers the topic of formal validity.

#### INTRODUCTORY PART: DEFINITION AND CONDITIONS OF VALIDITY

##### Articles 10-12

21. These articles are intended to make clear the two essential points relative to validity in general, namely, that validity:

- (a) Is a composite of three factors—form, substance and temporal existence;
- (b) Has two aspects—the validity of the treaty in itself, and its validity for any particular State—which do not necessarily coincide.

### Part I. Formal validity (framing and conclusion of treaties)

#### General comment

22. The remainder of the present report deals with this topic, on which it presents a complete set of articles. They are divided into two main sections: the negotiation, drawing up and establishment of the *text*; and the conclusion of, and participation in, the *treaty*. These are preceded by a section containing definitions of relevant technical terms, and a general provision.

#### A. GENERAL CONDITIONS OF FORMAL VALIDITY

##### Article 13. Definitions

23. The various definitions are for the most part

<sup>17</sup> Even in the case of the United States, ratification by the Senate is not *per se* operative on the international plane. The international *instrument* of ratification has still to be framed and transmitted by the President, and is his act, though it recites the Senatorial act.

<sup>18</sup> For instance, a denunciation of a treaty, effected by the executive authority of a State and regular so far as domestic constitutional considerations are concerned, but contrary to the terms of the treaty. Conversely, a denunciation in compliance with the treaty would be "valid", but would have no effect if it did not emanate from an authority competent to act for the State internationally, since it would not be (internationally) authentic, whatever its status domestically.

self-explanatory and are not commented on at this point because such issues of substance as they may involve will recur later in connexion with particular articles. There is a *general* question, whether a definitions article, as such, is desirable at all, or whether it would not be preferable to define each term, so far as necessary, in the particular article in connexion with which it principally occurs. However, as many of these terms are liable to occur in different connexions, the Rapporteur has thought that, for the time being, they might be grouped in one article for purposes of definition.

#### Article 14. The treaty considered as text and as legal transaction

24. Formal validity has two constituents, the text and the formal acts giving the text the character of a legal transaction. Considered purely as a *text*, the treaty is a document, rather than a legal act or transaction. In all talk of treaties there is this ambiguity—a treaty is both the document embodying an agreement, and the agreement itself.<sup>19</sup> In the former sense, there can be a treaty although it is not in force, or has ceased to be in force (i.e., although there is no subsisting agreement as a legal act). Nevertheless, it is essential to the validity of the ultimate agreement that the text should have been drawn up and established or authenticated by the correct means, and in the correct form; for if the text does not itself constitute in law the agreement, it is nevertheless the indispensable, and usually the sole, evidence of what that agreement is. The primary value of the *text* of a treaty, considered purely as such, is therefore evidential. Hence, it must be authentic evidence, and must for that purpose conform to certain requirements of form and method. This aspect is dealt with in section B. Section C deals with the ensuing process of converting the text into a legal transaction, by the initial act of conclusion (usually signature)<sup>20</sup> followed where necessary by final acts of participation, such as ratification, and by the entry into force of the treaty itself.

#### B. NEGOTIATION, DRAWING UP AND ESTABLISHMENT (AUTHENTICATION) OF THE TEXT

##### Article 15. Drawing up of the text

25. "...through the diplomatic...channel..." (*Paragraph 1*). Not only can treaty engagements take the form of correspondence (exchanges of notes, letters etc.) but they can in effect be negotiated by correspondence. This can also occur with the negotiation of more formal instruments.<sup>21</sup> It is as well to record this fact in any

<sup>19</sup> See A/CN.4/23 (first report by Brierly), para. 30.

<sup>20</sup> The difficulties and ambiguities surrounding the notions of signature and conclusion are considered later—see paragraphs 47-52.

<sup>21</sup> So important an instrument as the Japanese Peace Treaty of 1951 was negotiated without any conference, by a mixed process of diplomatic interchanges and consultations. It was *concluded* by the signature ceremony at San Francisco.

Bilateral treaty engagements and even formal instruments of all kinds are constantly negotiated without any delegation from the one country attending at the capital of the other. The use of the local diplomatic mission, supplemented by one or two experts sent out *ad hoc*, is often all that is needed.

Code, as a corrective, since it seems often to be assumed as necessary that some sort of meeting or conference should have been held.

26. "Delegates... must be duly *authorized* to carry out the negotiation... but they need not be in possession of *full-powers to conclude* the treaty..." (Paragraph 1). Negotiation and conclusion are not the same thing. The same person may of course be authorized to do both. Or, one person having negotiated, another may be empowered to conclude, by signature or otherwise. But authority to negotiate does not *per se* include authority to sign. For negotiation, full-powers are not necessary. Any form of authority such as a letter, or an intimation to the local government through the diplomatic channel, giving the delegate's name will suffice. But for conclusion (for example, by signature) full-powers are necessary (*see, comment on article 22*).

27. Paragraph 2. It is necessary to have some fundamental rule to govern the process of the adoption of texts. This seems the only possible rule, in practice.

#### Article 16. *Certain essentials of the text*

28. Paragraph 1. It is necessary to make clear the absence *in general* of any juridical necessity for formal or special clauses, in order to cover the kind of case (for example, exchange of letters) where usually or often there are none.

29. Paragraph 2. However, a treaty must indicate the countries making it, though it may suffice if this can be inferred from the signatures affixed—as in a exchange of notes.<sup>22</sup>

30. Paragraph 3. Similarly, it is necessary that the quarter in which the international responsibility lies should be indicated in the case of treaties entered into mediately or through another State.

31. Paragraphs 4, 5 and 6. It is necessary to provide for those cases where either (a) the parties fail to make any, or adequate, provision for such matters as coming into force and termination, or (b) the form of the "treaty" is such (for example, an exchange of letters) that it will probably not do so. The problem is masked by the fact that most formal instruments do make provision for these things. But the treaty cannot be regarded as invalid merely because they do not, if legitimate inferences of a legal character can be drawn; and it is believed that in the absence of any indication to the contrary, these inferences must be as stated in these paragraphs, which also provide for a number of procedural matters.

#### Article 17. *Legal consequences of drawing up the text*

32. No comment is required on this article, which is self-explanatory. But see paragraphs 59 and 80 below.

#### Article 18. *Establishment and authentication of the text*

33. The text of this article is the same (with slight verbal changes, and the addition of a second paragraph) as that adopted by the Commission at its third session.<sup>23</sup>

<sup>22</sup> In the case of exchanges of notes or letters, the letter paper heading will usually afford an additional indication.

<sup>23</sup> See A/CN.4/L.28 and A/CN.4/L.55.

#### Article 19. *Legal effects of establishment and authentication*

34. No comment is required, except as to the words "... confer formal validity on it *as a text*..." (Paragraph 1). They mark the fact that the treaty is still only a text at this stage, and has no validity as an agreement.

#### Article 20. *Signature and initialling (status)*

35. Paragraphs 1 and 3. With signature, or initialling, a further stage in the treaty-making process is reached. But signature, if it is full signature, has a double and sometimes a treble aspect, as stated in the text. In the present section, however, it is considered only as an act of authentication of the text.

36. Paragraph 2. Initialling, on the other hand, save exceptionally (as to which see article 21, paragraph 1), and signature *ad referendum*, can never in themselves be more than acts authenticating the text. They can never be acceptances of the text in any form, by or for the State concerned, unless subsequently confirmed or completed. These matters, which have been the subject of some misconception and confusion, are elaborated in the succeeding articles.

#### Article 21. *Initialling and signature ad referendum as acts of authentication of the text*

37. Paragraph 1 states the cases in which initialling may constitute a signature.

38. Paragraphs 2 and 3, without being limitative, enumerate the cases to which, as a rule, initialling and signature *ad referendum* ought to be confined, if these are to be given a proper role. These are cases where signature would not be justified, but initialling (or signature *ad referendum*, which has broadly the same effect) would be appropriate.

39. Paragraph 3 states the effect of initialling and signature *ad referendum*, and requires no comment.

#### Article 22. *Authority to sign*

40. Paragraph 1. No comment is necessary.

41. Paragraph 2. For comment, see paragraph 26 above on article 15. Negotiation may be regarded as in some sense the act of the individual negotiator, and so may initialling and signature *ad referendum*. But full signature is the act of the State.

42. Paragraph 3. The second sentence consecrates a practice that is very usual and has great convenience.

43. Paragraph 4. No comment is necessary.

#### Article 23. *Subsequent validation of unauthorized acts*

44. This is believed to be good law, and it is certainly convenient practice.

#### Article 24. *States which have a right to sign*

45. The right to sign a treaty is necessarily circumscribed. In the absence of special provision or agreement, no State can claim to be entitled to sign a treaty in the negotiation of which it did not participate.

*Article 25. Time and place of signature*

46. There must equally be limits in principle on the time within which, or occasion on which, signature may be affixed. In the absence of special provision or agreement, no State—even a negotiating State—can claim to sign after the date or occasion appointed for that purpose.

## C. CONCLUSION OF AND PARTICIPATION IN THE TREATY

*General comment*

47. This section assumes the existence of an established and duly authenticated text. But though *established* as a text, this text has not yet received any assent. It has been authenticated as accurate, that is all, though it may have been authenticated by an act, such as full signature, that also implies assent (having a double aspect—see article 20). It is now necessary that the treaty should be concluded and participated in, and brought into force, before it can pass from the status of text or document to that of agreement or legal transaction (see comment in paragraph 24 on article 14). Conclusion of the treaty and participation in it by any State may coincide, but they are juridically separate concepts and acts. A State that signs a treaty subject to ratification or final acceptance concludes, but does not yet participate in it.<sup>24</sup> A State that ratifies a treaty participates in it, having already concluded it by signature. A State that accedes to a treaty, or gives an acceptance not preceded by a signature, simultaneously concludes it (so far as that State is concerned) and also participates in it. Or it is perhaps more accurate to say, in this last case, that the treaty being already concluded independently of that State, it proceeds to participate in it.

48. Thus, while *authentication* is the act certifying, so to speak, that the text is the text that was drawn up during a certain negotiation or at a certain conference, *conclusion* is the act by which an active assent is given to this text, as being the one by which the State is willing to be bound if it eventually decides to become finally bound. This decision may itself coincide with the conclusion, as when signature also brings the treaty into force (for example, exchanges of notes). Failing that, conclusion gives assent to the text as the basis of the agreement, but it does not itself constitute agreement. Agreement (to be bound) follows with *participation*, which is always a final act so far as the State making it is concerned. By it, that State takes all the steps open to and necessary for it to become bound. But the State may not yet be actually bound, if the treaty itself is not yet in force. *Entry into force* is then necessary, and is the final stage in the series. It may coincide with the relevant acts of participation, as when two States bring a bilateral treaty into force by exchanging their ratifications of it; or it may be independent of any particular act of participation, as when a multilateral treaty comes into force on the happening of certain specified events, and not until then, even though a number of States have previously deposited ratifications.

49. The foregoing considerations will serve in particular as a general comment on articles 26 to 28.

<sup>24</sup> See A/CN.4/43 (second report by Brierly), comments on articles 1 and 4.

*Article 26. Conclusion of the treaty*

50. See general comment above. The term conclusion is ambiguous, and has always given rise to difficulties. When can a treaty be said to be “concluded”? When it is signed, for instance, or when it comes into force? If the former, there is the difficulty that the treaty may never actually come into force. Can a treaty that never comes into force be said to be concluded? On the other hand, there is no doubt that a treaty is always given the date of its signature (i.e., conclusion), never that of its entry into force unless that coincides with signature.

51. The solution lies in regarding conclusion as the process by which the States concerned definitely give their consent to the text, though not necessarily their agreement to be bound by it. It is more than authentication, which merely verifies that a certain instrument or document correctly embodies a certain text, but conveys no degree of substantive assent at all to that text. Conclusion involves a measure of substantive assent, though not final agreement. By it, States say not merely “This is the text we have established, and which we certify to be correct”, but also “This is the text by which we are willing to be bound if we become bound at all.”

52. Once it is understood that authentication, conclusion, participation and entry into force, are juridically separate concepts (see paragraph 48), no further difficulty arises, except from the confusion engendered by the fact that two or more of these acts may coincide. Thus signature, in those cases where the treaty comes into force on signature, accomplishes all four simultaneously. In other circumstances, two or three may coincide. Or all four may be separate, as when a treaty is first signed *ad referendum* or embodied in the Final Act of a conference (see article 18), then signed in full or confirmed, then ratified, and finally brought into force when so many ratifications have been deposited. But variable as practice may be, it is essential, juridically, to keep these concepts distinct, so as to be able to determine the status and exact legal effect of any given act.

*Article 27. Methods of participation in a treaty*

53. Participation by simple signature takes place in those cases (and only in those cases) where the treaty is not subject to ratification or, if the acceptance procedure is adopted (see article 36), where signature is given without reservation as to acceptance. As already noticed, the acts of participation specified in the present article 27 may or may not also be acts bringing the treaty into force, or coinciding with its entry into force. But they are all final so far as the State performing them is concerned.

*Article 28. Concluding and operative effect of acts of participation*

54. See comment in paragraphs 47 to 52 above. This article is largely formal, but its inclusion may be useful for purposes of clarification. An act purely concluding, such as signature subject to subsequent ratification or acceptance, is not of course an act of participation in the strict sense at all. Acts of participation proper pre-

suppose conclusion, or are themselves concluding as well as operative.

*Article 29. Legal effects of signature considered as an operative act*

55. *Paragraph 1.* The case here contemplated is where the treaty comes into force on signature, or at any rate where the signature is not subject to any ratification or further acceptance, so that it will suffice to bind the State if and when any other events on which coming into force depends have duly occurred. For the reasons given in Lauterpacht's first report<sup>25</sup> it is necessary to provide for this case. There is an almost inveterate tendency, particularly in the milieu of international organizations, to view all treaties as if they consisted exclusively of general multilateral and semi-law-making conventions, of the kind that are almost always subject to ratification. In actual fact, such conventions form a minority in comparison with the hundreds which, on the bilateral or semi-multilateral or purilateral<sup>26</sup> plane, come into force on signature (exchanges of notes, protocols, acts, declarations, memorandums of understanding, *modus vivendi*, etc.).<sup>27</sup>

56. *Paragraph 2.* As is also indicated in article 32, if the parties want ratification or other confirmatory act, it is open to them to provide for it. If they fail to do so, the presumption—particularly having regard to the considerations noticed in paragraph 55 above—must be that they did not intend it. In any case, there must be some basic rule to govern the case where a treaty is clearly intended to become operative (i.e., come into force), but fails specifically to indicate the method by which it is to do so.

57. *Paragraph 3.* Equally, it is always open to any particular State to safeguard its position by authorizing its representative to sign only subject to ratification, or by limiting his full powers in that way. In that case, his signature cannot bind that State, though the treaty may nevertheless come into force on signature for the other States.

*Article 30. Legal effects of signature considered as a concluding act only*

58. *Paragraph 1.* This deals with the case where signature only concludes the treaty, and does not operate as a final acceptance of it. But it may nevertheless have certain legal consequences even on that basis, and these are set out in sub-paragraphs (a) to (c). The point made in (a) will more conveniently be considered in connexion with article 42, paragraph 4. The reasons for points (b)

<sup>25</sup> A/CN.4/63, comment and notes on article 5.

<sup>26</sup> It is equally constantly overlooked that not every multilateral treaty is a general multilateral treaty. Many such treaties are only plurilateral, involving three or four, or six or eight, or other limited number of States having some common interest or object affecting them only.

<sup>27</sup> See the very striking statistical data given in Lauterpacht's first and second reports (A/CN.4/63 and A/CN.4/87, comments on article 6), showing the greatly preponderating number of international agreements coming into force on signature or its equivalent, and the comparatively small number that are subject to ratification.

and (c) are fully and very cogently set out in Lauterpacht's first report.<sup>28</sup> The present Rapporteur accepts that view, but considers it desirable to state the proposition in question in somewhat cautious and qualified terms.

59. *Paragraph 2.* Equally, while a merely "concluding" signature can confer no substantive rights under the treaty, it may confer certain rights in connexion with it. This matter is also referred to in Lauterpacht's first report.<sup>29</sup> Certainly signature confers a status, and with it the rights inherent in that status. The whole balance of a treaty is capable of being altered after its signature by the admission of reservations, or of other acceding parties, so that a signatory State may find that the treaty it has signed, and which it has the right to ratify, is, in effect, no longer the same treaty.

*Article 31. Ratification (legal character and modalities)*

60. *Paragraph 1.* The main point here is that ratification implies a previous signature (to be ratified).<sup>30</sup> Where there has been no signature there can be no ratification, though other means of participation may be available (e.g. accession), or there may still be time to affix a signature, if the treaty was left open for signature (see article 25).

61. *Paragraph 2.* It is necessary to insist—in order to avoid serious confusions—that on the *international* plane ratification is an executive act, and is effected by transmitting or depositing an *instrument* of ratification, drawn up by the executive authority. "Ratification" by the legislature is a purely domestic process. It is not always necessary. In some countries it is never necessary. Basically, a parliamentary "ratification" is no more than a vote, however recorded, approving the treaty and empowering the executive to proceed to *actual* ratification. Without this further act, there is, internationally, no ratification.

62. *Paragraph 3.* This paragraph is not intended to exclude reservations made on ratification where otherwise permissible (see articles 37 to 39). It is directed to a different type of condition. It has sometimes been suggested<sup>31</sup> that the operation of a ratification may be made dependent on another State or States also ratifying. This would be liable to cause considerable difficulties, for example, in those cases where entry into force of the treaty is made dependent on the deposit of a specified number of ratifications. Again, if by chance all the ratifying States made such a condition, none would have any operative effect. Ratification may be accompanied by a reservation as to some part of the *treaty*, but must in itself—as an act—be unconditional.

63. *Paragraph 4.* This is a necessary corollary of the fact that what is ratified is a signature to the text as a whole. But sometimes a treaty (for instance the London

<sup>28</sup> A/CN.4/63, comment and notes on article 5.

<sup>29</sup> *Ibid.*, comment on article 5.

<sup>30</sup> As a matter of convenience, it is usually said that the treaty is ratified. Strictly, it is the signature given to the treaty that is ratified; or alternatively, ratification is a final confirmation of the provisional consent given by signature.

<sup>31</sup> That is, the present Rapporteur has heard it suggested.

Naval Treaty of 1930) permits States to subscribe to one part of it only, or to exclude certain parts.

64. *Paragraph 5.* For instance, if there is an interval between the deposit of the ratification and the coming into force of the treaty, the ratification cannot be withdrawn during that interval. The State concerned must await coming into force, and then take any steps open to it under the treaty to terminate its participation, or must obtain a special release by consent.

65. *Paragraph 6.* See also article 42, paragraph 5. This case is no doubt a comparatively rare one. But it can occur, especially when a State takes benefits under a treaty, or by its actions in regard to it causes other States to alter their positions, or affects those positions.

*Article 32. Ratification (circumstances in which necessary)*

66. *Paragraph 1.* This gives effect to the principle of the facultative character of ratification as an *international* act. No State can be obliged to assume treaty obligations. Therefore, even though it has signed a treaty, it cannot be obliged to ratify it. In Lauterpacht's first report cogent reasons are given for thinking that in many cases States may be under a strong moral obligation to ratify a treaty they have signed.<sup>32</sup> But this can never be a legal obligation, or ratification would lose its meaning. The reference to the case contemplated by article 42, paragraph 5, illustrates this, for in those cases the State concerned is really bound by its signature. The last few lines of the paragraph are intended to cover the fact that, for historical and traditional reasons, many common forms of full-powers imply, or seem to imply, a promise that ratification will be forthcoming in due course.<sup>33</sup>

67. *Paragraphs 2 and 3.* These paragraphs deal with the important theoretical question (a question of perhaps much lesser practical importance, however, for the reasons given in Lauterpacht's reports<sup>34</sup>) of the *residuary rule* to be applied in those cases where the treaty is either silent on the subject of ratification, or fails to indicate positively that ratification is necessary. The controversy is an old one, but as the arguments are fully set out in Lauterpacht's reports<sup>35</sup>, it is unnecessary to repeat them. The present Rapporteur holds to the view he expressed over twenty years ago,<sup>36</sup> that the residuary rule must be the one stated in the proposed text of paragraphs 2 and 3 of article 32. Writing in 1934,<sup>36</sup> the Rapporteur thought that despite the weight of text-book authority in favour of the view that ratification must be assumed to be necessary unless expressly dispensed with, this view no longer corresponded (even then) with modern practice, and he gave illustrations to that effect. This view is even

less in accordance with practice today, as is clearly brought out by the data in Lauterpacht's reports.<sup>37</sup>

68. Such a view is in fact decisively refuted by the fact that States have never been content to rely on it—to rely on the existence of any basic rule in favour of the necessity for ratification—but on the contrary have always insisted on providing expressly for ratification in those cases where they wanted it; while on the other hand being quite content to rely on silence precisely in those cases where they did not want it. This latter fact is very striking. There hardly exists—if there exists at all—a treaty providing in terms that it shall *not* be subject to ratification, as might have been expected had there been any basic rule that, in the absence of provision to the contrary,<sup>38</sup> ratification was necessary. *Per contra*, there are innumerable cases of treaties providing expressly for ratification. It is true that where ratification is to take place there are mechanical reasons for making special mention of the fact, since it has to be specified how ratification is to be effected, where, at what time, etc. But this very fact (see paragraph 70 below) adds to the difficulty of presuming a necessity for ratification in cases of silence.<sup>39</sup>

69. The above considerations, coupled with those arising from the increasing use of instruments coming into force on signature, the decreasing proportion of treaties and conventions made subject to ratification,<sup>40</sup> the fact that any necessity for ratification is largely a domestic matter, and that States which require it can always insist on express provision being made for it, or on reserving to themselves a special right of ratification—all lead to the conclusion that the residuary rule must be to the effect that, in the absence of such provision, it must be assumed that ratification was not intended. Lauterpacht in his reports indeed reaches this conclusion, so far as what might be called the weight of practice goes, but refuses finally to concede it, on the ground that the inference from practice is not an absolutely inescapable one; that although “in an increasing number of cases Governments attach importance to treaties—however designated—entering into force without ratification”, it still does not follow that they consider non-ratification to be “the presumptive rule to which, in the absence of provisions to the contrary, they must be deemed to have submitted themselves”.<sup>41</sup> To the present Rapporteur however, this inference seems to be a legitimate and necessary one, having regard to the fact that the parties are at perfect liberty to provide for ratification if they feel they require it, or to insist on a form

<sup>37</sup> A/CN.4/63 and A/CN.4/87, comments on article 6.

<sup>38</sup> Such provision no doubt results indirectly in many cases from, for example, a clause providing that the treaty is to come into force on signature. Yet its absence in any direct form is striking.

<sup>39</sup> Alternatively, it might be said that by their conduct countries have given up the protection of any general rule in favour of the necessity of ratification, if such existed, and have elected to rely on making express provision for it whenever they intend it; and this being so, they can no longer fall back on, or plead the existence of a general rule in those cases where they fail to make express provision for ratification.

<sup>40</sup> See A/CN.4/87 (Lauterpacht's second report), comment on article 6.

<sup>41</sup> *Ibid.*

<sup>32</sup> A/CN.4/63, comment and notes on article 5.

<sup>33</sup> For a discussion of this see: Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to *The American Journal of International Law*, Vol. 29 (1935), pp. 770 and 772-775.

<sup>34</sup> A/CN.4/63 and A/CN.4/87, comments on article 6.

<sup>35</sup> *Ibid.*, comments and notes on article 6.

<sup>36</sup> “Do Treaties Need Ratification?” *The British Year Book of International Law*, 1934, especially pp. 122-9.

of treaty in which it would be natural to insert a provision for ratification<sup>42</sup>; that they often do this, but still more often do not; and that, so far as can be ascertained, they never fail to do it in those cases where they really intend ratification. As Lauterpacht in his second report points out, if there were a rule presuming the necessity for ratification, the exceptions to it would have to be so wide as almost to do away with the rule.<sup>43</sup>

70. Furthermore, no other course would be practicable. If the treaty is silent about ratification, there will *ex hypothesi* be no provision for the exchange or deposit of ratifications, not will it be specified where, or with what authority, this is to be effected. Some States will ratify—others not. There will also *ex hypothesi* be no provision about coming into force.<sup>44</sup> Some States will consider that the treaty does not come into force until it has received the necessary ratifications (but which, and how many?); others will regard it as operative from the date of signature. It must be assumed at the present day that Chancelleries and Foreign Ministries, all well versed in treaty law and practice, are aware of the inconveniences bound to result from such a position, and that if they make, and allow their representatives to sign, an international agreement not providing for ratification, this must be because they do not intend it.

71. In this connexion, it is worth remembering the changes effected by modern communications. At a time when a representative might be out of touch with his Government for prolonged periods, or unable to obtain final instructions before proceeding to signature, a fundamental rule presuming the necessity for ratification if no contrary indication was given, would be understandable and perhaps necessary.<sup>45</sup> It is so no longer.

72. *Paragraph 4.* This provides as before (see article 29 and paragraph 57 above) for the case where, whatever the treaty says, a signature is, as such, only given subject to ratification, or a representative's full powers are limited by a reservation as to ratification. Here, therefore, is another "escape clause" that Governments can always make use of if they want to, provided the correct procedure is observed—a fact further rein-

<sup>42</sup> This is perhaps the heart of the problem. It would be natural to maintain that if Governments do not want ratification they should choose some form of agreement—such as an exchange of notes—that clearly does not call for it; but that if they choose full treaty form, they must be assumed to intend it. Yet it is precisely in the full treaty cases that express provision for ratification is almost always inserted. On the other hand, it frequently does not figure in those instruments where there might be room for genuine doubt, for example, something not a full treaty, but not an exchange of notes either.

<sup>43</sup> A/CN.4/87, comment on article 6.

<sup>44</sup> Because if coming into force on signature or on a specified date were indicated, this, by inference, would exclude the idea of ratification being necessary; while if the treaty provided for entry into force on or after ratification, this would, by inference, be a provision for ratification.

<sup>45</sup> It is this that probably accounts for the fact that the older authorities predicated the existence of a presumption in favour of ratification (see paragraph 67 and footnote 36 above). But the object was far less to protect the constitutional positions of States, than to insure that Governments were not committed to a text the final version of which they might never even have seen. This can seldom happen now.

forcing the considerations set out in paragraphs 67 to 71 above.

73. *Paragraph 5.* This is merely consequential.

74. *Constitutional limitations.* The whole subject of the necessity for ratification is of course closely connected with that of constitutional or other domestic limitations on the treaty-making power. But that subject, though it most often arises with reference to the question of ratification, is not peculiar to it. It can just as well arise with reference to the question of the validity (under the domestic law or constitution) of an accession or acceptance. By some authorities<sup>46</sup> this is treated as a matter affecting the formal validity of the treaty, i.e., is the ratification or accession *operative*, or is it a nullity? On this might depend the question whether the treaty comes into force. By other authorities (par example, the *Harvard Research in International Law*), the matter seems to be treated as one of substantive or essential validity, i.e., has a true consent been given? The same view is taken in the first report of Lauterpacht where the matter is discussed under the heading of conditions of validity, and not under that of the making and conclusion of treaties.<sup>47</sup>

75. This is also the view taken by the present Rapporteur, despite the close connexion of the subject with the treaty-making process as such. His reason is as follows. *Internationally* an *instrument* of ratification drawn up in the prescribed form by the competent executive authority, and transmitted or deposited through the ordinary channels in an ostensibly regular manner, must be deemed to be valid—indeed is valid (as an instrument or act) internationally. Its invalidity—if it is invalid—is on the domestic plane. The issue therefore goes deeper. There is a valid (formal) act, just as there is when a contract is signed in error, or as a consequence of a misrepresentation. But is it the act of the State as a whole—or must it be deemed so to be, and if so, in what circumstances? These are questions partly of capacity, partly of the nature of consent, and involve issues of essential or substantive, rather than merely formal, validity. For the time being therefore, this question is left over for later consideration.

### *Article 33. Ratification (legal effects)*

76. *Paragraphs 1-3.* These paragraphs are directed to making clear five points: (a) that ratification places the State in the position that it has finally accepted the treaty—a position from which it cannot now withdraw; (b) that it may nevertheless not be actually *bound* by the treaty, if the treaty itself is not yet in force; (c) that the moment the treaty does come into force, the State will *ipso facto* be bound, without further act or room for choice on its part; (d) that in the meantime it will be under certain obligations of good faith (see also article 30 and comment in paragraph 58 above); and finally (e) that should the treaty already be in force at the time of ratification, or come into force *by virtue of* that act, the obligation of the State is immediate.

<sup>46</sup> For instance Rousseau, *op. cit.*, pp. 235-248.

<sup>47</sup> A/CN.4/63.

77. *Paragraph 4.* Ratification confirms signature, but is not *operatively* retroactive. It constitutes an agreement to be bound by an assent provisionally given earlier. But it is only operative from its own date, not the earlier date.

*Article 34. Accession (legal character and modalities)*

78. *Paragraph 1* indicates that accession is *par excellence* the process employed to render participation possible on the part of States which took no part in the original negotiation or framing of the treaty. That is its real *raison d'être*. Another method, of course, is to leave the treaty open for signature, in which case later signatories will become parties by ratification, if the treaty is subject to ratification. But even where this is done, it is not usually convenient to leave the treaty open indefinitely for signature, so that at some point accession will become the only means by which a "new" State can participate.

79. *Paragraph 2.* Accession is not a right, except where it is provided for. States that took no part in the framing of a treaty, and which did not sign it, have no legal claim to be allowed to participate in it. A State cannot, *ex cathedra*, deposit a purported accession to any treaty it develops an interest in. A faculty to do so must exist under the treaty itself, or be granted by one of the methods indicated in paragraph 2 of this article.

80. "... after consultation with any States still entitled to become parties by ratification..." (paragraph 2). See article 30, paragraph 2, and paragraph 59 above. A signatory State which is entitled to ratify, and may at any time become party to the treaty by doing so, has at least a right to be consulted if it is proposed to enlarge the class or number of States entitled to participate in the treaty, or specifically to admit some particular State. Some would say that a signatory State should have a right of veto in such cases<sup>48</sup>—and probably this is the correct position as a matter of *lex lata*. However, this might enable a State which had little real intention of ratifying to block indefinitely a desirable accession, and, *de lege ferenda*, the rule proposed—i.e., a right of consultation—is probably adequate to safeguard the rights of signatories.

81. *Paragraph 3.* This is the corollary of the absence of any unfettered right to accede resulting from paragraph 2.

82. *Paragraphs 4 and 5.* These paragraphs are intended to mark the fact that, even where accession is provided for, it can only properly be resorted to by States to whom signature (followed, if necessary, by ratification) is not open as a means of participation, or where the treaty is not to be signed at all. It is incorrect and inadmissible for a State that has signed a treaty to "accede" to it. Such a State ratifies.

83. *Paragraph 6.* Strictly, accession implies, and should only be made to, a treaty already in force. It is

<sup>48</sup> For any particular signatory State, the prospective balance and possibly the utility of a treaty might, so far as it was concerned, be seriously affected (e.g. in the matter of weight of voting) by the unforeseen admission of one or more States whose participation had not originally been contemplated.

essentially a method of joining a "going concern" so to speak, and this results from the fact (which constitutes the fundamental difference between accession and signature) that accession is essentially the acceptance of something already done—not a participation in the doing of it. Exceptionally, however—and particularly in the type of case where there is no signature at all—accessions prior to coming into force may be admitted and may have to be admitted. The cases cited in Lauterpacht's first report<sup>49</sup> represent a lax practice (mainly pre-war) that ought not to be encouraged, because it is not only wrong in principle but entirely unnecessary—except in those cases where signature of the treaty has never been possible at all.

84. *Paragraphs 7 and 8* are self-explanatory.

*Article 35. Accession (legal effects)*

85. *Paragraph 1.* This is unquestionably the correct rule. "Accession", or as it is sometimes called "adherence", implies a definitive act. The treaty is adhered to. An accession subject to ratification is not an accession, and also represents an attempt to secure the status of a signatory after the moment for that has gone by<sup>50</sup> (see also comment in paragraph 83 above). It is desirable that the various acts and concepts involved in treaty-making should preserve their respective special uses and distinctive juridical characteristics, and not become blurred by being resorted to out of place.

86. *Paragraph 2.* Accession is, in its juridical nature, a very different process from signature and ratification. But broadly its *results* are the same. It makes the acceding State a party to the treaty, with all the rights and obligations of a party, and on a basis of equality.<sup>51</sup> It may be suggested, however, that as a logical corollary of the fact that an acceding State accepts, but does not make a contract, it can have no voice in any subsequent amendment of that contract, though it need not of course accept the amendment. According to this view, an acceding State would not have any right to be consulted about, or participate in, any subsequent amendments to the treaty, though it would have an automatic right to terminate its adherence to the treaty if it disagreed with the result. According to normal practice, however, an

<sup>49</sup> A/CN.4/63, comment on article 7.

<sup>50</sup> Professor Rousseau (*op. cit.*, p. 280) says "Rationnellement, la règle de la ratification paraît étrangère aux adhésions... : aucun accord de volontés du type contractuel n'intervenant en effet entre les États signataires et l'État adhérent, celui-ci n'a pas à confirmer après coup un acte qui n'est en rien l'équivalent d'une signature. Au point de vue pratique, ce serait là une procédure défectueuse entraînant des complications inutiles."

He points out, however, that in the League of Nations a practice of acceding subject to ratification was introduced, and to some extent admitted. No case is known to have occurred since 1945, and it seems desirable that a code on treaty law should rule it out.

<sup>51</sup> Pradier-Fodéré (*Traité de droit international public européen et américain* (Paris, G. Pedone-Lauriel, 1885), Vol. 2, p. 829) says "L'accession place l'État qui la donne sur la même ligne que les parties principales qui ont conclu et signé le traité, elle lui confère les mêmes droits comme elle lui impose les mêmes obligations réciproques envers tous les États intéressés: la puissance qui accède devient partie contractante directe, en obtenant par son accession tous les droits et en se chargeant de toutes les obligations qui lui seraient échues ou qui auraient été mises à sa charge si elle eût signé immédiatement le document principal."

acceding State is admitted to participate in the discussion and voting on any proposals for amendment, in exactly the same way as other parties. Therefore, unless the treaty itself reserved some privilege in this matter to signatory and ratifying States (which position the acceding State would have accepted by its accession) no difference of status can exist.

87. *Paragraph 3.* This merely provides for the case, which should be exceptional (see paragraph 83 above) where accession takes place prior to the entry into force of the treaty.

*Article 36. Acceptance (character, modalities, and legal effects)*

88. *Paragraph 1.* Acceptance, which is a permissible method of participation only where the treaty provides for it, nevertheless involves no new principle.<sup>52</sup> It is either, in effect, a ratification (where it follows on a signature given subject to reservation of acceptance) or it is an accession (where there has been no previous signature and the treaty provides for participation by simple acceptance alone). However the rule that accession implies, in general, a treaty already in force does not apply to cases of participation by simple acceptance, since it is normally clear in those cases, from the terms of the treaty, that acceptance can be given at any time.

89. *Paragraph 2* is self-explanatory.

90. *Paragraph 3.* See paragraph 85 above. A State accepts or it does not.

91. *Paragraph 4.* No comment is required.

*Article 37. Reservations (fundamental rule)*

92. *General comment.* The question of reservations has now been a controversial one for some time—though more particularly in regard to reservations to general multilateral conventions, and where the reservation is wholly unilateral and has not been agreed to by the other interested States or has been definitely objected to by some of them. A history of this controversy and a discussion of the whole matter will be found in an article by the present Rapporteur in *The International and Comparative Law Quarterly* entitled "Reservations to Multilateral Conventions".<sup>53</sup> A very full discussion will also be found in Lauterpacht's reports.<sup>54</sup> The Rapporteur feels that in any code on the law of treaties the Commission should adhere to the same basic view as that which inspired chapter II of its report on the work of its third session.<sup>55</sup> This of course had reference to multi-

lateral conventions, but the considerations involved are applicable *a fortiori* to bilateral and plurilateral agreements. The Rapporteur has thought, however, that even as a matter of *lex data*, the strict traditional rule about reservations could be regarded as mitigated in practice by the following considerations which, taken together, allow an appreciable amount of latitude to States in this matter, and should meet all reasonable needs:

(a) By definition (see article 13, paragraph (1)) mere explanatory declarations, or statements of intention (and, within limits, of interpretation) are not regarded as reservations, and are permissible;

(b) A reservation only counts as such if it purports to derogate from a substantive provision of the treaty;

(c) Any State negotiating a treaty has a faculty to seek the insertion in it of an express provision permitting specific reservations, or certain classes of reservations;

(d) Any State has the right to ask specific acquiescence in any reservation it desires to make, even in those cases where the treaty makes no provision for reservations;

(e) Provided a proposed reservation has been clearly brought to the notice of another State, either during the negotiation of the treaty or afterwards, its tacit acquiescence (or lack of actual objection) may, at any rate in the case of general multilateral treaties, be inferred from silence, and this will suffice to constitute consent;

(f) Experience has shown that States do not normally refuse consent or object to reservations, unless these are clearly unreasonable and such as ought not to be admitted.

If to these considerations, more or less *de lege data*, are added the following, *de lege ferenda*, in the case of general multilateral treaties,<sup>56</sup> all legitimate requirements should be met:

(1) That in the case of reservations proposed after the treaty has been drawn up, acquiescence on the part of any particular State will be presumed if, within three months, no objection has been received;

(2) That in the same circumstances, although normally there must be acquiescence by all the States who have shown their interest in the treaty by signing it, even if they have not actually become parties to it, when the treaty has been in force for a certain period, in order to prevent a signatory State which does not seem likely to become a party from blocking a reservation not objected to by other States, the right of objection would be confined to actual parties to the treaty, provided these represented a reasonable proportion of those entitled to become parties.

These particular ideas are embodied in article 39 of the draft.

93. *Paragraph 1.* This has already been explained.

94. *Paragraph 2.* This poses the fundamental requirement of acceptance.

<sup>52</sup> The observations in Brierly's first report (A/CN.4/23, paras. 66-75) are most pertinent and should be given full weight. Lauterpacht's first report (A/CN.4/63, comment and note on article 8) is equally correct in its implications that no real juridical issue is raised by the "acceptance" procedure. Nevertheless, it is desirable to recognize the considerable practical conveniences of this method. It has mainly been adopted with reference to treaties concluded on the American continent, though only in a limited number of cases.

<sup>53</sup> *The International and Comparative Law Quarterly*, Vol. 2 (January 1953), pp. 1-26.

<sup>54</sup> A/CN.4/63 and A/CN.4/87, comments and notes on article 9.

<sup>55</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9.*

<sup>56</sup> Because, in the case of bilateral or plurilateral treaties, it is impossible to admit reservations that are not actively agreed to by the participating States.

95. *Paragraph 3.* If a treaty specifically permits certain reservations, or a certain class of reservations, it must be presumed that no others were intended.

96. *Paragraph 4.* It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties. It is one thing to make a reservation concerning a substantive obligation of the treaty, if this receives the necessary assents; but it is another thing to assume the substantive obligations of the treaty, and yet refuse to be bound by the very provision which is intended to afford some guarantee that these obligations will be carried out, or to give the other parties a right of recourse if they are not. Such a provision is too fundamental to the scheme and order of any treaty containing it to permit of any reservation, and a State purporting to make such a reservation is virtually reserving a right to execute the treaty only at its discretion. It is sometimes argued that States can only be obliged to submit disputes to arbitration or judicial settlement if they consent to do so. This is true, but such consent need not be given *ad hoc* in every individual case. It can be given generally, and in advance, for any class or classes of case, as the optional clause procedure under article 36, paragraph 2, of the Statute of the International Court of Justice shows. A State which becomes a party to a treaty containing a provision for arbitration or judicial settlement thereby *ipso facto* consents to settle by those means any dispute in which it becomes involved under the treaty.

*Article 38. Reservations to bilateral treaties and other treaties with limited participation*

97. A distinction must be drawn between general multilateral treaties and bilateral treaties or merely plurilateral treaties made between a restricted number of States having some common interest or object. Whereas in the case of general multilateral treaties there may be grounds, arising from their character and the circumstances in which such treaties are framed, for permitting a fairly liberal practice about reservations, quite different considerations apply to bilateral treaties and other treaties with restricted participation. Such treaties are almost always framed by a process involving the unanimous consent of the negotiating States to each article, and indeed each sentence; and every word in the treaty is usually the result of careful and prolonged consideration, and constitutes the *ne plus ultra* of the agreement that can be reached. The element of contract and common accord is so strong, that the admission of reservations (except where the treaty provides for them, or they are specially agreed to) would be contrary to the whole spirit of the negotiation, and to the basis and balance of the treaty itself.

*Article 39. Reservation to multilateral treaties*

98. Here some latitude may be allowed, on lines already explained (see paragraph 92 above). The period of five years, and the figure of twenty per cent specified in paragraph 1 (b) (ii), and the period of three months specified in paragraph (2), are of course matters for discussion.

99. *Paragraph 3.* This lays down the necessary consequence if a reservation is objected to, and the objection is maintained.

100. *Paragraph 4.* Despite certain mechanical difficulties, this is believed to represent the right rule, as compared with that propounded in the paragraph numbered 1 in alternative A to article 9 of the Lauterpacht draft.<sup>57</sup> A State which has entered a reservation not yet accepted—or which fails to secure acceptance—cannot be said to be a party, and its ratification or accession, etc., must remain in suspense until the reservation is either accepted or withdrawn.

*Article 40. Reservation (legal effect if admitted)*

101. It is considered useful to state these consequences, but they require no explanation.

*Article 41. Entry into force (modalities)*

102. *Paragraph 1.* This is self-explanatory. The residuary rule mentioned is the only practicable one.

103. *Paragraph 2.* This is a not uncommon case, and a rule should be provided for it.

104. *Paragraph 3.* It seems necessary to try and propound a rule *de lege ferenda* for the not uncommon case where a treaty provides that the ratifications are to be exchanged or deposited by a certain date, but says no more; and when the date arrives the ratifications are not exchanged, or not all of them have been deposited. If all are there, then the date named may be taken as the date of coming into force. If not, the problem arises whether the treaty comes into force on that date for the States which have then ratified it, or whether entry into force must await the later ratifications, which may possibly never arrive. It is thought that in such circumstances, unless it is clear from the nature of the treaty that ratification by all concerned is intended before entry into force can take place, the best rule is to bring the treaty into force on the date named for the exchange or deposit of ratifications, provided a substantial number of the States concerned have by then ratified it, or as soon as a substantial number have duly done so.

105. *Paragraphs 4 and 5.* These are self-explanatory.

*Article 42. Entry into force (legal effects)*

106. *Paragraph 1.* This covers the case of *provisional* entry into force and states the rule applicable in case this situation becomes unduly prolonged.

107. *Paragraphs 2-4.* These paragraphs are self-explanatory, and certain aspects of them have already been discussed under other headings. Strictly, a separate instrument, to come into force on signature, should deal with all such matters as ratification, entry into force, etc. Logically, a treaty which, *ex hypothesi*, is not yet in force, cannot provide for its own entry into force since, until that occurs, the clause so providing can itself have no force. The real truth is that, by a tacit assumption invariably made, the clauses of a treaty providing for ratification, accession, entry into force and certain other possible matters, are deemed to come into force separately

<sup>57</sup> See A/CN.4/63, comment on article 9, section II.

and at once, on signature—or are treated as if they did—even though the substance of the treaty does not.

108. *Paragraph 5.* This case is not a common one, but it occurs. For instance, peace treaties not infrequently provide that they must be ratified by certain States, but that they will come into force if and when they are ratified by certain other States. Ratification by States of the first group will not therefore bring the treaty into force. On the other hand, ratification by States of the second will, and will do so for the first group of States also, even if they have not yet ratified. This group is, in that event, really in breach of the treaty, and the correct legal position would seem to be that the States of the

first group are bound from the start by their signature (a) to ratify<sup>58</sup> and (b) to carry out the substantive provisions of the treaty as from the date when ratification by the second group of States brings the treaty into force.

109. *Paragraph 6.* This is self-explanatory.

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<sup>58</sup> Of course in these circumstances ratification loses its *raison d'être* juridically, and becomes strictly otiose. The real object of this procedure is a political one, namely to secure a parliamentary endorsement of the treaty, with a view to preventing any eventual attempt at a repudiation of it on such grounds as, for instance, that the representatives signing the treaty exceeded their authority, or had no right to agree to certain of its clauses.

# DIPLOMATIC INTERCOURSE AND IMMUNITIES

## DOCUMENT A/CN.4/98

### Memorandum prepared by the Secretariat

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## Introduction

### A. PRELIMINARY OBSERVATIONS

1. During its sixth session, held at Paris from 3 June to 28 July 1954, the International Law Commission briefly examined the question of the codification of the rules governing "Diplomatic intercourse and immunities" and took the following decision:

"In pursuance of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of the topic "Diplomatic intercourse and immunities" and to treat it as a priority topic, the Commission decided to initiate work on this subject. It appointed Mr. A. E. F. Sandström as special rapporteur."<sup>1</sup>

2. At its first session, held at New York from 12 April to 9 June 1949, the Commission, in accordance with article 18, paragraph 1, of its Statute, had surveyed "the whole field of international law with a view to selecting topics for codification" (A/CN.4/4). In order to facilitate this task, the Secretariat had submitted a memorandum containing a comprehensive analysis of international law relating to this work of codification. The question of diplomatic immunities is dealt with on pages 53 and 54 of that memorandum; after a short reference to the relevant work of the League of Nations, to the Sixth International Conference of American States at Havana (1928) and to the draft convention published in 1932 by the Harvard Research in International Law, the memorandum concludes:

"The work of the League of Nations Committee of Experts, of the Havana Convention of 1928, and of the Harvard Research, the documentation on which that work was based, as well as the rich sources of judicial practice, of diplomatic correspondence, and of doctrinal writing and exposition, provide sufficient material for a comprehensive effort at codifying this part of international law. The wealth of the available practice need not necessarily mean that such codification would be merely in the nature of systematization and imparting precision to a body of law with regard to which there is otherwise agreement on all details. This is not the case. Practice has shown divergencies, some of them persistent, on such questions as the limits of immunity with regard to acts of a private law nature, the categories of the diplomatic staff which is entitled to full jurisdictional immunities, the immunities of the subordinate staff, the immunities of nationals of the receiving State, the extent of the immunities from various forms of taxation, conditions of waiver of immunities, and the nature of acts from which such waiver will be implied. There may also have to be considered the consequences of the partial amalgamation, in some countries, of the diplomatic and consular services. For the task confronting the International Law Commission in this matter is not only one of diplomatic immunities and privileges, but also of the various aspects of diplomatic intercourse in general."<sup>2</sup>

3. At the sixth meeting of its first session, the International Law Commission decided that: "... the subject

<sup>1</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9*, para. 73.

<sup>2</sup> A/CN.4/1/Rev. 1, p. 54.

of diplomatic intercourse and immunities would appear in the list of topics to be retained.”<sup>3</sup>

4. The report of the International Law Commission covering the work of its first session mentions the problem as the twenty-first of the “Topics of international law considered by the Commission”<sup>4</sup> and among the fourteen provisionally selected for codification.<sup>5</sup> It was not, however, one of the topics to which the Commission gave priority.<sup>6</sup>

#### B. THE YUGOSLAV PROPOSAL FOR PLACING THE TOPIC ON THE AGENDA OF THE SEVENTH SESSION OF THE GENERAL ASSEMBLY

5. Subsequently, by a letter dated 7 July 1952 addressed to the Secretary-General, the acting permanent representative of the Federal People’s Republic of Yugoslavia to the United Nations requested the inclusion of the following item in the provisional agenda of the seventh regular session of the General Assembly:

“Giving priority to the codification of the topic ‘Diplomatic intercourse and immunities’ in accordance with article 18 of the Statute of the International Law Commission.”<sup>7</sup>

6. In an “Explanatory memorandum”, sent with a letter addressed to the Secretary-General on 10 October 1952, the acting permanent representative of the Federal People’s Republic of Yugoslavia stated, *inter alia*, that:

“Of late . . . the violations of the rules of diplomatic intercourse and immunities have become increasingly frequent. . . Such a situation makes it imperative to undertake, with all the necessary urgency, the task of codifying the rules of international law relating to diplomatic intercourse and immunities and thus to confirm definite and precise rules of international law . . .”<sup>8</sup>

He added that the purpose of his request for the inclusion of the item in the agenda was to enable the appropriate body urgently to begin the study of the problem and the codification of the pertinent rules, in order to make clear what are the rights and privileges of diplomatic representatives and what are the obligations of the State on whose territory they perform their functions.<sup>9</sup>

#### C. THE YUGOSLAV DRAFT RESOLUTION AND THE DISCUSSION IN THE SIXTH COMMITTEE

7. On 29 October 1952, the representative of the Federal People’s Republic of Yugoslavia submitted a draft resolution<sup>10</sup> requesting the General Assembly to recommend that the International Law Commission

should: “. . . undertake the codification of the topic ‘Diplomatic intercourse and immunities’ as a matter of priority”. In support of this request, it was stated in the preamble that the codification of international law relating to this topic “. . . is necessary and desirable for the purpose of promoting an improvement of relations among States”.

8. The Sixth Committee discussed the item during its 313th to 317th meetings, held from 29 October to 3 November 1952.<sup>11</sup> It may be useful to consider very briefly the various amendments of substance which were submitted during these discussions but failed to obtain the Committee’s approval. In this way it will be possible to perceive the true scope of the present study.

9. First, at the 315th meeting, the United States representative expressed the opinion that the scope of the Yugoslav draft resolution should be broadened, “. . . so as to refer to consular as well as to diplomatic privileges and immunities”.<sup>12</sup>

Similarly, the United States representative and several others wished to include “. . . such matters as personal privileges and immunities, asylum, protection of premises and archives, and selection and recall of staff”.<sup>13</sup>

10. A Colombian amendment<sup>14</sup> to the Yugoslav draft resolution<sup>15</sup> expressly proposed that the International Law Commission should deal not only with diplomatic privileges and immunities but also with the right of asylum. This amendment was rejected by 24 votes to 17, with 10 abstentions,<sup>16</sup> the majority of the Committee holding that the two questions were distinct and had always been regarded as such by the International Law Commission.<sup>17</sup>

#### D. GENERAL ASSEMBLY RESOLUTION 685 (VII)

11. The Sixth Committee in fact rejected all the amendments mentioned above<sup>18</sup> and submitted to the General Assembly the following resolution, which was adopted on 5 December 1952 at the 400th plenary meeting:

“*The General Assembly,*

“*Recalling* the purposes of the United Nations and the provision of the Preamble of the Charter according to which ‘the peoples of the United Nations’ are determined to ‘practice tolerance and live together in peace with one another as good neighbours’,

“*Expressing* its desire for the common observance by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities, particularly in regard to the treatment of diplomatic representatives of foreign States,

<sup>3</sup> A/CN.4/SR.6.

<sup>4</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 15.

<sup>5</sup> *Ibid.*, para. 16, No. 11.

<sup>6</sup> *Ibid.*, paras. 19 and 20.

<sup>7</sup> *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/2144.

<sup>8</sup> *Ibid.*, document A/2144/Add.1.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, document A/C.6/L.248.

<sup>11</sup> *Ibid.*, document A/2252, para. 3.

<sup>12</sup> *Ibid.*, *Seventh Session, Sixth Committee*, 315th meeting, para. 8.

<sup>13</sup> *Ibid.*, para. 7.

<sup>14</sup> *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/C.6/L.251.

<sup>15</sup> *Ibid.*, document A/C.6/L.250.

<sup>16</sup> *Ibid.*, document A/2252, para. 32.

<sup>17</sup> *Ibid.*, *Seventh Session, Sixth Committee*, 315th meeting, para. 32 ff.

<sup>18</sup> *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/2252, paras 32 and 33.

"Considering that early codification of international law on diplomatic intercourse and immunities is necessary and desirable as a contribution to the improvement of relations between States,

"Noting that the International Law Commission has included the topic 'Diplomatic intercourse and immunities' in its provisional list of topics of international law selected for codification,

"Requests the International Law Commission, as soon as it considers it possible, to undertake the codification of the topic 'Diplomatic intercourse and immunities', and to treat it as a priority topic."

12. The International Law Commission, to which this resolution was communicated at its fifth session, agreed to wait until the following session before deciding when it could undertake the codification of this topic;<sup>19</sup> at its sixth session, it appointed Mr. A. E. F. Sandström as Special Rapporteur on the subject.<sup>20</sup>

13. From the preamble to resolution 685 (VII) it is clear that the request to the Commission to undertake the codification of the topic "Diplomatic intercourse and immunities" reflects the Assembly's hope that the existing principles and rules and recognized practice would be observed by all Governments, particularly in regard to the treatment of foreign diplomatic representatives.

#### E. PURPOSE OF THIS STUDY

14. This memorandum, intended for the International Law Commission, was prepared in response to a request made to the Secretariat by Mr. A. E. F. Sandström, Special Rapporteur.

15. The purpose of this study is to present a broad outline of existing principles and rules and of the practice followed by States with regard to the immunities and privileges enjoyed by diplomatic representatives of foreign States.

16. This memorandum will first review the various attempts made by States to reach general agreement on the problem of diplomatic intercourse and immunities, the relevant work of the League of Nations and the proposals made by private authorities; it will then summarize the main theories relating to the juridical basis of the privileges and immunities in question. A final section will briefly discuss some of the problems which the existence of these privileges and immunities involves and refer to a few selected judicial decisions in which these problems have been considered.

#### CHAPTER I

#### Review of the attempts to reach General Agreement on the problem of diplomatic privileges and immunities

##### A. DIPLOMATIC INTERCOURSE AND IMMUNITIES UP TO THE AIX-LA-CHAPELLE REGULATION

17. "There are two maxims in the law of nations

relating to ambassadors which are generally accepted as established rules: the first is that ambassadors must be received and the second that they must suffer no harm."<sup>21</sup>

##### 1. DIPLOMATIC INTERCOURSE BEFORE THE CONGRESS OF VIENNA

18. The sanctity of ambassadors was recognized at a very early date. In Roman times, whenever the priests of College of Fetiales conducted diplomatic negotiations, the Republic demanded and obtained respect for their inviolability; it also refrained, as a general rule, from any interference with the person or property of foreign ambassadors sent on special mission to Rome. As Oppenheim says:

"Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct."<sup>22</sup>

19. The establishment of permanent legations and embassies is nevertheless a recent historical development:

"The history of diplomacy falls into two clearly distinct periods. The first is the period of non-permanent *ad hoc* embassies, covering antiquity and the Middle Ages and ending in the 15th century. The second period is that of permanent legations, which originated in Italy, particularly in Venice, in the 15th century..."<sup>23</sup>

After the Peace of Westphalia (1648), which confirmed the principle of the balance of power in Europe and thus obliged States to keep watch on each other, the establishment of permanent diplomatic missions gradually became the common practice; initially, however, certain States, such as France in the reign of Henri IV and England under Henry VII, vigorously opposed the establishment of embassies or legations. In 1651 the States General of Holland debated whether embassies were of any use,<sup>24</sup> and in 1660 Poland proposed that all accredited ambassadors should be sent out of the country.

20. The French Revolution, the wars which followed, and the spectacular industrial development which was then beginning to make itself felt, put an end to the isolation of States. Regular relations were established and it became necessary to seek agreement on some universally binding rules regarding the rights and privileges of foreign diplomats.

##### 2. DECISIONS TAKEN AT THE CONGRESS OF VIENNA (1815) AND AT AIX-LA-CHAPELLE (1818)

21. The first international documents which should be

<sup>21</sup> Hugo Grotius, *De jure belli ac pacis*, Book II, chap. XVIII.

<sup>22</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 7th ed., ed. H. Lauterpacht (New York, Longmans, 1948), pp. 687 and 688.

<sup>23</sup> P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Arthur Rousseau, 1926), Vol. I, Part III, p. 29.

<sup>24</sup> Sir Cecil Hurst, *International Law, The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Limited, 1950), p. 171.

<sup>19</sup> *Ibid.*, *Eighth Session, Supplement No. 9*, para. 170.

<sup>20</sup> *Ibid.*, *Ninth Session, Supplement No. 9*, para. 73.

mentioned in this connexion relate to the classification of diplomatic agents. Owing to the frequently irreconcilable claims of sovereigns concerning the relative rank of these agents, this question has often given rise to disputes and to some fairly serious incidents:

“The inequality of European powers”, wrote F. Deak “and, to an even greater extent, jealousy and unceasing rivalry . . . were the principal forces that shaped the policies of the Middle Ages . . . Mediaeval records give countless accounts of disputes between the diplomatic agents of different powers, each of whom claimed precedence over his colleagues . . . it is in the light of these facts that we must consider the rules prepared by the Congress of Vienna for the classification of diplomatic agents according to their rank and title . . .”<sup>25</sup>

22. The Regulation adopted at Vienna on 19 March 1815 (Annex XVII of the Acts of the Congress) succeeded in putting an end to these disputes over precedence. The Regulation provides:

“XVII. *Regulation concerning the relative ranks of diplomatic agents*

“In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite the representatives of other crowned heads to adopt the same regulations.

“Article I. Diplomatic agents shall be divided into three classes:

“That of Ambassadors, Legates, or Nuncios;

“That of Envoys, Ministers or other persons accredited to sovereigns;

“That of *Chargés d'affaires* accredited to Ministers of Foreign Affairs.

“Article II. Only Ambassadors, Legates or Nuncios shall possess the representative character.

“Article III. Diplomatic officials on extraordinary missions shall not *ipso facto* be entitled to any superiority of rank.

“Article IV. Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified. The present regulation shall not in any way modify the position of the Papal representatives.

“Article V. A uniform method shall be established in each State for the reception of diplomatic officials of each class.

“Article VI. The existence of a relationship by blood or by marriage between Courts shall not confer any rank on their diplomatic officials. Similarly, the existence of a political alliance shall not confer any rank.

<sup>25</sup> Francis Deak, “Classification, immunités et privilèges des agents diplomatiques”, *Revue de droit international et de législation comparée*, 3rd. ser., Vol. IX (1928), p. 181 (quoted by Raoul Genet, *Traité de diplomatie et de droit diplomatique* (Paris, A. Pedone, 1931), Vol. I, pp. 266 and 267.

“Article VII. In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

“The present Regulation was inserted in the Protocol concluded by the plenipotentiaries of the eight Powers signatories of the Treaty of Paris at their meeting on 19 March 1815.”<sup>26</sup>

23. This agreement thus established three categories of public ministers: ambassadors and certain agents of equivalent rank, ministers in the strict sense and *chargés d'affaires*. Articles IV to VII finally put an end to all disputes over precedence by providing, first (article IV), that the relative ranks of diplomatic agents would be determined by the date of their arrival in the country to which they were accredited and, secondly (article V), that each State would establish a uniform procedure for their reception, regardless of the country they represented. Lastly, articles VI and VII, which stipulated that relationship could not be used as a pretext for granting a special rank to the agents concerned (article VI), and laid down the order to be observed in the signing of international treaties or instruments (article VII), eliminated other frequent causes of friction.

24. The Vienna Regulation was supplemented by the Protocol of the Conference of 21 November 1818 (Aix-la-Chapelle), which established a new class of diplomatic agent: that of “ministers resident”. These agents, according to the Protocol, “. . . shall take rank as an intermediate class between ministers of the second class and *chargés d'affaires*.”<sup>27</sup>

25. It should perhaps be noted that the distinction drawn in the Vienna Regulation between ambassadors and agents of the second class is gradually losing its practical significance, because today most States tend more and more to accredit to foreign capitals agents designated as ambassadors. Some authors have asserted that ambassadors enjoy an absolute right to deal directly with the sovereign to whom they are accredited, while ministers plenipotentiary do not possess that prerogative.<sup>28</sup>

26. The classification established at Vienna nevertheless still holds good. This means that the first class comprises ambassadors, who hold the highest rank which a country's diplomatic representative can attain; the same degree of precedence is enjoyed by legates and nuncios, who are Papal envoys usually entrusted with ecclesiastical missions. Ministers plenipotentiary, who were originally entrusted with extraordinary and temporary missions and as such entitled to take precedence immediately after ambassadors, still occupy second place. The minister resident, who, according to Genet, “. . . does not represent the dignity of the prince but merely conducts his business”,<sup>29</sup> occupies a lower hierarchical

<sup>26</sup> Géo. Fréd de Martens, *Nouveau recueil de traités* (Gottingen, Librairie de Dieterich, 1818), Vol. II, pp. 449 and 450.

<sup>27</sup> The text of this Protocol is reproduced in Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), Vol. III, p. 184 and n. 1.

<sup>28</sup> *Ibid.*, p. 187.

<sup>29</sup> Raoul Genet, *Traité de diplomatie et de droit diplomatique* (Paris, A. Pedone, 1931), Vol. I, p. 283.

position. However, Oppenheim appears to hold a somewhat different view. He says that:

“The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, have not the privilege of treating with the Head of the State personally, and cannot at all times ask for an audience with him. But otherwise there is no difference between these two classes, except that Ministers Plenipotentiary receive the title of ‘Excellency’ by courtesy only, and not by right.”<sup>30</sup>

Lastly we should mention the categories of ordinary *chargés d'affaires* who may be actual heads of missions and acting *chargés d'affaires*; the latter, usually in a temporary capacity, run the diplomatic mission in their chief's absence or, in the event of his recall, pending the designation of a successor.

## B. ATTEMPTS TO CODIFY INTERNATIONAL LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES

### I. GENERAL OBSERVATIONS

27. The rules relating to diplomatic immunities are essentially based on custom. They originate in the conviction that the absolute independence of the diplomatic agent in his dealings with the sovereign to whom he is accredited is an indispensable condition for the accomplishment of his mission. It is from this principle that the various immunities enjoyed by the diplomatic representatives of States derive. Some of these immunities, such as the inviolability of the agent's person and residence, are undisputed; with regard to some others, however, there is still a certain lack of uniformity in interpretation and application. A number of States give statutory recognition to the principle of the immunity and inviolability of foreign diplomatic representatives; we can cite, for example, the French Decree of 13 *Ventôse*, year II, concerning the representatives of foreign Governments,<sup>31</sup> the British “Act for preserving the privileges of ambassadors and other public ministers of foreign princes and states” of 1708 (7 Anne, c. 12),<sup>32</sup> and the United States Act of 30 April 1790.<sup>33</sup> These statutes, however, in so far as they relate to foreign diplomatic agents, merely incorporate into domestic legislation certain generally recognized rules of international law.

28. Frequent efforts have been made, both officially and privately, to clarify disputed rules and to codify the whole body of international law on this subject. The most important of these draft codifications will be examined briefly below.

<sup>30</sup> Oppenheim, *op. cit.*, p. 696.

<sup>31</sup> A. H. Feller and Manley O. Hudson (ed.), *Diplomatic and Consular Laws and Regulations of Various Countries*, (Washington, D.C., Carnegie Endowment for International Peace, 1933), p. 536.

<sup>32</sup> *Ibid.*, pp. 211 and 212.

<sup>33</sup> *Ibid.*, p. 1340.

## 2. INTERNATIONAL TREATIES RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES

### (a) *Bilateral treaties*

29. Generally speaking, provisions concerning diplomatic privileges and immunities have been embodied in treaties between States only since the last century. Express provisions relating to this subject are to be found mainly in conventions which Latin American, Middle Eastern or Far Eastern States have concluded with the United States or European Governments.

“Out of approximately one hundred treaties containing articles on diplomatic agents, Latin American States were parties to about one-half, Near and Middle Eastern States to one-fourth and States of the Far East to the remainder. These treaties were in nearly every case either with the United States or with European nations. Only a very few conventions between European States contained any provisions as to the privileges and immunities to be enjoyed by diplomatic agents.”<sup>34</sup>

30. These treaties show that privileges and immunities are granted to foreign diplomats on a reciprocal basis. To mention only one example, the treaty concluded in 1809 between Great Britain and Portugal contained the following provision:

“His Britannic Majesty and His Royal Highness the Prince Regent of Portugal agree severally to grant the same favours, honours, immunities, privileges and exemptions from duties and imports, to Their respective ambassadors, ministers or accredited agents at the Courts of each of them; and whatever favours either of the two Sovereigns shall grant in this particular at His own Court, the other Sovereign engages to grant the same at His Court.”<sup>35</sup>

31. Many other treaties contain the most-favoured-nation clause. We can cite, as examples, the treaty concluded in 1809 between Great Britain and the Sublime Porte, the treaty of friendship, commerce and navigation concluded in 1826 between Great Britain and Mexico, or the treaties concluded in 1827 between the Netherlands and Mexico, in 1828 between the Netherlands and Brazil and in 1829 between the Netherlands and Colombia.

32. Many such treaties are listed by Harvard Law School on pages 28 and 29 of the work quoted above. The list includes the treaty concluded in 1843 between France and Ecuador, the provisions of which were used as a model for the treaties between France and other Latin American Republics. Article XXVII of this treaty states:

“The two Contracting Parties expressly agree that notwithstanding the foregoing provisions, the diplomatic and consular agents . . . of either State shall be absolutely entitled, in the territory of the other State, to such exemptions, privileges and immunities as are granted or may at any time be granted to the most favoured nation.”<sup>36</sup>

A treaty of commerce and friendship concluded between

<sup>34</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 26.

<sup>35</sup> *Ibid.*, p. 27.

<sup>36</sup> *Ibid.*, p. 28, n. 2.

France and Persia in 1885 contained a clause granting most-favoured-nation treatment to the diplomats of the two countries; its text was largely followed in similar conventions concluded by Persia with the United States, Great Britain, the Netherlands, Belgium and other countries.<sup>37</sup> Similarly, a treaty concluded between China and Sweden contained the following provision:

“The diplomatic representatives thus accredited shall enjoy all the prerogatives, privileges and immunities accorded by international usage to such representatives, and they shall also in all respects be entitled to the treatment extended to similar representatives of the most favoured nation.”<sup>38</sup>

33. Other treaties refer to certain specific privileges; for example, in the treaty concluded in 1858 between the United States and China, provision was made for correspondence by American diplomatic agents with Chinese officials on a footing of equality, and for the right of visit and sojourn at the Chinese capital.<sup>39</sup>

34. Some treaties, such as the one concluded in 1858 between France and China, merely contained a general enumeration of the immunities enjoyed by diplomatic agents:

“At their place of residence, diplomatic agents shall enjoy, on a basis of reciprocity, the privileges and immunities recognized by the law of nations; in pursuance thereof, their person, family, house and correspondence shall be inviolable and they may engage such staff, couriers, interpreters, servants and others as they may require.”<sup>40</sup>

35. As a more recent example, we may mention the provisional agreement of 4 July 1946 between the United States and the Philippines concerning “friendly relations and diplomatic and consular representation.”<sup>41</sup> Article III of this agreement states:

“The diplomatic representatives of each contracting party shall enjoy in the territories of the other the privileges and immunities derived from generally recognized international law . . .”

36. An examination of these texts shows that many treaties, while referring to diplomatic immunities, neither specify nor define them. It is assumed in these treaties that the relevant rules are familiar to all; the texts therefore, merely speak of generally recognized principles of international law. It is also apparent from these various provisions that immunities are granted on a reciprocal basis; this point seems to be of paramount importance. The provision regarding reciprocity is sometimes coupled with a most-favoured-nation clause.

37. The nature and juridical significance of these immunities are dealt with more thoroughly in certain multilateral agreements, such as the Convention regarding Diplomatic Officers, adopted at Havana on 20 February 1928, in the draft conventions proposed by learned

societies, and in the studies of the League of Nations Committee of Experts. Some of these drafts and studies will be discussed below.

(b) *Multilateral treaties*

38. The *Research in International Law*,<sup>42</sup> notes that the only general instrument dealing with diplomatic privileges and immunities is the Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference and signed at Havana on 20 February 1928.<sup>43</sup>

39. Diplomatic immunities, in the strict sense are enumerated in article 14 *et seq.* of the Convention in the following sequence:

- |             |   |   |
|-------------|---|---|
| Article 14  | } | (a) Inviolability of the person   |
|             |   | (b) Inviolability of private or official residence  |
|             |   | (c) Inviolability of property   |
| Article 15. |   | (d) Freedom of communication between the diplomatic agent and his Government  |
| Article 16. |   | (e) Provisions restraining judicial or administrative functionaries or officials of the State to which the diplomatic officer is accredited from entering the domicile of the latter, or of the mission, without his consent. (This follows from the principle of the “inviolability” of the person and of the residence of diplomatic officers.) |
| Article 18. |   | (f) Exemption from all personal taxes, either national or local, from all land taxes on the building of the mission, when it belongs to the respective Government, from customs duties on articles intended for the official use of the mission or of the personal use of the diplomatic officer or his family                                    |
| Article 19. |   | (g) Exemption from all civil or criminal jurisdiction of the State to which the diplomatic officers are accredited. (This exemption likewise follows from the “inviolability” of the person of the diplomatic officer.)   |

40. Among the immunities listed in the previous paragraph, those which refer to the inviolability of the person of the diplomatic officer and of his official or private residence, to the freedom of communication with his Government and to his exemption from the civil and criminal jurisdiction of the State to which he is accredited are generally recognized in international law and by all Governments. Nor is the exemption from personal taxes contested. By contrast, the exemption of the building of the mission from land taxes and other charges, even when the building belongs to the sending Government, has given rise to some controversy and doubt; similarly, although it may be customary not to levy customs duties on articles intended for the personal use of the diplomatic officer or his family, this privilege is usually extended only on the basis of strict reciprocity and often for a limited period only.

41. The “Exchange of notes constituting an agreement between the United States of America and Poland relating to the granting of certain reciprocal customs

<sup>37</sup> *Ibid.*, p. 29.

<sup>38</sup> *Ibid.*, p. 31.

<sup>39</sup> *Ibid.*, p. 29.

<sup>40</sup> *Ibid.*, p. 30.

<sup>41</sup> United Nations, *Treaty Series*, Vol. 6 (1947), No. 86.

<sup>42</sup> Harvard Law School, *op. cit.*, p. 26.

<sup>43</sup> League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581.

privileges for foreign service personnel," dated October 1945,<sup>44</sup> seems to be a representative agreement. The two Governments concerned agreed, "on the basis of reciprocity", to grant to their diplomatic and consular staffs free entry of articles imported for their personal use.

### 3. THE LEAGUE OF NATIONS

#### (a) Background

42. On 22 September 1924, the Assembly of the League of Nations adopted the following resolution on the report of its First Committee:

"The Assembly,

"...

"Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

"Requests the Council:

"To convene a committee of experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organizations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

"(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment;

"(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

"(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution."<sup>45</sup>

The Committee mentioned in this resolution was established by a decision of 11 December 1924.<sup>46</sup> It met at Geneva in April 1925 and selected a provisional list of eleven subjects of international law, the codification of which by international agreement seemed to be both desirable and realizable. It appointed a Sub-Committee to conduct researches into each of these subjects. At its second session, held at Geneva in January 1926, after a study of the reports submitted by the Sub-Committee, it was decided to send to Governments questionnaires on seven subjects; one of these (questionnaire No. 3) related to diplomatic privileges and immunities. At its third session, held from 22 March to 2 April 1927, the Committee of Experts studied the replies to the questionnaires and drew up a list of questions which appeared

ripe for international regulation; that list included diplomatic privileges and immunities.

43. At its eighth session (meeting of 27 September 1927), however, the Assembly retained only three subjects, namely, nationality, the responsibility of States, and territorial waters, as possible topics for codification at the First Conference for the Codification of International Law.<sup>47</sup> As far as diplomatic privileges and immunities were concerned, it decided, in accordance with the conclusions in the report of its First Committee, not to keep the subject on its agenda; it endorsed the Council's view, which was also that of the First Committee, that the conclusion of a universal agreement on the subject seemed somewhat difficult and was not "important enough to warrant insertion in the agenda of the proposed Conference".<sup>48</sup>

44. At its third session held from 22 March to 2 April 1927, the Committee of Experts prepared a questionnaire (No. 10) on the "Revision of the classification of diplomatic agents".

45. The replies to this questionnaire were studied by the Committee at its fourth session in June 1928. Its report to the Council of the League of Nations stated:

"On the other hand, while noting that the majority of the replies received recommend that the third question above mentioned<sup>49</sup> should be placed on the agenda, the Committee has found the contrary opinion to be so strongly represented that, for the moment, it does not feel it can declare an international regulation for this subject matter to be realisable."<sup>50</sup>

46. Despite this deferment of the question by the competent organs of the League of Nations, the reports which the Sub-Committee of Experts prepared on diplomatic privileges and immunities and on the classification of diplomatic agents deserve closer consideration.

#### (b) Analysis of the Sub-Committee's work

47. The Sub-Committee on diplomatic privileges and immunities consisted of Mr. Diena, who acted as Rapporteur, and Mr. Mastny. Its terms of reference had been laid down in a resolution adopted by the Committee of Experts at its meeting of 8 April 1925, as follows:

"The Committee instructs a Sub-Committee to ascertain what are the questions relating to diplomatic privileges and immunities which are suitable for treaty regulation and what provisions might be recommended on this subject."<sup>51</sup>

#### (i) Material suitable for codification

48. The Rapporteur notes at the beginning of this report that his colleague and he were in agreement "in recognising that the whole question of diplomatic privi-

<sup>47</sup> *Ibid.*, Special Supp. No. 53 (October 1927), p. 9.

<sup>48</sup> League of Nations publication, *V. Legal*, 1927.V.21 (document A.105.1927.V), p. 2.

<sup>49</sup> Namely, the "Revision of the classification of diplomatic agents (questionnaire No. 10)".

<sup>50</sup> League of Nations publication, *V. Legal*, 1928.V.4 (document A.15.1928.V), p. 6.

<sup>51</sup> *Ibid.*, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 78.

<sup>44</sup> United Nations, *Treaty Series*, Vol. 15 (1948), No. 238.

<sup>45</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 5.

<sup>46</sup> League of Nations, *Official Journal* (February 1925), p. 143.

leges and immunities was suitable for treaty regulation".<sup>52</sup> According to Mr. Diena, there are in fact certain fundamental principles concerning this question which are generally admitted, and although, as regards certain particular points, there

"...is often considerable divergence between the laws and the legal practice of the various countries, these differences can be overcome by an international agreement arrived at either collectively or as the result of a series of bilateral agreements".<sup>53</sup>

(ii) *Method of work adopted*

49. The two members of the Sub-Committee agreed in recognizing that it was necessary:

"(1) To determine as exactly as possible the existing law...;

"(2) To ascertain which points or, rather, questions are disputed as regards either legal doctrine or practice;

"(3) To indicate the solutions of these questions favoured in one or other country, and which of these would be the most reasonable solution; and

"(4) To indicate possible and desirable alterations and reforms to be introduced into the existing rules—paying due and even critical attention throughout both to the draft prepared on this question by the Institute of International Law at Cambridge in 1895 and to the rules contained in the project for the codification of American international law laid down on March 2nd, 1925, by the American Institute of International Law".<sup>54</sup>

50. In attempting to determine the existing positive law, the Sub-Committee subdivided the problem into two questions: (1) What are the existing prerogatives? and (2) To what persons do they apply?

(iii) *The question of extritoriality*

51. Mr. Diena did not admit the validity of the theory that diplomats should enjoy the right of extritoriality. That theory had been affirmed in articles 7 to 10 of the regulations adopted in 1895 by the Institute of International Law, at its Cambridge session;<sup>55</sup> it had been rejected, however, by article 23 of the draft of the American Institute,<sup>56</sup> which states:

"The private residence of the agent and that of the legation shall not enjoy the so-called privilege of extritoriality."

52. The second member of the Sub-Committee, Mr. Mastny, expressed a less categorical opinion on this subject. He declared that he was inclined rather to

"...the restrictive definition given by Strisower: 'the removal of certain persons or certain portions of territory from the legal authority of the country in

respect of matters to which, according to general principles, such persons and such portions of territory ought on the contrary to be subject';"

and to favour the retention of the term "extritoriality" although only as a metaphor. He explained that what he had in mind was:

"...*diplomatic extritoriality* including no more than certain exemptions from the authority and power of the State enjoyed by the diplomatic residence..."

He then added:

"Extritoriality in the limited meaning of the word refers only to the legal exceptions recognized in any particular State, and these must always be interpreted in a restrictive sense."<sup>57</sup>

53. It is common knowledge that most modern authorities share Mr. Diena's opinion and believe that the so-called principle of extritoriality cannot serve as a theoretical basis for the immunities which diplomatic agents enjoy.

(iv) *Inviolability*

54. The second point which engaged the Sub-Committee's attention was the question of the inviolability enjoyed by diplomatic agents, during their mission, with regard to their person, official and private residence, correspondence and personal effects. As the principle of inviolability is generally recognized, Mr. Diena tried to determine the exceptions to the rule. In this connexion, the Rapporteur quoted the regulations of the Institute of International Law mentioned in paragraph 51 above, which state that inviolability may not be invoked in the case of lawful defence, in case of risks run by a diplomatic agent voluntarily or unnecessarily, and in case of reprehensible acts committed by him compelling the State to which he is accredited to take defensive and precautionary measures. The Rapporteur considered that, while the first two exceptions were consistent with existing practice, the third might give rise to controversy, particularly as regards the measures which the local authorities might be authorized to take in cases of extreme urgency.

55. Mr. Mastny apparently agreed with the Rapporteur, but it seemed to him "...difficult... to determine satisfactorily the cases in which inviolability could not be claimed."<sup>58</sup> At all events, he believed that all immunities should be limited to persons belonging to the official staff of the mission.

(v) *Immunity from taxation*

56. The Rapporteur was of the opinion that immunity from taxation was not strictly necessary for the exercise of diplomatic functions and was recognized mainly for reasons of international courtesy. Hence only bilateral agreements based on reciprocity could satisfactorily regulate the numerous questions which this privilege involved. Mr. Diena did not exclude the possibility of a collective agreement, but, in that case, the text of

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Annuaire de l'Institut de droit international*, Vol. XIV, 1895-1896, (Paris, A. Pedone), p. 240.

<sup>56</sup> Harvard Law School, *op. cit.*, p. 170.

<sup>57</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), pp. 86 and 87.

<sup>58</sup> *Ibid.*, p. 87.

articles 9 and 11 of the Cambridge draft of the Institute of International Law appeared to him to constitute an adequate basis;<sup>59</sup> those articles would exempt the minister's residence from military quarterings and from the taxes substituted therefor, while the functionaries officially connected with the mission would be exempt from direct and sumptuary taxes, from general taxes on wealth, either on the principal or on the income, war-taxes and customs duties on articles for their personal use.

57. Mr. Mastny drew attention to the practical difficulties which the question of immunity from taxation continually raised. He hoped that the question might be settled along the lines of the "English instructions", which were described by Sir Ernest Satow in his work, *A Guide to Diplomatic Practice*, and which Mr. Mastny considered to be most reasonable and suitable for incorporation in a collective instrument.<sup>60</sup>

(vi) *Immunity from criminal jurisdiction*

58. The Rapporteur stressed that, according to generally recognized custom, this was an absolute immunity enjoyed as long as the mission lasted. According to him, the principle was formulated adequately in article 25 of the draft prepared by the American of International Law Institute which states:

"Diplomatic agents shall be exempt from the civil or criminal jurisdiction of the nation to which they are accredited. They cannot be prosecuted in civil or criminal matters except in the courts of their own countries."<sup>61</sup>

59. On the other hand, Mr. Mastny<sup>62</sup> took the view that articles 6, 12, 13, 15 and 16 of the Cambridge draft of the Institute of International Law faithfully reflected international custom in the matter. Article 6 defines the cases in which inviolability cannot be invoked: lawful defence, risks run voluntarily or unnecessarily by an agent and reprehensible acts committed by him; article 12 provides that the minister and his family shall be exempt from jurisdiction in the State to which he is accredited and notes that these persons remain subject to the jurisdiction of the courts of their own country; article 15 denies these immunities to diplomatic agents who are nationals of the country to which they are accredited; and under article 16 the agent cannot claim immunity from jurisdiction in respect of engagements contracted in the exercise of a profession carried on concurrently with diplomatic duties or with regard to real actions, including possessory actions, relating to movable or immovable property situated in the country to which the agent is accredited. This article provides that immunity from criminal jurisdiction shall remain effective even in case of offences endangering public order or of a crime attacking the security of the State, except that the State maintains its right to adopt the measures of self-protection indicated in article 6, paragraph 3 (to inform the agent's Government of the facts or to request the punishment or recall

of the guilty official and, if necessary, to surround the building of the mission in order to prevent illegal communications with the outside world or public expressions of opinion).

(vii) *Immunity from civil jurisdiction*

60. The Rapporteur compared article 16 (summarized above) of the Cambridge draft of the Institute of International Law with article 27 of the draft of the American Institute of International Law;<sup>63</sup> the latter does not admit exemption from civil jurisdiction (1) in the case of real actions, including possessory actions, relative to immovable property which is situated in the territory where the agent is accredited, and which is neither the house he occupies nor that of the legation; (2) in the case of actions resulting from contracts executed by the diplomatic agent which do not refer to the seat or furnishings of the legation, if it has been expressly stipulated that the obligation must be fulfilled in the country where the agent is accredited; (3) in case of waiver of diplomatic immunity, which, however, cannot occur without the consent of the Government which the agent represents.

61. Mr. Diena noted that the two texts are consistent with generally recognized custom only in the case of the exception relating to real actions, including possessory actions relating to immovable property owned in a private capacity. He said:

"The most reasonable solution, however, would be to make no distinction with regard to real actions between those relating to movable property and those relating to immovable property. The nature of the subject-matter of the action in no way affects its legal character."<sup>64</sup>

62. The Rapporteur of the Sub-Committee considered that immunity should not extend to obligations contracted otherwise than in the performance of diplomatic duties and should also be inapplicable in the case mentioned in article 27, paragraph 3, of the draft prepared by the American Institute of International Law, summarized in paragraph 60 above; he noted, however, that the latter exception is not admitted by French jurisprudence. In this connexion, he referred to a decision of the Civil Chamber of the *Cour de Cassation* of 10 January 1891, the principles of which are summarized in Clunet as follows:

"1. As a general rule, diplomatic agents of foreign Powers are not subject to the jurisdiction of French courts;

"2. This lack of jurisdiction of the French courts arises from the need of States and of the persons appointed to represent them to enjoy independence in their reciprocal relations; jurisdiction may thus only be exercised if those persons explicitly and in due form signify their acceptance thereof.

"3. Failing such acceptance by the diplomatic

<sup>59</sup> *Ibid.*, p. 80.

<sup>60</sup> *Ibid.*, p. 88.

<sup>61</sup> See above, para. 51 and n. 56.

<sup>62</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 88.

<sup>63</sup> Harvard Law School, *op. cit.*, p. 170.

<sup>64</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 81.

agents, the French courts must declare that they have no jurisdiction, even in civil actions.”<sup>65</sup>

63. Clunet cites the statement of *Avocat Général Desjardins*,<sup>66</sup> summarizing French theory on this subject; the main points of that statement will be set forth later in this memorandum.

64. The Rapporteur of the Sub-Committee proposed that a diplomatic agent's waiver of his immunity from jurisdiction should be accepted *sic et simpliciter*, provided that the person concerned, whether he be the head of the mission or a subordinate official, has voluntarily submitted to local jurisdiction. He was also of the opinion that in cases where the agent appears as plaintiff and the defendant enters a counter-claim, it would be reasonable, seeing that the diplomatic agent himself has submitted to local jurisdiction, to consider the ordinary law applicable.

65. Finally, Mr. Diena shared the view of most authorities regarding the rule—embodied in article 17 of the Cambridge draft of the Institute of International Law and, in a slightly different form, in article 28 of the American draft—that a diplomatic agent is not compellable to appear as a witness.<sup>67</sup>

66. Mr. Mastny, while not opposed in principle to placing some limitations on the exemption from civil jurisdiction, as suggested by the Rapporteur of the Sub-Committee, thought that such a solution would nevertheless raise a number of objections; these, because of their importance, are reproduced in full below:

“(1) Existing national laws are for the most part inclined to favour absolute exemption (excluding, of course, generally admitted exceptions, such as real actions, trading, etc.). This is especially the case with English law (7 Anne, c. 12, sections 3-6, April 21st, 1709), French law (Decree of the 13th Ventôse, Year II) and the United States statute corresponding to the English statute.

“(2) The principle of complete immunity seems to have been hitherto the rule of the French and English Courts (Judgments of the Cour de Paris, dated July 12th, 1867, and January 21st, 1875, of the Cour de Lyon, dated December 11th, 1883; Case of *Magdalena Steam Navigation Company v. Martin*, etc.).

“(3) Most jurists favour complete immunity. Some of those who uphold this view, however, admit that

<sup>65</sup> Edouard Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1891), Vol. 18, p. 137.

<sup>66</sup> *Ibid.*, pp. 144-157.

<sup>67</sup> The text of these articles, as reproduced in League of Nations, document C.196.M.70.1927.V, p. 82, nn. 1 and 2, reads as follows:

Article 17 of the draft of the Institute of International Law: “Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the national Courts on condition that they give their evidence, if required to do so through the diplomatic channel, to a magistrate of the country appointed for this purpose, and this evidence may be given even on the premises of the mission”.

Article 28 of the American Institute's draft: “The diplomatic agent may refuse to appear as a witness before the Courts of the Country to which he is accredited. In case the evidence should be necessary, it must be requested in writing through the diplomatic channel.”

liberal interpretation and practice often unduly extend the limits of this privilege and that due caution should be observed.

“(4) The Cambridge draft (articles 12-16) and the Washington draft (articles 25-27) decided in favour of immunity (but see paragraph 3 of article 27).

“(5) As this immunity is one of the immediate consequences of *inviolability* there is no need to distinguish between official and unofficial persons.

“(6) Analogy with exemption from criminal jurisdiction (the full extent of which is not disputed) calls for uniform regulation (see the Cambridge draft).

“(7) In practice it is often very difficult to distinguish the capacity in which a privileged person has acted, and sometimes it is even impossible to give an opinion upon the case before the details have come to light through judicial proceedings.

“(8) The principle of the *prestige of States* demands exceptional protection, particularly in those cases in which the Courts would have to discuss *delicate private affairs* (family matters; publicity of the procedure; publication in the newspapers, etc.).

“(9) Jurists opposed to immunity are assuming ideal conditions of civilization, a degree of protection which is not yet everywhere attained in our times, since there are still divergencies of opinion even on fundamental social ideas and the general principles of civil law (ownership). Take West and East. We cannot be blind to quite recent experiences (China, Russia).

“(10) Material progress allowing direct communication between States (by telephone, telegraph) makes it possible for any matter to be promptly settled through the diplomatic channel.”<sup>68</sup>

67. Mr. Mastny thought that these difficulties could be overcome by introducing an arbitral jurisdiction and a conciliation procedure for the official and private acts of diplomatic agents.<sup>69</sup> The arbitral tribunal would consist of the doyen of the diplomatic corps, an expert in the person of a professor of international law, another expert in the person of a professor of civil law, another member of the diplomatic corps and a civil court judge. The tribunal would first decide upon the official or unofficial character of the case; in official cases, the file would be sent to the Ministry of Foreign Affairs for diplomatic action; in unofficial cases, resort would be had to arbitration, and refusal by the agent to accept the award would be interpreted as willingness to submit to the national courts of the country in which he resided in his diplomatic capacity. With regard to the duty to give evidence, Mr. Mastny shared the view of the Rapporteur of the Sub-Committee.

#### (viii) *Beginning and end of the mission*

68. Neither article 5 of the Cambridge draft of the Institute of International Law, nor article 29 of the draft prepared by the American Institute of International Law,

<sup>68</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 89.

<sup>69</sup> *Ibid.*, pp. 89 and 90.

appeared to Mr. Diena to offer a satisfactory solution to the problem. Article 5 provides that the diplomatic officer's inviolability lasts for the whole period during which he remains in the country to which he is accredited and, in the event of war between that country and the one he represents, until he is able to leave the State where he is fulfilling his mission, together with his staff and effects. Article 29 of the draft of the American Institute states that:

"The inviolability of the diplomatic agent and his exemption from local jurisdiction shall begin from the moment he crosses the frontier of the nation where he has to exercise his functions; they shall terminate the moment he leaves the said territory."

69. Mr. Diena raised two objections to this line of thought: (a) The official capacity of the diplomatic agent is only proved by the presentation of credentials; and (b) It cannot be accepted absolutely and as a general truth that the prerogative should cease with the departure of the diplomatic agent.<sup>70</sup>

In this connexion, article 14 of the Cambridge draft of the Institute of International Law appeared to the Rapporteur to state a rule of existing positive law:

"Immunity continues after retirement from office in so far as acts connected with the exercise of the said duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

70. In regard to obligations contracted by the agent prior to entering on his duties and the fulfilment of which is demanded by the other contracting party while the diplomat is still exercising his functions, Mr. Diena agreed with the *Cour de Cassation* of Paris<sup>71</sup> that the diplomat could not be sued, in those circumstances, in the courts of the country to which he is accredited.

71. Mr. Mastny preferred the formula in article 5 of the Cambridge draft of the Institute of International Law to that in article 29 of the draft of the American Institute of International Law.<sup>72</sup>

(ix) *Juridical status of diplomatic agents in the territory of a third State*

72. Mr. Diena considered that, in positive law:

"...diplomatic agents are only entitled to claim their prerogatives in third countries while they are journeying to the country of their mission or returning therefrom."<sup>73</sup>

By contrast, Mr. Mastny favoured the adoption of the system advocated in article 29, paragraph 2, of the draft of the American Institute of International Law which provides:

"The diplomatic agent who, in going to take pos-

session of his post or in returning therefrom, crosses the territory of an American Republic or is *accidentally there during the exercise of his functions* shall enjoy in that territory the personal immunity and immunity from jurisdiction referred to in the preceding articles."<sup>74</sup>

The exact meaning of the words "is accidentally there during the exercise of his functions" appears vague, as the Rapporteur of the Sub-Committee indeed noted.

(x) *Persons to whom diplomatic privileges extend*

73. The Rapporteur of the Sub-Committee favoured the traditional rule that: "...diplomatic prerogatives extend *only* to heads of mission, members of their families living with them and persons belonging to the *official staff*."<sup>75</sup>

74. He referred to the difficulties involved in extending the prerogatives to non-official personnel and mentioned three different practices:

(a) The English practice, based on the Statute of 1708, as interpreted by English authorities, whereby immunities are extended to any person belonging to the suite of a diplomatic agent, without distinction of nationality;

(b) The practice confirmed in a judgement of the Rome Court of Cassation of 7 November 1881, which held that the prerogative of immunity from jurisdiction cannot be applied to persons other than diplomatic agents in the strict sense;

(c) The German system, which recognizes the prerogative of immunity from jurisdiction as regards non-diplomatic personnel in the service of the diplomatic mission, provided that they are not of German nationality. The last solution is the one most widely adopted in practice; it is reaffirmed in article 30, *in fine*, of the draft of the American Institute of International Law which states that:

"The exemption from local jurisdiction extends likewise to their servants; but if the latter belong to the country where the mission resides, they shall not enjoy such privilege except when they are in the legation building."<sup>76</sup>

Mr. Diena considered this text, which also resembles that of article 2, paragraph 3, of the Cambridge draft of the Institute of International Law, to be unsatisfactory; he felt that the fact that a person was in the legation building could not give rise to any personal privilege. If that solution were adopted, a disguised right of asylum would be created in that person's favour. All that could be said was that those non-diplomatic employees, like anyone else, would benefit from the inviolability of the legation building while they remained on the premises; but that fact did not entitle them to any immunity and it would be superfluous and misleading to introduce such an implication into the text of an international agreement.

75. Mr. Mastny was prepared to endorse Mr. Diena's

<sup>70</sup> *Ibid.*, p. 82.

<sup>71</sup> *Journal du Palais*, Bulletin des sommaires (Paris, Librairie du Recueil Sirey, 1921), Part. I, p. 121.

<sup>72</sup> Article 5 is summarized and article 29 reproduced in para. 68 above.

<sup>73</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 83.

<sup>74</sup> Harvard Law School, *op. cit.*, p. 171.

<sup>75</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 84.

<sup>76</sup> Harvard Law School, *op. cit.*, p. 171.

proposal, as reproduced at the beginning of paragraph 73 above. He nevertheless stressed that it would involve a change, because "national laws and custom usually regard inviolability as extending also to unofficial personnel"<sup>77</sup>

76. At present this question is of great importance because of the increase in the number of persons employed in embassies, and because certain States have merged the consular with the diplomatic service proper.

(xi) *Questionnaire addressed to States*

77. On 29 January 1926, the Committee of Experts, having considered the report of the Sub-Committee, sent the following questionnaire<sup>78</sup> to the Governments of Members of the League of Nations:

A. PRIVILEGES AND IMMUNITIES OF DIPLOMATS IN THE TRADITIONAL SENSE OF THE TERM AND OF PERSONS BELONGING TO A LEGATION

I. *Extent of these Privileges and Immunities considered under the following Heads*

1. Inviolability attaching to:
  - (a) The persons themselves;
  - (b) The official premises of the legation, including the archives;
  - (c) The private residence of the persons in question;
  - (d) Correspondence;
  - (e) Goods serving for the personal use of the diplomat.
2. Immunity from civil, administrative or fiscal jurisdiction, with all the limitations and exceptions consistent with the object of the immunity.
3. Immunity from criminal jurisdiction.
4. Fiscal immunities (including customs).

*Note 1.* The above are merely heads for discussion. It is not suggested that every question falling under them should necessarily be regulated by a general convention. This reservation applies in particular to the question of fiscal immunities, in regard to which it may be desirable to leave details to be the subject of bilateral agreements but may at the same time be possible, as well as desirable, to lay down some general principles by way of a pluralateral or universal convention.

*Note 2.* Under the head of inviolability should be discussed the question of the existence and, in the affirmative, of the extent of the right to afford asylum to persons threatened with criminal proceedings.

*Note 3.* In connection with immunity, it would seem desirable to consider whether and to what extent immunity involves exemption from the operation of social legislation and, in particular, legislation concerning social insurance.

*Note 4.* In connection with immunity from jurisdiction, it would be desirable to consider what should be the position of the privileged person as regards giving evidence before the courts.

II. *Persons entitled to Privileges and Immunities*

It seems not to be disputed that among such persons must be included the chiefs of embassies and legations and the official staff employed exclusively in diplomatic work, and that the privileges and immunities extend to members of the families of such persons

living with them. But there are other questions connected with this head which should be examined and settled:

1. First, the question arises whether, in order to avoid abuses or uncertainty, it should be a condition of possessing privileges that the persons in question should be included in a list delivered to the Foreign Office of the country concerned. In close connection with this point is the question whether and on what grounds (for example, on the ground of the palpably exaggerated number of officials included in the list) the Government would be entitled to refuse or accept the list with or without modification.

2. To what extent may official agents of a foreign State who are not employed in diplomatic work in the proper sense of the term acquire diplomatic privileges and immunities by being included among the personnel of the legation? Under this head falls the case of particular categories of attachés, such as certain commercial attachés, attachés for social questions and others.

3. What is the position of the servants of a diplomatic agent and of the servants of a legation, i.e., its clerks, domestic staff and other employees?

4. In what cases and to what extent may diplomatic privileges and immunities be refused to a person, who would otherwise be granted them: (a) when he is a national of the country concerned; or (b) when, being already domiciled in the country, he occupies a special position intermediate between foreigners and nationals?

5. In regard to some of the above-mentioned categories, it will be necessary to examine the limits of the privileges (if any) which should be enjoyed.

III. *Duration of diplomatic Privileges and Immunities as regards: (1) the Privileged Person; and (2) Premises and Archives.*

*Note 1.* Under the above point (2), it is intended to raise the question of the treatment to be accorded to privileged premises and archives which have ceased to be occupied or to be in the charge of a diplomatic agent; as may, for example, happen in the case of the decease of a diplomatic agent or when a State ceases to recognize and to receive representatives from the Government of a State which has established a legation in its territory and the legation premises and archives are left without any person entitled to take charge and be responsible for them.

*Note 2.* In the case of the decease of the diplomatic agent, a similar question may arise as to the members of his family and servants.

IV. *Position of a Diplomatic Agent within, and more particularly, in Transit through, the Territory of a State to which he is not accredited*

[Part B deals with the privileges of officials of the League of Nations.]

78. Twenty-eight Governments answered the questionnaire in detail.<sup>79</sup>

(xii) *Analysis of replies of Governments to the questionnaire*

79. On 27 March 1927, at the seventh meeting of the third session of the Committee of Experts, Mr. Diena briefly analysed the replies of Governments to the questionnaire reproduced in paragraph 77 above.<sup>80</sup> He said that the United Kingdom was not in favour of convening an international conference, but that twenty-two of the twenty-eight replies received had been in favour of holding such a conference.

80. The replies received by the Committee will be

<sup>77</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 87.

<sup>78</sup> *Ibid.*, pp. 76 and 77.

<sup>79</sup> *Ibid.*, p. 127.

<sup>80</sup> *Ibid.*, pp. 266 and 267.

briefly summarised below, in order to show the opinion of Governments at that time.

81. Firstly, the United Kingdom confined itself to stating that, in its opinion, the question was not "... a subject of international law which it would be at present possible or desirable to regulate by international agreement,"<sup>81</sup> while the Government of Australia saw no objection to including the question on the agenda of an international conference.<sup>82</sup>

82. The German Government took the view that "the exemption from all measures of constraint to be accorded to diplomatic agents... extends to their person and, everything that may seem necessary for the exercise of their functions..."<sup>83</sup> It stressed that the exemption should be expressly stated to preclude any enforcement of a "lessor's mortgage" against the diplomat; it felt, however, that the State should be entitled to adopt such measures for its defence and security as might seem to be indispensable in questions of self-defence or to guarantee public safety.

83. It was prepared to admit exceptions to the privilege of exemption from civil jurisdiction in respect of "acts connected with special, professional or commercial transactions", including actions for obtaining possession of immovable property. A diplomatic agent's express or tacit renunciation of his immunity from jurisdiction should be recognized, as should his exemption from the obligation of giving evidence.

84. The matter of fiscal privileges and the exemption of diplomatic agents from the payment of customs duties should be settled by bilateral agreements.

85. Diplomatic privileges and immunities should extend not only to the heads and members of missions, *stricto sensu*, but also to the auxiliary staff of the legation; German nationals employed as domestic would nevertheless be excluded.

86. The question of the duration of immunities could be settled on the basis of articles 5 and 14 of the draft prepared by the Institute of International Law and Cambridge<sup>84</sup> and article 29 of the draft prepared by the American Institute of International Law.<sup>85</sup>

87. Finally, with regard to the position of diplomatic agents in transit through the territory of a third State, the German Government was prepared to accept the principle that they should enjoy diplomatic privileges and immunities in a third country across which they were proceeding to take up their posts or while returning therefrom.

88. Brazil<sup>86</sup> raised two objections to Mr. Diena's proposals:

(a) It could not accept the principle set forth in article 27, paragraph 3, of the draft of the American

Institute<sup>87</sup> (no immunity from jurisdiction in respect of actions arising out of private contracts); in the view of the Brazilian Government, such a provision would imply a renunciation of immunity, which the agent was not free to contract away.

(b) The Brazilian Government saw no need to extend exemption from jurisdiction to servants; it was reasonable, however, that exemption should be extended to the whole auxiliary staff, which constituted the administrative organ of the diplomatic mission.

89. The Danish Government<sup>88</sup> recommended withdrawal of diplomatic privileges if the diplomatic agent engaged in commercial transactions, whether on behalf of his Government or in his personal capacity; the exclusion of immunity from taxation when the taxes were really in the nature of payment for services rendered by the State or municipality; and the limitation of the number of persons whom the receiving State might be requested to recognize as official diplomatic staff.

90. Estonia<sup>89</sup> submitted a detailed reply, of which the following are the salient points:

(a) *Inviolability*: The Estonian Government supported the solution suggested in the draft prepared by the Institute of International Law at Cambridge, articles 3 to 6 (protection of the person of the diplomatic agent against all forms of constraint, protection of all property necessary to the accomplishment of his duties, duration of privileges for the full period of the mission, cases in which inviolability may not be invoked). As regards the type of acts which could be regarded as "reprehensible" and leading to the forfeiture of immunity (article 6 of the Cambridge draft), Estonia thought that the stipulations contained in articles 5, 16 and 22 of the draft of the American Institute made the point sufficiently clear. (Article 5 provides that diplomats should exercise their authority without coming into conflict with the laws of the country to which they are accredited; article 16 prohibits foreign diplomats from interfering in the internal and external political life of the nation where they discharge their function; article 22 refers to the obligation to surrender to the competent local authority any individual pursued for crime or misdemeanour under the laws of the country).

(b) *Immunity from criminal jurisdiction*: Estonia agreed with the Rapporteur of the Sub-Committee.

(c) *Immunity from civil jurisdiction*: Estonia adopted the same position.

(d) *Renunciation of privileges*: Estonia agreed with the Rapporteur.

(e) *Giving evidence in court*: Estonia approved the solution recommended in the draft prepared by the Institute of International Law at Cambridge (whereby the diplomatic agent can be compelled to give testimony in the diplomatic residence to a magistrate appointed for the purpose).

(f) With regard to the persons entitled to enjoy these immunities. Estonia agreed with the Rapporteur that the privileges should apply only to the chiefs of mission and the persons belonging to the official staff.

(g) The Estonian Government was also of the opinion that the number of persons entitled to exemption from taxation might reasonably be limited by the Government concerned (reply to part II, question 7 of the questionnaire).

<sup>87</sup> Harvard Law School, *op. cit.*, p. 170.

<sup>88</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 151.

<sup>89</sup> *Ibid.*, p. 157.

<sup>81</sup> *Ibid.*, p. 145.

<sup>82</sup> *Ibid.*, p. 136.

<sup>83</sup> *Ibid.*, p. 132.

<sup>84</sup> *Revue générale de droit international public*, (Paris, A. Pedone, 1895), Vol. II, pp. 536 ff. and n. 1.

<sup>85</sup> Harvard Law School, *op. cit.*, p. 171.

<sup>86</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 143.

(h) It was also in favour of a precise definition of the rules relating to the question (part II, question 2 of the questionnaire) of the extent to which official agents of a foreign State who are not employed in diplomatic work in the proper sense of the term acquire diplomatic privileges and immunities by being included in the personnel of the legation.

(i) With regard to the duration of privileges, Estonia hoped that the relevant rule would enable diplomats both in time of peace and in time of war to enjoy their prerogatives until they left the country to which they were accredited. It approved the wording in the Cambridge draft of the Institute of International Law, article 14, which reads as follows:

"Immunity continues after retirement from office, in so far as acts connected with the exercise of such duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

91. The Government of Norway<sup>90</sup> made some suggestions which can be summarized as follows:

*Inviolability of domicile and official premises:* The proposed codification of the relevant provisions should also cover all related questions, such as:

- (i) Health regulations;
- (ii) Rents;
- (iii) Electric and radio-technical installations;
- (iv) The extent to which rules regarding immunities apply to persons living in hotels;
- (v) Import prohibitions instituted on grounds of social policy;
- (vi) Inviolability of archives;
- (vii) Exemption from taxation on personal and real property.

92. The Romanian Government<sup>91</sup> thought that some limitation should be placed on immunity from civil jurisdiction, particularly with regard to contractual obligations unrelated to the performance of diplomatic functions. It also thought that the privileges should be confined to the official staffs of missions and their families. Judicial documents, both in respect of cases in court and other matters, duly issued by the competent authorities, might be served on diplomats through the Ministry of Foreign Affairs of the country to which they were accredited.

93. As regards the question of executing judgement delivered by the national courts and not subject to further appeal, it was clear that enforcement measures could not be taken inside the legation or the private residence of the diplomat; the Romanian Government thought, however, that execution might be levied at such places as railway stations, warehouses and banks of the country where the diplomat was stationed.

94. The Government of Sweden<sup>92</sup> also thought that certain restrictions should be imposed on the immunity of diplomats from civil jurisdiction, and it did not think that such exceptions should be limited *a priori* to "real actions" and "actions connected with the exercise of a commercial calling". The Swedish Government also thought it desirable to adopt some conciliation or arbi-

tration procedure for disputes at private law to which diplomats might be parties. Finally, the Swedish Government agreed with the statement in the Sub-Committee's report that the privileges of exemption from taxation and customs duties for diplomats did not lend themselves to detailed regulation in the form of a collective treaty.

95. The Swedish Government thought that a list of persons entitled to diplomatic privileges should be communicated to the Ministry of Foreign Affairs, which should have the right to refuse either "to admit an obviously exaggerated number of diplomatic agents" or "to recognize as diplomatic agents persons whose activities are essentially different from the ordinary activities of diplomatic officials". The office staff of legations should be included in the privileged class, but the Swedish Government wished to exclude "the personal servants" of diplomatic agents.

96. Persons forming part of diplomatic missions who were nationals of the country in which they resided should, in the Swedish Government's view, be granted prerogatives in respect of their official acts but not in respect of "their personal status".

97. Switzerland's<sup>93</sup> very detailed reply contains many points of interest; it is summarized below:

(a) *Legal basis of diplomatic immunities:* Switzerland supported the theory that "diplomatic immunities are justified by the necessity of securing the independence of diplomatic agents, and are therefore only to be maintained so far as they are warranted by the functions of the official." It also wished to draw a distinction between privileges and immunities "arising out of international law" and those "whose sole basis was the *comitas gentium*" for the rules of pure courtesy were not rules of law.

(b) *Inviolability of the person:* The Swiss Government agreed that a diplomatic agent's person and personality should be respected by the authorities and that he should have complete freedom of movement. It stressed the differences in the various national legislations with regard to the protection due to diplomats against the acts of private persons. It criticized article 6 of the Cambridge draft regulations which did not distinguish clearly between "cases in which the diplomatic agent may not invoke the laws which protect him against outrage or objectionable treatment and those much more serious cases in which the actual arrest of the Minister becomes possible."

(c) *Inviolability of the premises of diplomatic missions:* The Swiss Government was prepared to accept article 9 of the Cambridge draft regulations of the Institute of International Law, conferring on the diplomatic representative the right to refuse admittance to officers of the public authority in the performance of their duty, but it thought that it might be well to define certain cases in which an official should not be refused admittance to the inviolable premises of a diplomatic mission; moreover, the inviolability of the premises should have "no influence on the personal status of persons living on those premises or entering them".

<sup>90</sup> *Ibid.*, pp. 175 and 176.

<sup>91</sup> *Ibid.*, p. 200.

<sup>92</sup> *Ibid.*, pp. 234 and 235.

<sup>93</sup> *Ibid.*, pp. 242-249.

(d) *Inviolability of correspondence*: The Swiss Government was prepared to agree that, where there appeared to be a clear case of abuse of the diplomatic mails, the Government concerned should be justified in opening suspected envelopes in the presence of a member of the diplomatic mission.

(e) *Inviolability of property*: Switzerland agreed that measures of execution could not be carried out in the country of residence upon property which was indispensable to the diplomatic agent for the discharge of his duties. It thought, however, that it would be desirable "to avoid the confusion... between inviolability of property and the immunity of its owner from jurisdiction".

(f) *Domicile and legislation applicable*: While venturing no definite answer to the question, the Swiss Government thought that a settlement of the problem would be of considerable practical importance. The question had a vital bearing on such issues as the law applicable both in civil and criminal matters, the nationality of children born in the country where the diplomat was stationed, his right to invoke the laws governing the acquisition of nationality, and so forth.

(g) *Immunity from civil jurisdiction*: Switzerland adhered firmly to the principle that the diplomatic agent was not personally responsible for acts done in his official capacity, and thought that it should be possible to reach some agreement as to the right of the diplomatic agent to waive his immunity from civil jurisdiction, and as to the consequences of such a decision.

(h) *Immunity from criminal jurisdiction*: As that immunity was generally recognized, the Swiss Government did not think that it raised any problem; the question of renunciation might nevertheless be investigated.

(i) *Giving of evidence*: The Swiss Government thought that further study should be given to the question of the right to refuse to give evidence in all circumstances.

(j) *Fiscal immunities*: The Swiss Government was uncertain whether such immunities were legal privileges or prerogatives granted out of pure courtesy. Fiscal exemption could not be said to be based on the nature of the official's functions, but it formed a portion of the *comitas gentium* and was established by general usage. The extent of the exemption would have to be clearly specified.

(k) *Persons entitled to privileges and immunities*: The Swiss Government thought that, on that point, it was most desirable that international usage should be made more uniform. The Swiss Government granted the privilege of full inviolability to heads of diplomatic missions only. Personal inviolability, however, including immunity from civil and criminal jurisdiction and exemption from taxation, was enjoyed in Switzerland by the following:

- (i) Members of the diplomatic agent's family, if they were living with him and had no occupation;
- (ii) Members of the diplomatic staff of a mission, and their families, and the head of the secretarial staff of the mission;

- (iii) The household servants of the head of a diplomatic mission.

The other pertinent points in this connexion were as follows:

- (iv) The rest of the staff enjoyed exemption from taxation;
- (v) As regards customs, exemption in the full sense of the term was granted to the head of a mission in respect of all articles for his personal use and that of his family, and to the other members of the diplomatic corps only in respect of their first installation.

(l) *Duration of diplomatic prerogatives*: In the opinion of the Swiss Government, a minister became eligible for diplomatic privileges and immunities immediately on his arrival at the frontier of the country to which he was accredited; his prerogatives did not terminate, at the end of his mission, until he left the country.

(m) *Position of a diplomatic agent in the territory of a State to which he is not accredited*: It seemed to the Swiss Government quite reasonable to grant diplomatic privileges and immunities to a diplomatic agent passing through a country on an official journey.

(n) *Other persons entitled to enjoy diplomatic privileges and immunities*: In the Swiss Government's opinion, these should include:

"... foreign agents, who, though not holding permanent credentials... nevertheless had a diplomatic standing..."

The Swiss Government thought that it was necessary to specify which of the persons entrusted with a mission to a foreign country should be recognized as having diplomatic status.

98. Czechoslovakia<sup>94</sup> made the following suggestions:

(a) The inviolability of the official premises of the legation and of the diplomatic agent's private residence did not imply a right of asylum;

(b) The building in which the legation was housed was subject to police regulations;

(c) Exemption from the obligation of giving evidence should always be granted in cases affecting the exercise of diplomatic functions;

(d) With regard to immunity from criminal jurisdiction, the local courts should in all cases be given power to take the necessary precautionary measures in case of emergency;

(e) The question of fiscal immunities should be settled by bilateral agreements;

(f) The case of agents who were not assigned to diplomatic posts in the strict sense of the term should form the subject of a special study;

(g) The legation staff should only enjoy such privileges and immunities as were indispensable to the exercise of the diplomatic agent's functions;

(h) Diplomatic privileges and immunities should be granted even in cases where the diplomatic agent was a

<sup>94</sup> *Ibid.*, p. 254.

national of the country to whose Government he was accredited;

(i) With regard to the duration of diplomatic privileges, Czechoslovakia supported the proposals of the Institute of International Law, prepared at Cambridge, which read as follows:

(Article 14) "Immunity continues after retirement from office in so far as acts connected with the exercise of the said duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

(xiii) *Some conclusions*

99. The foregoing account of the efforts made under the auspices of the League of Nations to codify the rules governing diplomatic prerogatives leads to the conclusion that most States then thought it both possible and desirable to codify these rules. Out of the twenty-eight replies received, only those of the United Kingdom and Indian Governments were definitely opposed to the conclusion of an agreement, saying that it would not be desirable to lay the problem before an international conference.

100. Both the Sub-Committee and the Governments which answered the questionnaire took the view that the "extritoriality" theory could not be regarded as the rationale of diplomatic immunities. Majority opinion seemed to favour the theory that those immunities derived from the needs of the service and from the principle that the diplomatic agent must be allowed absolute independence in his dealings with the State to which he is accredited.

101. There was a substantial measure of agreement regarding the nature of the immunities necessary to the performance of diplomatic duties. These immunities comprise inviolability of the agent's person, inviolability of his private and official residence, and exemption from the criminal jurisdiction of the country to which he is accredited; they also include exemption from civil jurisdiction, provided that the action arises out of an act done by the agent in the performance of his duties and not in a purely personal capacity. Nevertheless, neither the Sub-Committee's report nor the replies of Governments suggest any juridical criterion to be applied in distinguishing between official and non-official acts, nor do they indicate the authority competent to adjudicate as between the agent and whoever may, in certain circumstances, feel disposed to challenge the official character of his acts. Mr. Mastny, it is true, proposed the introduction of a conciliation procedure and arbitral jurisdiction. But would private parties voluntarily submit to any such special appellate jurisdiction, which, incidentally, the Governments themselves did not apparently view with favour?

102. No serious objections were raised to the right of the diplomatic agent to refuse to give evidence in court, but some Governments appeared disposed to adopt the solution proposed in article 17 of the draft regulations prepared by the Institute of International Law at Cambridge, making it obligatory upon the person concerned

to give his testimony in the diplomatic residence to a magistrate appointed for that purpose.

103. Finally, as regards exemption from taxation, most of the States which specifically dealt with the point in their replies stated that they did not consider this exemption as one of the immunities imposed by international law *erga omnes*, but rather as one of the courtesy privileges accorded by practically every State. They regarded the matter as a suitable subject for bilateral agreements, rather than for a multilateral convention.

104. This general agreement on the principles governing the question, notwithstanding certain divergencies of view concerning some important points of detail, is also a feature of the draft conventions prepared by learned societies or by eminent authorities; some of these will be studied after the analysis contained in the next section of this chapter of the work of the Committee of Experts in connexion with the classification of diplomatic agents.

(xiv) *Classification of diplomatic agents*

105. At its third session, held in March and April 1927, the Committee of Experts decided to include in its list the following questions:

"Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative case, to what extent should the existing classes of diplomatic agents be amalgamated, and should each State be recognized to have the right, in so far as existing differences of class remain, to determine at its discretion in what class its agents are to be ranked?"<sup>95</sup>

106. The Committee reached this decision on the basis of a report, submitted to it by a Sub-Committee consisting of Mr. Guerrero, Rapporteur, and Mr. Mastny. The conclusions of the report may appropriately be analysed here.

107. In the first place, the report points out that one of the aims of the classifications established at Vienna and Aix-la-Chapelle had been "to ensure a higher rank for representatives of the great Powers".<sup>96</sup> The supposedly representative character attributed to ambassadors, legates and nuncios by article 2 of the Vienna Regulation had been a false concept, even at the time of its introduction; that fact was even more manifest at the time when the report was prepared, as "the sovereign was no longer a crowned head at the apex of supreme power...":

"The credentials by which ambassadors and ministers plenipotentiary are accredited are absolutely identical, as are their rights and duties, the privileges and immunities granted them and the methods of communication with their own Governments and those to which they are accredited."<sup>97</sup>

108. This opinion, shared by many of the authorities

<sup>95</sup> League of Nations publication, *V. Legal, 1927.V.8* (document C.203.M.77.1927.V), p. 1.

<sup>96</sup> The text of these regulations is reproduced in paras 22 and 24 of this memorandum.

<sup>97</sup> League of Nations publication, *V. Legal, 1927.V.8* (document C.203.M.77.1927.V), p. 3.

cited in the Sub-Committee's report, induced it to propose:

"...that ambassadors, legates and nuncios should be included in the same class and designation with envoys or ministers plenipotentiary, including resident ministers."<sup>98</sup>

109. On the other hand, the Sub-Committee thought that *chargés d'affaires* should continue to form a class apart, "...because their credentials are given them by the Minister for Foreign Affairs and are addressed to Ministers for Foreign Affairs."<sup>99</sup>

110. Finally, for the reasons given in its report, the Sub-Committee inclined, in the choice of a common designation to be given to the diplomatic representatives in the first three categories, in favour of the title of ambassador, because "the adoption of the term 'public minister' or 'minister plenipotentiary' might appear to be somewhat derogatory to existing ambassadors..."<sup>100</sup>

111. It does not appear necessary to analyse in detail the replies of Governments to the questionnaire on the revision of the classification of diplomatic agents;<sup>101</sup> it is sufficient to note that in its second report on the questions which appeared ripe for international regulation, adopted at its fourth session in June 1928 for submission to the Council of the League of Nations, the Committee of Experts stated:

"On the other hand, while noting that the majority of the replies received recommend that the third question above mentioned (revision of the classification of diplomatic agents) should be placed on the agenda, the Committee has found the contrary opinion so strongly represented that, for the moment, it does not feel it can declare an international regulation of this subject matter to be realisable."<sup>102</sup>

112. The Committee of Experts had, in fact, received twenty-seven replies,<sup>103</sup> only twelve of which had categorically favoured revision;<sup>104</sup> the replies of four States had been neither negative nor affirmative. The eleven negative replies had included those of the British Empire, the United States, France, Germany and Belgium, which doubtless accounts for the recommendation of the Committee of Experts as quoted above. It may perhaps be fitting to mention one of the reasons given by the Belgian Government for its negative attitude:

"The Belgian Government... is of opinion that the classification established by article 1 of the Vienna Protocol should stand. In the principal capitals, the rank of ambassador is a necessity; and another argument in its favour is that some countries may desire to confer a greater lustre on their diplomatic relations in order to mark such special bonds as there may be between them on account of historic relations, racial

<sup>98</sup> *Ibid.*, p. 4.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> League of Nations publication, *V. Legal, 1928.V.4* (document A.15.1928.V), pp. 58-87.

<sup>102</sup> *Ibid.*, p. 6.

<sup>103</sup> *Ibid.*, p. 57.

<sup>104</sup> *Ibid.*, p. 91.

affinities, geographical position or a multiplicity of common interests."<sup>105</sup>

#### 4. WORK BY PRIVATE AUTHORITIES IN CONNEXION WITH THE CODIFICATION OF REGULATIONS GOVERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES

##### (a) *Preliminary observations*

113. In the foregoing account of the efforts made under the auspices of the League of Nations to codify the international law concerning diplomatic intercourse and immunities, frequent reference has been made to the main provisions of the draft regulations adopted by the Institute of International Law at Cambridge (1895) and those prepared in 1925 by the American Institute of International Law, as those texts were largely used by members of the League of Nations Sub-Committee. There is accordingly no need to give a further summary of them here. This section will be concerned only with comments on other drafts prepared by scholars and non-governmental organizations.

##### (b) *Bluntschli's draft code, 1868*<sup>106</sup>

114. This draft code is divided into chapters under the respective headings of "exterritoriality", "commencement of the diplomatic mission", "personal rights and obligations of envoys", and "termination of the diplomatic mission".

115. As the title of the first chapter indicates, Bluntschli considers the theory of exterritoriality as the legal basis of immunities, although he himself admits that it is a legal fiction established "for the purpose of safeguarding the independence of persons representing a State in a foreign country" (article 135). From this, he draws the following conclusions:

1. A person enjoying exterritorial status is not subject to the laws or police regulations of the country to which he is accredited, but he must respect the independence and security of that State and must not infringe the police regulations (articles 136/137);
2. Such persons are exempt from taxation, but must pay the usual charges for any public services of which they may make use (article 138);
3. They enjoy immunity from civil jurisdiction, but the courts are nevertheless competent to adjudicate on real actions and actions connected with the exercise of a profession other than diplomatic duties, or in case of waiver of immunity. In any event, execution of a court order may only be levied on the personal assets of the defendant (articles 139/40);
4. The diplomatic agent is not subject to criminal jurisdiction (article 141);
5. The right of self-defence against the agent is recognized (article 144);
6. The agent's immunities extend to his family, employees and suite (article 145); but he may waive immunity with respect to any such person, and if he does so that

<sup>105</sup> *Ibid.*, p. 61.

<sup>106</sup> Harvard Law School, *op. cit.*, pp. 144-153.

- person is subject to the jurisdiction of the judicial authorities in the country of residence (article 149);
7. The immunities extend to the diplomatic residence, but not to immovable property owned by the agent in his private capacity (article 150);
  8. The mission commences as soon as the agent's credentials have been accepted; even before they have been presented, an agent who proves his status is entitled to special consideration as the representative of a foreign State (article 186);
  9. Under the heading "personal rights and obligations of envoys", Bluntschli mentions inviolability (article 191); this does not guarantee protection when the agent voluntarily exposes himself to unreasonable danger (article 193). Inviolability extends to the agent's archives (article 197). With regard to his duties, the agent must not "allow the diplomatic residence to be used for subversive activities directed against the State to which he is accredited" (article 202);
  10. The State of residence may request the recall of an agent who commits a criminal offence; if such an offence is committed by a member of his retinue, the agent must take all the necessary steps to ensure that the offender is brought before the court and upon conviction duly punished (articles 210 to 212);
  11. Under the heading "termination of the mission" the draft code lists the various circumstances in which a mission may come to an end. Article 239 provides that:

"In all circumstances, even in the event of declaration of war, every State shall safeguard the freedom of an envoy to depart unmolested from its territory."

(c) *Fiore's draft code, 1890*<sup>107</sup>

116. This draft, which is even more elaborate than Bluntschli's, also recognizes the principle of extritoriality as the theoretical basis of diplomatic immunities. This principle is mentioned in the provisions relating to the persons, premises and objects covered by it. A special chapter deals with the grounds on which extritoriality may be forfeited. According to articles 363 and 366 of the draft, the privilege of extritoriality is assigned to the offices of foreign legations, to the consular archives, and to the private residences of diplomatic agents; in consequence, the authorities of the country of residence may not enter these premises. The persons who enjoy "extritoriality" are the diplomatic agents and (article 471): "persons attached to the legation, who exercise public functions... and who have been officially recognized as such by the Government where the legation is established..." On the other hand, the code (article 474) does not confer upon the family of the agent any other rights and prerogatives beyond those which are due to them in consideration of the high dignity with which the minister as head of the family is invested.

117. What are these rights and privileges which derive

from the "extritoriality" and personal inviolability of the agent? In the first place (article 343), he is exempted from territorial jurisdiction, except in respect of acts which are entirely divorced from his official functions. He is entitled to exemption from inspection of his baggage and of any package sealed with the seal of his Government, and also enjoys immunity from customs duties, and exemption from personal taxes and forced loans (article 453). Similarly, but only on the basis of reciprocity, he is exempted from war taxes, the obligation of billeting, and in general any charges imposed on resident foreigners (article 454). His correspondence is inviolate (article 463), and he cannot be held responsible for acts performed in the exercise of his functions (article 465). The agent may, however, lose these rights and privileges if he uses them improperly or violates territorial law (article 376).

118. If, in travelling to or from his mission station, the agent traverses the territory of a third State, that State, if it has authorized the transit, must respect the diplomatic status of the person concerned and the prerogatives attaching thereto (article 476). Lastly, the agent must abstain from any direct interference with the local administrative or judicial authorities, even with a view to defending the interests of his countrymen (article 482). Upon the termination of the mission, the agent must be granted a reasonable period, during which he will enjoy all his privileges, for returning to his country.

(d) *Pessôa's draft code, 1911*<sup>108</sup>

119. This draft, which is divided into three sections dealing respectively with "diplomatic agents", "immunities of diplomatic agents", and "suspension and end of a diplomatic mission", suggests, in addition to the usual proposals, a number of solutions for questions not yet settled in international law.

120. Article 125 proclaims the principle of the "inviolability" of the diplomatic agent, while article 126 extends that privilege to "all classes of diplomatic agents" and all the personnel of the legation, as well as their private effects, papers and archives. The same principle would seem to apply to employees who perform only administrative functions, for the last paragraph of article 126 provides that persons who are not part of the official personnel shall not, if they are nationals of the State to which the legation is accredited, enjoy inviolability except within the premises of the legation.

121. The members of a diplomatic mission travelling through a third State also enjoy inviolability (article 129). Inviolability may not, however, be invoked in cases of lawful defence on the part of individuals against a member of the mission, on account of risks to which he voluntarily or unnecessarily exposes himself, or on account of acts of such gravity that measures of precaution or of defence are taken on the part of the State (article 128).

122. Other articles explain in detail what is meant by "inviolability". Inviolability is extended to the residence

<sup>107</sup> Harvard Law School, *op. cit.*, pp. 153-162.

<sup>108</sup> Harvard Law School, *op. cit.*, pp. 164-168.

of the minister, which no agent of the public authority, administrative or judicial, is permitted to enter and which is exempt from the obligation to give lodgings to military forces or contributions in lieu of this burden (articles 132 and 133). In addition, all diplomatic officials are exempted from the payment of direct personal taxes, taxes on movables, war contributions and customs duties relative to the objects of their personal use (article 135). They also enjoy immunity from civil and criminal jurisdiction—they may not renounce the second (article 142)—and such immunity survives their diplomatic functions as to those acts to which they are related (articles 136 and 137). It does not, however, extend to the members of the mission who are nationals of the State in which the mission serves (article 138), and it may not be claimed (article 139) in the following cases:

1. In actions originating from obligations contracted by the agent in the practice of a profession exercised by him in the State of his residence concurrently with diplomatic functions, or referring to any industrial or commercial activity which he has carried on in the territory of the State;
2. In real actions, including possessory actions, relative to property, movables or immovables situated in the territory, not relating to the residence of the minister, or dependent or accessory thereto;
3. When the agent renounces immunity;
4. In actions resulting from his capacity as heir or legatee of a national of the State of his residence;
5. In actions based on contracts entered into by him in a foreign State, if, by express provision, or by the nature of the action, its execution may be demanded there;
6. In actions of indemnification resulting from a delict or quasi-delict.

The agent is not obliged to appear as witness before the court of the country, but if a deposition is requested through the diplomatic channel, it may be given in the building of the legation (article 141).

123. The diplomatic agent enters upon the enjoyment of his immunities from the moment he passes the frontier (article 145), and he continues to enjoy them after his mission is terminated for a time sufficient for him to withdraw from the territory of the State to which he is accredited (article 146).

(e) *Project of the International Commission of American Jurists*<sup>109</sup>

124. After setting forth in sections I, II, III and IV what is meant by "chiefs of mission", "personnel of legations", "special agents" and "duties of diplomatic agents", this project gives in section V a description of the immunities of diplomatic agents which is consistent with what has been said under (d) above. In particular, article 27 of the project contains a list of cases in which immunity from jurisdiction may not be claimed; this list is identical with that contained in Pessôa's draft.

<sup>109</sup> Harvard Law School, *op. cit.*, pp. 171-174.

(f) *Phillimore's draft code, 1926*<sup>110</sup>

125. From article 20 on, this draft code, which was submitted by Lord Phillimore to the International Law Association at its 34th Conference,<sup>111</sup> lists the customary immunities. These are the inviolability of the minister's correspondence, exemption from customs duties, immunity from jurisdiction, the right not to testify before a court of law, inviolability of residence, immunity of the official suite, family and servants, etc. It should be noted that, in this draft, a diplomat may not invoke immunity before the courts if he makes himself a plaintiff or in respect of immovables which he owns in his private capacity within the territory of the receiving State, or in respect of any obligations which may result from his engaging in trade.

126. Under articles 29 and 30, diplomatic immunities are granted to "members of the personal suite of a diplomatic agent and the personal suite of the official suite being nationals of the accrediting State", whereas these privileges are denied to persons in this category who are not nationals of the accrediting State.

(g) *Strupp's draft code, 1926*<sup>112</sup>

127. This draft deals with diplomatic immunities *stricto sensu* in articles X to XIX. It is stated in article X that the immunities arise out of "the need to safeguard the freedom of foreign envoys in the performance of their functions...". From this theoretical basis, the author draws the conclusion in article II that "inasmuch as any immunity constitutes a derogation from the independence of the State against which it is invoked, the relevant rule should be interpreted restrictively, without any inferences being drawn by analogy." This rule is in agreement with the views clearly indicated by the Rapporteur of the Sub-Committee of the League of Nations Committee of Experts and approved in principle by his colleague, Mr. Mastny.

128. In other respects this draft code covers the same ground as the other drafts discussed above. It should, however, be mentioned that under its article XVIII, "the members of a diplomatic mission do not enjoy any juridical prerogatives in third States".

(h) *Draft code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai, 1926*<sup>113</sup>

129. The draft lists the immunities customarily accorded to diplomats, their family and their suite. Attention should, however, be drawn to section VI, article I, paragraph 6, according to which the exemption of diplomatic agents from customs duties and from other taxes, and from taxes and imposts in respect of immovables employed for private purposes shall be regulated by usage or "by courtesy".

<sup>110</sup> *Ibid.*, pp. 177-180.

<sup>111</sup> International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, 1927), p. 399.

<sup>112</sup> Harvard Law School, *op. cit.*, pp. 181-184.

<sup>113</sup> *Ibid.*, pp. 185 and 186, and International Law Association, *op. cit.*, p. 378.

(i) *Resolution of the Institute of International Law, 1929*<sup>114</sup>

130. At the session it held in New York in 1929, the Institute of International Law adopted a resolution amending the regulations adopted at Cambridge in 1895, which were "no longer entirely in accord with the recent developments of international law bearing on the subject". Its most important provisions are summarized below.

131. Unlike the Cambridge draft, which based diplomatic immunities on the fiction of extritoriality (articles 7 to 10), this resolution accords the immunities to the agents in question "in the interest of their functions" (article 1). These immunities are enjoyed by the chief of mission, the members of the mission officially recognized as such, and the persons officially in the service of these agents, provided "that they do not belong to the State to which the mission is accredited" (article 2). Article 6 lists four immunities to which the persons mentioned in article 2 are entitled: personal inviolability; inviolability of the legation building; immunity from jurisdiction; and exemption from taxation. Personal inviolability includes that of the official residence of the chief of mission (article 8) and of any dwelling that he may occupy, even temporarily.

132. Immunity from jurisdiction may not be claimed in the cases already considered in the analysis of other drafts (real actions, counter-claims, professional activity unconnected with diplomatic functions (articles 12 and 13)); it is denied to agents who are nationals of the country to which they are accredited (article 15); it continues after the cessation of diplomatic functions in respect of acts relating thereto (article 16). If requested to do so through the diplomatic channel, the agent shall make his deposition in the building of the mission (article 17). Exemption from taxation enjoyed by diplomatic agents applies only to direct taxes, "with the exception of the taxes to which they would be subject by reason of their immovable properties or their personal activities", and they must pay customs duties except on articles intended for their personal use (article 18). Lastly, article 9 states that such official members of missions and their families living with them retain their earlier domicile; and under article 10, a diplomatic agent's child born abroad, in the country of the parent's duty station, does not *ipso facto* acquire the nationality of that country under the *jus soli*.

(j) *Harvard Law School draft on diplomatic privileges and immunities*<sup>115</sup>

133. It now remains for us to examine the important draft published in 1932 by the Harvard Research in International Law. This draft includes comments on each article and takes into account the work already summarized in the present study, including that of the League of Nations Committee of Experts.

134. The draft is divided into six sections, dealing respectively with the definition of the terms used, the

problem of premises and archives, selection and recall of members of a mission, communications and transit, personal privileges and immunities, and, lastly, interpretation of the draft.

135. In the summary which follows, special attention is given to provisions which, in comparison with the drafts examined above, propose new and different solutions.

136. Attention should be drawn to the following definitions:

"(1) A 'member of a mission' is a person authorized by the sending State to take part in the performance of the diplomatic functions of a mission.

"(2) A 'chief of mission' is a member of a mission authorized by the sending State to act in that capacity.

"(3) The 'administrative personnel' consists of the persons employed by the sending State in the administrative service of a mission.

"(4) The 'service personnel' consists of the persons in the domestic service of a mission or of a member of a mission.

"(5) A 'mission' consists of a person or a group of persons publicly sent by one State to another State to perform diplomatic functions."

137. The comment<sup>116</sup> explains the purely formal character of the last definition by the fact that there is no objective standard by which a diplomatic mission may clearly be distinguished from all other official missions, in view of the expansion of the activities entrusted to diplomatic missions and the growth of new types of agencies performing certain tasks for the State in foreign territory.

138. The question of premises and archives is dealt with in articles 2 to 8 of the draft. It should be noted that, under article 2, the State to which the mission is accredited must permit the sending State to acquire land and buildings adequate to the discharge of the mission's functions and to dispose of such land and buildings in accordance with the law of the receiving State. The comment<sup>117</sup> justifies this provision by the fact that in modern times the normal functioning of diplomatic services requires "adequate physical instrumentalities". Nevertheless, the sending State acquires over such land not *imperium* (sovereignty), but *dominium* (property) only.<sup>118</sup>

139. Article 3 of the draft, while guaranteeing the inviolability of diplomatic premises, is so drafted as to obviate the need for any recourse to the fiction of extritoriality and even to such terms as "inviolability", which the authors of the draft consider to be "unfortunate and misleading".<sup>119</sup>

140. Under article 4, movable and immovable property owned by the sending State is exempted from national and local taxes. Such property is also declared exempt from any form of attachment or execution. It is noted

<sup>116</sup> *Ibid.*, p. 43.

<sup>117</sup> *Ibid.*, p. 49.

<sup>118</sup> *Ibid.*, p. 50.

<sup>119</sup> *Ibid.*, p. 52.

<sup>114</sup> Harvard Law School, *op. cit.*, pp. 186 and 187.

<sup>115</sup> *Ibid.*, pp. 19-43.

in the comment<sup>120</sup> that there is no legal obligation on the part of the State to which the mission is accredited to grant exemption from taxes levied to pay for special services; however, as the sending State is immune from the jurisdiction of the receiving State, with respect to property occupied by diplomatic missions, no action to recover such taxes is in fact possible. It is doubtful whether a lien will attach to such property.

141. Articles 5 to 7 deal respectively with the protection of premises and archives, the right of asylum, and the protection of premises and archives of a discontinued mission.

142. Article 8, in the section dealing with the selection and recall of members and personnel of a diplomatic mission, provides *in fine* that a State may not send as a member of a mission a national of the receiving State without the express consent of the latter. The authors feel that this rule, which follows closely article 7 of the Havana Convention, expresses the customary rule of international law.<sup>121</sup>

143. Articles 9 to 13, which deal with the selection of a chief of mission, selection of administrative and service personnel, official lists, recall of members of a mission, and objectionable personnel, require no comment.

144. Similarly, article 14 (section IV: Communications and transit), which relates to freedom of communications, merely sets forth in detail an established rule of law. Article 15, on the other hand, seems to be less specific than the drafts analysed above. It imposes on the third State, which the members of a mission must cross *en route* to or from their posts, the obligation to accord to these agents "such privileges and immunities as are necessary to facilitate their transit", provided that the third State has recognized the Government employing the agents and has been notified of their official character. It will be seen that the article fails either to define or to enumerate the "necessary" privileges and immunities, and thus increases rather than dispels the uncertainty prevailing on this point. The authors of the draft note that there is disagreement on this problem among authorities and cite some opinions in their comments.<sup>122</sup> Court decisions, extracts from which are also given, seem no less uncertain of the right solution. Nevertheless, the authors think<sup>123</sup> that their draft will adequately safeguard "that freedom for the carrying on of international relations through the instrumentality of diplomatic agents" which is a common interest of all the members of the international community. Furthermore, the rights are accorded to the agent in transit only, and not if, for any reason, he prolongs his stay beyond the time necessary to traverse the country in question.

145. Personal privileges and immunities *stricto sensu* are set forth in section V of the draft. Article 16 specifies the time from which the agent enjoys these immunities, by stating that they begin as from the time of such person's entry into the territory of the State where he is

to exercise his functions or, if he is already there, as from the time of his becoming a member of a diplomatic mission accredited to that State. With regard to this last category of officials, however, the draft does not resolve the problem any more than do the drafts already examined, for it fails to specify at what moment the official concerned becomes a member of the mission in the eyes of the law. Does this occur when he is appointed, or when his appointment is notified to the State where he will serve, or when that State signifies its approval?

146. Article 17 protects "a member of a mission and the members of his family from any interference with their security, peace, or dignity". Stated in this general form, the obligation does not seem to exceed the State's obligation towards all foreigners lawfully within its territory. It is emphasized in the comment<sup>124</sup> that neither according to national legal practice nor according to the different drafts already studied does the duty of States to exercise special vigilance over diplomatic agents on official mission appear to be a generally accepted rule of international law. It would seem, however, that, where necessary, special protection must be granted in order to avoid placing an unnecessary strain on the relations between the two Governments concerned.

147. Article 18 represents a statement of the existing law. It provides that an agent may not be held responsible by the State to which he is accredited for acts done by him in the performance of his official functions. Article 19, which deals with the exemption from jurisdiction of members of a mission and their families, also sums up the prevailing practice. The comment,<sup>125</sup> which cites in detail the provisions of the domestic legislation of many countries, as well as the rules established by judicial decisions confirming the principle of immunity from jurisdiction, nevertheless mentions two decisions of the Court of Cassation at Rome which recognize immunity in civil matters only as regards acts performed by the diplomatic agent in the exercise of his official functions. It is pointed out in the comment that the diplomatic corps at Rome protested against these decisions. The French ambassador, as *doyen*, dispatched a note to the Minister of Foreign Affairs, calling attention to the international law in force:

"In this decision", wrote the French Ambassador, "the Court of Cassation of Rome has enunciated the principle... that diplomatic immunity is confined only to those cases in which diplomatic agents act in their official capacity, as representatives of their Governments. This decision is in conflict with the rule hitherto generally recognized and applied by all States. That rule provides that, in principle, diplomatic agents are exempt not only from the criminal but also from the civil jurisdiction of the countries to which they are accredited..."<sup>126</sup>

According to the comment, in 1927 the Tribunal of Rome rejected the previous decisions of the higher Court and observed the established rule.<sup>127</sup> The comment also cites

<sup>120</sup> *Ibid.*, p. 58.

<sup>121</sup> *Ibid.*, p. 70.

<sup>122</sup> *Ibid.*, pp. 85-87.

<sup>123</sup> *Ibid.*, p. 88.

<sup>124</sup> *Ibid.*, pp. 89-97.

<sup>125</sup> *Ibid.*, pp. 104 and 105.

<sup>126</sup> *Ibid.*, p. 105.

<sup>127</sup> *Ibid.*, pp. 105 and 106.

a decision of the Court of Appeal at Lyons, which held that:

"...complete immunity from jurisdiction in civil matters extends to any person vested with the official attributes of one representing a foreign Government in any capacity."<sup>128</sup>

148. Article 20 makes it a mandatory rule, despite a widely held opinion to the contrary, that States must exempt diplomats from payment of customs duties or other import or export charges upon articles intended for the official use of a mission or for the personal use of its members or their families.

149. It is stated in the comment<sup>129</sup> that an analysis of the provisions of national legislation on this subject fails to reveal any "irreducible minimum" of exemption which may be held to be required by international law. This is a prerogative granted out of courtesy, often on a basis of reciprocity, rather than an exemption which States must accord under international law.

150. Article 21 confirms the right of a State to refuse to permit members of a diplomatic mission to bring in articles the importation of which is prohibited by general laws, or to take out articles the exportation of which is so prohibited.

151. Article 22 lists the national and local taxes which may not be imposed on a diplomatic agent. They are:

- (a) Personal taxes;
- (b) Taxes on salary;
- (c) Taxes on income derived from sources outside the State to which the agent is accredited;
- (d) Taxes on movable property, unless used in a private business or profession;
- (e) Taxes on immovable property used as the residence of the diplomatic agent or for the purposes of the mission.

152. The comment<sup>130</sup> states that these exemptions are granted out of international courtesy rather than under any rule of positive law. It recognizes that the proposed text does not deny the possibility of a lien,<sup>131</sup> but that under the general procedure of immunity enjoyed by diplomatic agents such liens are not enforceable as against property while owned by a person having diplomatic status.

153. Article 23 restricts to some extent the immunity from jurisdiction enjoyed by a mission's administrative personnel; the State to which the mission is accredited retains its rights in respect of these persons, but must exercise them in such a manner as to avoid undue interference with the business of the mission.

<sup>128</sup> *Ibid.*, p. 106.

<sup>129</sup> *Ibid.*, p. 108.

<sup>130</sup> *Ibid.*, p. 115.

<sup>131</sup> The English common law lien is the right of a person in possession of a thing the ownership of which vests in another to detain it until some debt or demand in connexion therewith is satisfied. The French "droit de rétention" amounts to a lien constituting a privilege or a priority claim. The common law lien has been extended by statute in some countries to cases of non-payment of taxes.

154. The comment<sup>132</sup> stresses that the article is not declaratory of existing international law, but is rather an attempted recognition of modern international practice and of the views of Governments, which seem practically unanimous in the desire to restrict the privileges accorded to this class.

155. Article 24 attempts to settle the question of non-official activities of a diplomatic agent by stipulating that the State in which he exercises his official functions may refuse to permit him to engage in such private activities (paragraph 1). Furthermore, the State may (paragraph 2) refuse to accord diplomatic privileges and immunities to such a person with respect to acts done in the exercise of a private profession.

156. The comment states that paragraph 2 of the draft probably represents a modification of present practice, which affords immunity from jurisdiction for all acts, whether official or private. The authors of the draft believe, however, that there is sufficient doubt concerning immunity for acts performed in the conduct of a business or profession to justify the provision of article 24, paragraph 2.

157. Article 25 deals with immunity from jurisdiction in case the agent himself institutes a proceeding, and stipulates that in those circumstances the receiving State has jurisdiction for the purposes of that proceeding; nevertheless, unless the agent expressly renounces his privileges, no execution may issue in consequence of that proceeding against him or against his property. The authors of the draft consider this provision to be in conformity with existing international law.

158. The problem of renunciation of immunities is dealt with in article 26 of the draft. In the case of the chief of mission, renunciation must be confirmed by the Government of the sending State; in the case of other members of the mission, the consent of the chief of mission is sufficient.

159. It is stated in the comment that the authors believe that the rule thus laid down in the article fulfils the requirement of international law. However, it may reasonably be asked whether the express or tacit renunciation by the chief of mission should not be regarded as necessary and sufficient in all cases, as it may be presumed that an official of such high rank would not act without first securing the consent of his Government, which he is duly authorized to represent.

160. On the other hand, there seems to be unanimous agreement among the authorities as regards the prohibition of all measures of execution against a diplomatic agent.

161. Articles 27 and 28, which deal respectively with extradition and the nationality of children born within the territory of the country to which the mission is accredited—the State being prohibited from imposing that nationality on them even in the countries where it is acquired *jure soli*—do not call for comment.

162. Article 29, which is concerned with the termination of diplomatic privileges and immunities, is

<sup>132</sup> Harvard Law School, *op. cit.*, p. 119.

declaratory of existing law. It provides that the State to which the agent is accredited must allow him a reasonable period to enable him and his family to leave the territory, and that such persons shall enjoy full diplomatic privileges and immunities until the expiry of this period.

163. In the comment,<sup>133</sup> the authors of the draft sum up the legal reasoning on which they base article 29 as follows:

- (1) Members of missions are immune from the jurisdiction of the receiving State for their official and private acts;
- (2) Immunity from jurisdiction with respect to private acts being conceded only in the interest of the successful and unhindered functioning of the mission, it does not imply an exemption from the substantive law of the receiving State;
- (3) Consequently, immunity for private acts ends with his departure from the receiving State;
- (4) Immunity for official acts is an exemption from both the jurisdiction and the law of the receiving State, and, as a manifestation of the immunity of the sending State acting in a public capacity, it imposes an incompetence *ratione materiae* upon the receiving State;
- (5) Consequently, immunity for official acts survives the cessation of diplomatic character and functions, since it is not attached to the person of the agent but to the sending State itself.

164. Articles 30 and 31 of the draft, which deal respectively with the death of a diplomatic agent and arbitration proceedings in case of disagreement on the interpretation of the convention, do not require comment.

(k) *Some conclusions*

165. In concluding this brief survey of the work undertaken in the field of diplomatic privileges and immunities, we note a striking degree of unanimity on the point that there must be some derogation, in favour of diplomatic agents, from the ordinary law of the States to which they are accredited. The authorities, supported by a substantial volume of judicial precedent, seem to be in full agreement regarding the principle of the "inviolability" of the agent's person or property, the immunities from jurisdiction which he enjoys, his right freely to correspond with his Government, the need to ensure the secrecy of that correspondence and of archives, the privileges which, in addition to immunities, are recognized by international custom as a matter of courtesy, and the prerogatives due to his family.

166. Such disagreement as exists relates to the degree, rather than to the principle, of immunity. To give a few examples, there may be differences of opinion on points such as: the diplomatic agent's immunity from civil jurisdiction in respect of acts performed not in his official but in a private capacity; the applicability of exemption from taxation to the official building of the legation, or, more particularly, to the immovable property which the agent personally owns in the country to which he is

accredited; or, the measure of privilege he must receive from a third State through which he travels on his way to his post or on returning to his country of origin.

167. The most important of these points on which there is disagreement, and the relevant case law, will be dealt with in a later chapter of this study, following a summary of the legal theories most often invoked to justify the immunities enjoyed by diplomats.

## CHAPTER II

### Diplomatic intercourse and the theoretical basis of diplomatic immunities. Consideration of some specific aspects of the problem

#### A. DIPLOMATIC INTERCOURSE

##### 1. GENERAL OBSERVATIONS. THE RIGHT OF LEGATION

168. In its resolution 685 (VII), reproduced in paragraph 11 of the present memorandum, the United Nations General Assembly requests the International Law Commission to give priority to the codification of the topic "Diplomatic intercourse and immunities". It might therefore be desirable to dwell for a moment on the meaning of the term "diplomatic intercourse".

169. Calvo writes:

"One of the essential attributes of the sovereignty and independence of nations is the right of legation, which is the right to be represented abroad by diplomatic and consular agents... The right of legation is considered a perfect right in principle but imperfect in practice, since no State is bound to maintain political missions abroad or to receive on its territory representatives from other nations..."<sup>134</sup>

In view of the imperfect character of this right in practice "any State may... refuse to receive diplomatic agents..."<sup>135</sup>

170. The above excerpts from Calvo's work give a concise statement of the theory of diplomatic intercourse, as accepted and defined by most authors.

171. Thus, Fauchille writes in his treatise on public international law:

"The active right of legation, that is to say the capacity to accredit diplomatic agents to other States, and the passive right of legation, which is the capacity to receive envoys from other States, represent essential characteristics of sovereign power... Sovereign States enjoy both an active and a passive sovereign right... No State is under an obligation (in the strict sense of the word) to receive the diplomatic envoys of another State. It is a matter of good relations, not of strict law..."<sup>136</sup>

172. A similar opinion is stated in detail in Bustamante<sup>137</sup> while Hackworth quotes from a State Depart-

<sup>134</sup> Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), Vol. III, p. 177.

<sup>135</sup> *Ibid.*, p. 180.

<sup>136</sup> Fauchille, *Traité de droit international public*, pp. 32 and 37.

<sup>137</sup> Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cía, 1933) chap. IX.

<sup>133</sup> *Ibid.*, p. 137.

ment memorandum dated 6 April 1920 which states:

“Every independent and full sovereign member of the family of nations possesses the right of legation, which is the right of a State to send and receive diplomatic envoys . . .”<sup>138</sup>

We shall conclude these quotations with a brief excerpt from Sir Cecil Hurst’s course of lectures delivered at The Hague:

“The right of legation is one of the recognized attributes of every sovereign independent State. The right of legation comprises the right to accredit diplomatic representatives to another State and the obligation to receive diplomatic representatives when accredited by a foreign State.”<sup>139</sup>

173. It is clear from the above excerpts that the basis upon which diplomatic intercourse rests is the right of States to send and to receive diplomatic agents. The authorities seem to agree that there is consequently also an implied right to refuse to maintain diplomatic relations with one or more States; they all, however, take the view that a State refusing to maintain such relations with other States would forfeit its place in the comity of nations and violate a strong moral obligation.

174. Oppenheim expresses this view as follows:

“Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys. But, on the other hand, the very existence of the family of nations makes it necessary for the members . . . to negotiate occasionally on certain points . . . The duty of every member to listen, in ordinary circumstances, to a message from another member brought by a diplomatic envoy is, therefore, an outcome of its very membership of the family of nations, and this duty corresponds to the right of every member to send such envoys.”<sup>140</sup>

175. The active and passive right of legation belongs, in principle, only to States enjoying full sovereignty and independence. However, some exceptions to this principle have been admitted. Thus, according to the Peace Treaty of Kainardji of 1774 between Russia and Turkey, the principalities of Moldavia and Wallachia had the right of sending *chargés d'affaires* to foreign Powers.<sup>141</sup> Member States of a Federal State generally do not have the right of legation, but since the First World War the British self-governing Dominions have acquired, and whenever they find it convenient, do exercise, such right. Likewise, some States of the German Empire before the First World War (Bavaria, for example) used to send and receive diplomatic representatives.

## 2. ACCEPTANCE (*agrégation*)

176. No State is bound to receive any individual as a foreign diplomatic agent unless it has expressly accepted him. Such acceptance is necessary, and the receiving

<sup>138</sup> Green Haywood Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1942), Vol. IV, p. 393.

<sup>139</sup> Hurst, *International Law, The Collected Papers of Sir Cecil Hurst*, p. 173.

<sup>140</sup> Oppenheim, *International Law—A Treatise*, p. 691.

<sup>141</sup> *Ibid.*, p. 692.

State is free to refuse it. Oppenheim says on this point:

“International law gives no right to a State to insist upon the reception of an individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself.”<sup>142</sup>

Fauchille expresses the same view when he says:

“While membership of the community of nations implies, in principle, acceptance of diplomatic envoys on a basis of reciprocity, a State is nevertheless not bound to accept any given individual as the agent of another State . . . Indeed, the very independence of States in their reciprocal relations precludes a State from seeking to impose upon another an objectionable or unwelcome arrangement . . .”<sup>143</sup>

177. This has led to the practice of asking the receiving State for its acceptance (*agrégation*) of nominees; this practice is followed by all States in their mutual relations. A State wishing to entrust a diplomatic mission to one of its agents ascertains whether the prospective receiving State considers him *persona grata*. This practice has only occasionally given rise to difficulty and its principle has never been challenged.

Hackworth has the following to say on this point:

“Since the establishment and maintenance of diplomatic relations between two States must of necessity be mutually agreeable to them, and since this may, and often does, depend upon the personal characteristics of the chief of mission, his known or reputed attitude towards the receiving State . . . it is the invariable practice of the sending State to inquire . . . whether the person about to be appointed would be acceptable to the receiving State . . .”<sup>144</sup>

## 3. POSITION WHERE AGENT IS A NATIONAL OF THE COUNTRY IN WHICH HE IS TO PERFORM DIPLOMATIC FUNCTIONS

178. In this connexion, we have to determine whether a State is bound to receive one of its own subjects as a diplomatic agent and to what immunities such an agent would be entitled in the event of reception. Oppenheim is explicit on this point. His view is that most States almost invariably refuse to receive one of their own subjects, but a State departing from this principle must grant the agent all the privileges of a diplomatic envoy, including exterritoriality.<sup>145</sup>

179. This view was also shared by the Queen’s Bench Division in its judgement of 24 February 1890 in *Macartney v. Garbutt*. The Court held that a diplomatic agent accredited by a foreign State to his own country of origin enjoys full diplomatic immunity, provided that the Government of his country of origin accepted him without any reservation in that respect.<sup>146</sup>

180. In this particular case, Sir Halliday Macartney, a British subject, had been appointed by the Chinese Government to serve as English secretary to the Chinese

<sup>142</sup> *Ibid.*, p. 701.

<sup>143</sup> Fauchille, *op. cit.*, pp. 37 and 38.

<sup>144</sup> Hackworth, *op. cit.*, p. 446.

<sup>145</sup> Oppenheim, *op. cit.*, p. 701 and note 1.

<sup>146</sup> 24 *Q.B.D.* 368.

Embassy in London; the Foreign Office had accepted him in that capacity without reservation. He sought to recover a sum of £118, which he had paid under protest in order to obtain the release of furniture seized under a claim for parochial rates. In finding for the plaintiff, the Court based its decision on his *de facto* situation and followed the principle laid down by Cornelius van Bynkershoek in chapter VIII of his *De foro legatorum*. According to this principle, although a State has the right not to accept a member of a foreign embassy, except on such conditions as it deems fit to impose upon him, a member who has been unconditionally accepted enjoys the full *ius legationis*.<sup>147</sup>

181. Both Calvo<sup>148</sup> and Oppenheim<sup>149</sup> draw attention to the fact that many countries, including the United States, refuse to receive one of their own subjects as a foreign diplomatic agent, while others make acceptance conditional on the agent and his property remaining subject to the local legislation. Calvo believes that unless such a condition is imposed before the agent is accepted, the receiving nation renounces all claim to jurisdiction over his person.<sup>140</sup> In support of this thesis, he cites such authorities as Wheaton, Sir Robert (later Lord) Phillimore and Vattel.

182. Fauchille takes the same view and recalls the case of Mr. Pozzo di Borgo, a French citizen, received as Ambassador of Russia to Paris with all the prerogatives befitting his rank.<sup>151</sup>

183. However, attention is drawn to article 15 of the Cambridge draft of the Institute of International Law which states:

"Persons belonging by their nationality to the country to whose Government they are accredited, may not take advantage of the benefits of immunity."<sup>152</sup>

By contrast, article 8 of the draft prepared by Harvard Law School<sup>153</sup> admits the principle that a national of a State to which a mission is accredited may be sent as a member of that mission, provided the express consent of the receiving State has been obtained. This view is in line with the one taken in article 7 of the Havana Convention and by a number of authorities cited, in the relevant comment, in support of the Harvard text (Westlake, Satow, De Heyking, Weiss and others).

184. On the basis of this cursory analysis, it can be said that the prevailing views of the authorities and the practice followed by States may be summed up as follows: Governments are free to refuse to receive one of their nationals as a foreign diplomatic agent or they may accept him on the condition that certain immunities will not be extended to him; if, however, a State accepts him unconditionally and without first stating that he shall not

be entitled to specific immunities, the agent concerned shall enjoy all the diplomatic prerogatives of his rank.

#### 4. DUTIES OF DIPLOMATIC AGENTS

185. The generous exemptions extended to diplomats, by reason of their position as representatives of a sovereign independent foreign State, obviously entail certain duties on their part. Diplomatic envoys must respect the independence of the country to which they are accredited, comply with its laws, and conduct themselves in a manner befitting their station and rank. A breach of these rules exposes them to action by the host State, and may even result in a request for their recall or in their expulsion.

186. Attempts have been made, in several draft codes on diplomatic immunities, to define these duties and the remedies to be applied in case of misconduct.

187. Thus, under article 142 of Bluntschli's<sup>154</sup> draft code, a diplomatic agent who "commits hostile acts in the country in which he resides" may be treated by the Government as an enemy and, if necessary, put under restraint. Moreover, under article 141, the Government may require the agent to comply with its penal legislation and, if he commits an offence, seek redress from the State to which he is responsible. Article 6, paragraph 3, of the Cambridge draft of the Institute of International Law says:

"Inviolability may not be invoked . . .

"3. In case of reprehensible acts committed by them [persons who enjoy the privilege of inviolability], compelling the State to which the minister is accredited to take defensive or precautionary measures . . ."<sup>155</sup>

188. Fiore's draft code<sup>156</sup> states in article 376 that the privilege of extraterritoriality may be lost by a person who abuses it or, for example, if the official residence of the mission is wrongly used for a purpose different from that for which the privilege was granted; article 482 states that the agent must abstain from any direct interference with the local administrative or judicial authorities. He must respect the institutions of the country and must not interfere in the internal affairs of the State to which he is accredited; nor may he make the legation available to conspirators or revolutionaries wishing to overthrow the legally established Government (articles 483 to 485).

189. The project of the International Commission of American Jurists states in article 16 that foreign diplomatic officials may not interfere in the domestic or foreign political life of the State in which they exercise their functions.<sup>157</sup> Article 12 of the Havana Convention<sup>158</sup> is not less emphatic on this point.

190. There can be no doubt that this view is shared by most authorities. Calvo writes:

"The first duty of a diplomatic agent is not to

<sup>147</sup> Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1890), Vol. 17, p. 343.

<sup>148</sup> Calvo, *op. cit.*, p. 181.

<sup>149</sup> See para. 178 above.

<sup>150</sup> Calvo, *op. cit.*, p. 182.

<sup>151</sup> Fauchille, *op. cit.*, p. 40.

<sup>152</sup> Harvard Law School, *op. cit.*, p. 69.

<sup>153</sup> *Ibid.*, pp. 67-71.

<sup>154</sup> *Ibid.*, p. 145.

<sup>155</sup> *Ibid.*, p. 97.

<sup>156</sup> *Ibid.*, pp. 153-162.

<sup>157</sup> *Ibid.*, p. 173.

<sup>158</sup> *Ibid.*, p. 176.

interfere in any manner in the internal affairs of the country to which he is accredited.”<sup>159</sup>

He cites the case of Lord Sackville, British Minister in Washington, who wrote a private letter to a citizen of the United States, attempting to influence the presidential elections of the year 1888; he was duly recalled, at the United States Government's request. Similarly, in 1892 the Belgian *Chargé d'Affaires* in Venezuela was recalled at the Venezuelan Government's request after that Government had learned of a personal letter which he had addressed to the Italian Minister, informing the latter of a meeting of the diplomatic corps for the purpose of drafting a memorandum to the Governments concerned regarding the insurmountable obstacles encountered by the diplomatic agents in their efforts to secure protection for their nationals.

191. Fauchille writes that:

“... the public minister must refrain from any interference in matters of domestic administration... and from any semblance of insult to the Government and institutions of the foreign country... he must join in national rejoicing... The public minister must never provoke a disturbance, instigate an uprising, or attempt to corrupt Government officials... he must avoid any intrigue with a parliamentary opposition...”<sup>160</sup>

Fauchille also gives numerous examples of diplomatic agents whose attempts to interfere in the internal affairs of the State to which they were accredited resulted in their recall and the termination of their mission.

192. Oppenheim says that:

“The presupposition of the privileges he [the diplomatic envoy] enjoys is that he acts and behaves in such a manner as harmonizes with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the municipal law as do not restrict him in the effective exercise of his functions.”<sup>161</sup>

193. With reference to the inviolability of the agent's person, he lists the instance when this privilege cannot be invoked. Thus, when the envoy

“... commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being...”<sup>162</sup>

In this connexion, he recalls the famous case of Gyllenburg, the Swedish Ambassador in London, who was arrested as an accomplice in a plot against George I. His papers were seized.

194. Similarly, in 1718 Prince Cellamare, the Spanish Ambassador in Paris, having organized a conspiracy with the Duc du Maine against the Regency, was arrested and

subsequently escorted to the Spanish border. Saint-Simon relates the incident in his *Mémoires*:<sup>163</sup>

“Cellamare, the Spanish Ambassador, a man of great intelligence and wit, had long been given to intrigue... The scheme was simply to incite the whole Kingdom to rise up against the Duc d'Orléans, and, although they did not know exactly what to do with him, they wanted to place the King of Spain at the helm of France's affairs... and under him a lieutenant of the Regency, who was none other than the Duc du Maine...”

The French Government, however, having scant respect for the secrecy of correspondence, was well aware of the intentions of the Ambassador, of his superior, Cardinal Alberoni, and of their French connexions. It learned that Cellamare was about to send some important documents to Spain, in the care of a young cleric who called himself the Abbé de Portocarrero:

“It may be that the Abbé de Portocarrero's arrival and the briefness of his stay in Paris aroused the suspicions of the Abbé du Bois [the French Minister of Foreign Affairs] and his emissaries, or that the Abbé had bribed somebody of importance on the Spanish Ambassador's staff...”

The Spanish emissary was, in any case, arrested at Poitiers, on orders from the Abbé du Bois; his papers were seized and taken to Paris. The Spanish Ambassador, upon being notified, “concealed his anxiety by preserving a calm demeanour and called at M. Le Blanc's residence at one o'clock in the afternoon to ask for the return of a package of letters...”. It was there that he was arrested.

“M. Le Blanc replied that the package had been inspected, that it contained a number of important things and that not only was its return out of the question but he had been instructed to escort the Ambassador to his residence in the company of the Abbé du Bois, who, having just been informed of Cellamare's arrival at Le Blanc's place, had proceeded there in all haste...”

The Ambassador “retained his composure and calm demeanour throughout the three long hours they spent at his residence searching every desk and coffer... After they were done, the King's seal and the Ambassador's stamp were placed on every desk and coffer which contained papers...”. Cellamare was left in his residence, guarded by musketeers and du Libais, “one of the King's gentlemen-in-ordinary, in conformity with the practice usually followed in such unpleasant circumstances”. Du Libais later escorted him to the Spanish border, where... “He was immediately appointed Viceroy of Navarre...”

195. Thus ended a well-known incident, as related by a contemporary who had followed it closely. It shows that diplomatic agents and their sending Governments do not always duly abstain from interfering in the internal affairs of the States to which the agents are accredited; that States sometimes violate the secrecy of correspondence and even arrest the couriers of a foreign State if they deem it necessary as a measure of self-defence against

<sup>159</sup> Calvo, *op. cit.*, Vol. VI, p. 232.

<sup>160</sup> Fauchille, *op. cit.*, p. 54.

<sup>161</sup> Oppenheim, *op. cit.*, pp. 708 and 709.

<sup>162</sup> *Ibid.*, p. 709.

<sup>163</sup> *Mémoires du duc de Saint-Simon*, Edition Chéruel (Paris, Librairie Hachette, 1874), Vol. 16, chap. VI, pp. 130 ff.

a dangerous conspiracy; and also that, whatever the offence against the safety of the State imputed to him, a high dignitary, even when deprived of his freedom of movement, is treated with all the courtesy befitting his rank; his mission is terminated and, if he should be a conspirator as dangerous as Prince Cellamare, the Government to which he is accredited has him escorted to the frontier under armed guard. Moreover, his Government, instead of punishing him, frequently rewards him for the activities which evoked criticism beyond the border—"truth on one side of the Pyrenees is error on the other".

##### 5. TERMINATION OF THE MISSION

196. Incidents of this kind may lead, and indeed often have led, to a rupture of diplomatic relations between the States concerned. Frequently, however, the aggrieved State merely requests the recall of the offending agent and his replacement by one both more cautious and more respectful of conventions.

197. Other reasons for the termination of a mission are:

- (1) Accomplishment of the object of the mission;
- (2) Expiration of a letter of credence;
- (3) Recall;
- (4) Promotion of the agent to a higher class;
- (5) Delivery of passports to the agent by the State to which he is accredited;
- (6) Request by the agent for his passport;
- (7) Outbreak of war between the States concerned;
- (8) Death of the sovereign of the monarchy to which the agent is accredited;
- (9) Revolutionary change of government;
- (10) Extinction of one of the States concerned;
- (11) Death of the envoy.

198. These are, in Oppenheim's<sup>164</sup> view, the causes which may terminate a diplomatic mission. They require no comment. Whatever the reasons for an agent's departure from the foreign country in which he performs his functions, that country must allow him a sufficient period in which to prepare to leave with his family and, in cases such as the outbreak of war, with all the members of his official retinue. Until he crosses the border, the State to which he is accredited must afford him every protection, and the immunities he enjoyed survive the cessation of his functions. We shall return to this point when we come to consider which immunities protect an agent indefinitely and which of them lapse after a given time. This question has given rise to difficulties and has led to some conflicting judicial decisions. We might merely recall that in 1936 the question of the severance of diplomatic relations was the subject of debate in the League of Nations.

199. In a letter dated 30 December 1935,<sup>165</sup> Mr. Litvinov, the People's Commissar for Foreign Affairs of the

Union of Soviet Socialist Republics, advised the Secretary-General that, following a communication received from the Government of Uruguay,

"... the diplomatic representatives of the Union of Soviet Socialist Republics at Montevideo and of Uruguay at Moscow have been recalled from their respective posts".

200. The Soviet Government, relying on article 12, paragraph 1, of the Covenant of the League of Nations<sup>166</sup> said that recourse to a severance of diplomatic relations was, in its view, "a grave breach of one of the fundamental principles of the League". It also invoked article 11, paragraph 2, of the Covenant, under which any Member had the right "... to bring to the attention of ... the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends..."

201. On 23 January 1936, at the fourth meeting of the ninetieth session of the Council, the representatives of the two Governments stated their respective positions.

202. According to the representative of the Soviet Union, every State was free to establish, or not to establish, diplomatic relations with other States, and States were even free to agree between themselves in a friendly way to discontinue the exchange of diplomatic missions. However, the unilateral rupture of diplomatic relations always had to be regarded as an inimical act, of which an explanation was due to world public opinion. The procedure laid down in article 12, paragraph 1, was designed to settle situations of that kind and to provide the States concerned with an opportunity to offer the necessary explanations.<sup>167</sup> It was the duty of the League of Nations to make every effort to prevent such differences as inevitably arose between States from developing into armed conflict.

203. The representative of Uruguay, on the other hand, maintained that when a nation's internal order was threatened the Government was entitled to take whatever measures it considered necessary to protect the threatened public order and that, when in that position, it could do so "without consulting beforehand any authority other than [its] own conscience...". He further maintained that the circumstances which had given rise to the rupture "come within the category of questions which are the exclusive concern of States..." and that "It is the intrinsic characteristics of a question which determine whether it is of the category of international disputes or whether it is a matter within the internal competence of a State...".<sup>168</sup>

204. The validity of that argument was challenged by the Soviet representative at the Council's fifth meeting.

<sup>166</sup> Article 12, para. 1, of the Covenant of the League of Nations provided, *inter alia*, that: "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or *judicial settlement* or to enquiry by the Council..."

<sup>167</sup> For the debate on this question, see League of Nations *Official Journal* (1936), pp. 90-98 and 100-106.

<sup>168</sup> *Ibid.*, p. 97.

<sup>164</sup> Oppenheim, *op. cit.*, pp. 727 to 733.

<sup>165</sup> League of Nations, *Official Journal*, (February 1936), annex 1586.

He said that:

"... the only State which is absolutely sovereign and free to do whatever it likes is the State which has no international obligations, for as soon as a State assumes such obligations, it sacrifices some of its sovereignty..."<sup>169</sup>

In the view of the Soviet Union, some such sacrifice was required by article 12 of the Covenant, and Members of the League were obliged, before breaking off diplomatic relations, to submit to certain procedures outlined in the Covenant.

205. When the representative of Uruguay refused to accept this argument, a "Committee of Three" was appointed with Mr. Titulesco as Rapporteur.<sup>170</sup> The Committee submitted a resolution, subsequently adopted by the Council, expressing the hope that the interruption of diplomatic relations would be temporary.<sup>171</sup>

206. It was explained in the preamble that both States were prepared "to leave the question to the judgement of international public opinion..."<sup>172</sup> Uruguay had previously refused to produce the evidence, demanded by the Government of the Union of Soviet Socialist Republics, of the acts imputed to the latter, for Uruguay contended that the matter was governed by municipal law.

#### 6. SOME CONCLUSIONS

207. The brief account given above warrants the following conclusions: "diplomatic intercourse" consists chiefly of the active and passive right of legation, which belongs *ipso facto* to every sovereign State and occasionally, in special historical circumstances, to States which are only semi-independent; it is an imperfect right, since no State is strictly bound, under international law, to maintain diplomatic intercourse with other States; there is no well defined rule on this point other than that a sovereign State is free to maintain, with other members of the family of nations, such relations as it deems desirable and convenient; the maintenance of such relations has, since the end of the eighteenth century, become a generally accepted practice; they are established and maintained through officials called diplomatic agents; such agents are entitled to special consideration and protection; the sending State is free to select its agents and the receiving State is free to accept them or to consider them *personae non gratae*; there is nothing to prevent a State from appointing as its agent a national of the receiving State, provided that he is acceptable to that State; the agent thus appointed is entitled to all diplomatic privileges and immunities other than those expressly and previously declared inapplicable by the State to which he is accredited; diplomatic agents and the sending State have some generally recognized duties towards the receiving State, one of the most important being to refrain from interference in that State's internal or foreign affairs; even today, this obligation is not always respected; in the event of a violation, the aggrieved

State is free to impose such sanctions as it deems fit, not excluding a rupture of diplomatic relations; a diplomatic mission may come to an end from a number of causes; whatever the cause, the agent is entitled to full diplomatic immunity until he has crossed the border of the State to which he is accredited. The above principles, which reflect an international usage firmly established throughout the family of nations, may be regarded as rules of positive, albeit unwritten, international law.

### B. THEORETICAL BASIS OF DIPLOMATIC IMMUNITIES

#### I. GENERAL OBSERVATIONS

208. The principal theories, elaborated by learned jurists over the centuries, have at various times gained acceptance as the legal basis of the immunities which States extend, out of considerations of necessity and mutual interest, to the diplomatic agents whom they receive and with whom they negotiate. These theories are "extritoriality", "the representative character of the agent" and the "necessity to protect communications between States", or "functional necessity". All these will be considered below.

#### 2. THE THEORY OF EXTRITORIALITY

209. Bynkershoek gives the following explanation of the special status of a diplomatic agent:

*"Legatus non est civis noster, non incola, non venit, ut apud nos domicilium, hoc est verum et fortunarum sedem transferat: peregrinus est, qui apud nos moratur ut agat rem principis sui."*<sup>173</sup>

The learned writer's explanation resembles the theory advanced by Grotius, who says:

"According to the law of nations, the fiction that an ambassador represents the actual person of his Sovereign engenders the further fiction that he must be regarded as being outside the territory of the Power to which he is accredited..."<sup>174</sup>

210. This theory, which was upheld until relatively recent times by many authorities and often cited in judicial decisions, allows ambassadors and persons of equivalent rank immunity from all action by the public authorities of the country in which they are exercising their functions; they are thus held to be exempt from all civil and criminal jurisdiction, police regulations, duties and taxes, and so forth.

211. The fiction of extritoriality is nowadays strongly criticized. It fails to provide an adequate basis for a sound appreciation of the facts, or at least of all the relevant facts, and the scope of exemption which it would allow is never accepted in actual practice. Thus, for example, a foreign minister must observe police regulations and pay certain municipal charges for services actually rendered; if he engages in trade on his own account, the business is governed by the laws in force in

<sup>169</sup> *Ibid.*, p. 101.

<sup>170</sup> *Ibid.*, p. 106.

<sup>171</sup> *Ibid.*, pp. 137 and 138.

<sup>172</sup> *Ibid.*, p. 138.

<sup>173</sup> Cornelius van Bynkershoek, *De foro legatorum* (Classics of International Law; Oxford, Clarendon Press, 1946), chap. VIII.

<sup>174</sup> Grotius, *op. cit.*, chap. XVIII [quoted by Charles Morton, *Les privilèges et immunités diplomatiques* (Lausanne, Imprimerie La Concorde, 1927), p. 29.]

the territory in which it is effectively carried on; and, if he owns, in his private capacity, any real property in the country where he exercises his functions, such property remains subject to that country's laws.

212. It would be superfluous to cite in detail all the judicial opinions and decisions which have led to the present trend against the theory of extritoriality; the main objections, however, are these:

213. Opponents of this theory primarily criticize it because it does not afford a theoretical basis for diplomatic immunity. Moore, for example, says that the learned authorities, in speaking of the extritoriality of the minister's residence, have used the term in a figurative sense and have implicitly, or sometimes even explicitly, rejected the theory that the residence is deemed to be outside the territory where it is actually situated and to form part of the country which the minister represents.<sup>175</sup> Similarly Mastny, a member of the Sub-Committee of the League of Nations Committee of Experts, who thought it desirable to retain the term "extritoriality", stressed that it should be used only as a metaphor, in the limited but clear sense which it had acquired.<sup>176</sup>

214. It has also been emphasized that if this fiction were carried to its logical conclusion, the consequences might well be disastrous; an independent country would hesitate to authorize the presence on its territory of a foreign sovereign, even though it were only through his duly qualified representative. Even an advocate of the theory of extritoriality such as Slatin, who states that extritoriality must be understood to mean that "An ambassador, despite the fact that he resides in the State to which he is an envoy, has no domicile there in the juridical sense,"<sup>177</sup> expresses the view that this idea must not be carried too far; if it were, it would lead to the conclusion that an "ambassador could not, for example, invoke the rule of *locus regit actum*..."<sup>178</sup> that the envoy would have difficulty in entering into any business relationship with citizens of the State in which he exercises his functions, and that a crime committed within the embassy would have to be tried in accordance with the laws of the foreign country.

215. It has also been observed that the term "extritoriality" does not faithfully reflect the actual situation we are attempting to define and that such equivocation is contrary to sound legal doctrine. Another argument is that the theory affords no useful guidance towards the determination of the rights and duties of the persons supposed to benefit thereby. Thus, acceptance of the fiction of "extritoriality" in the literal sense of the word may lead to intolerable consequences; if, on the other hand, the term is used in a restricted sense, it becomes necessary to ascertain every usage, custom and other relevant source of international law before the

applicable rule can be determined. In those circumstances, the fiction ceases to serve any purpose.<sup>179</sup>

216. Sir Cecil Hurst maintains that the theory

"... may for certain purposes be useful, but it is untrue in fact, it leads to absurd results and it has now been definitely repudiated by the more modern writers and by the decisions of the courts",<sup>180</sup>

and he proposes that the term should not be construed to mean

"... that the person enjoying the privileges is to be regarded as remaining in his own country, but merely that he is not subject to the authority, the jurisdiction or the legislation of the State to which he is accredited".<sup>181</sup>

The word is used in the same sense by J. P. A. François in his lectures at the *Académie de droit international*:

"If, however, it is realized that the word only means that the person concerned may avail himself of certain privileges which, generally speaking, place him outside the authority of the host State, and that this in no way implies the fiction that he is physically outside that State, then there are few objections to its use."<sup>182</sup>

217. Oppenheim, after stating that "extritoriality" is only a fiction, finds that the term nevertheless has some practical value,

"... because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States".<sup>183</sup>

Strisower gives a definition of extritoriality which is equally applicable to diplomatic immunities. He states that it is

"... a special juridical phenomenon, the distinctive feature of which is that it clashes with the general rule that persons and things are subject to the regulation of the State governing the territory..."<sup>184</sup>

### 3. THE THEORIES OF "REPRESENTATIVE CHARACTER" AND "FUNCTIONAL NECESSITY"

218. In his work *De l'esprit des lois*, Montesquieu states this theory as follows:

"Political laws demand that every man be subject to the criminal and civil courts of the country where he resides, and to the censure of the sovereign. The law of nations requires that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either

<sup>175</sup> John Bassett Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), Vol. II, p. 775.

<sup>176</sup> See para. 52 above.

<sup>177</sup> Slatin, "De la juridiction sur les agents diplomatiques" in Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal, Billard et Cie, 1884), Vol. II, p. 335.

<sup>178</sup> *Ibid.*

<sup>179</sup> For a full summary of the theory of diplomatic immunities see Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington, D.C., John Byrne and Co., 1936), where numerous judicial decisions are cited.

<sup>180</sup> Hurst, *op. cit.*, p. 199.

<sup>181</sup> *Ibid.*, p. 203.

<sup>182</sup> J. P. A. François, "Règles générales du droit de la paix" in *Recueil des cours de l'Académie de droit international*, 1938, IV, p. 146.

<sup>183</sup> Oppenheim, *op. cit.*, p. 711.

<sup>184</sup> Leo Strisower, "L'extritorialité et ses principales applications", in *Recueil des cours de l'Académie de droit international*, 1923, pp. 233 ff.

on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office; they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accuses, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice."<sup>185</sup>

219. Different theories may be grouped under this head,<sup>186</sup> the oldest being based on the dignity of *majestas* of the State or prince whom the agent represents. Any insult to the ambassador is considered a slight upon the personal dignity of the sovereign whose envoy he is. It was this generally accepted notion which led to the famous Statute of Queen Anne after the Czar's Ambassador to London had been arrested for debt.

220. A second theory, leading to similar results, is that which explains diplomatic immunity by the fact that the ambassador represents a sovereign State whose complete independence must be respected. (See the quotation from Montesquieu in paragraph 218.) It was propounded, for example, by Chief Justice Marshall in the *Schooner Exchange v. M'Faddon and others*, where it was held, *inter alia*:

"One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or his sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence . . . This perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation."<sup>187</sup>

221. Mention may also be made here of the memorandum from the Duke d'Aiguillon to the diplomatic corps in Paris. The memorandum was in answer to a protest addressed to the Duke after the King had refused to deliver the passports of Baron de Wrech, whose creditors had made representations; d'Aiguillon defines the basis of diplomatic immunity as follows:

"The immunity of ambassadors and other ministers

is based on two principles: first, the dignity of the representative character with which they are invested; secondly, the accepted practice which derives from the fact that the reception of a foreign minister implies recognition of the rights conferred upon him by usage, or, if the term be preferred, by the law of nations."<sup>188</sup>

222. Another theory in this group seeks to justify diplomatic immunities by saying that only completely independent States enjoying full right of legation may be represented by diplomatic agents, and that, consequently, respect for the complete independence of the agent is equivalent to respect for the sovereignty of the sending State.

223. A fourth theory bases immunities on the fact that any slight upon the dignity and independence of a diplomatic representative might lead to international complications and even to war; the energetic action taken by Queen Anne against the persons who had sought to jeopardize the liberty of the Russian ambassador may be cited in support of this contention.

224. It is obvious that none of these theories provides an entirely satisfactory explanation. They may all be criticized as somewhat illogical. The State whose representative enjoys diplomatic immunities is admittedly sovereign, but the receiving State also enjoys that status; it is consequently difficult to see why either State should surrender part of its sovereign rights in the agent's favour. Even if it is argued that diplomatic intercourse is a necessity of international life and that the relevant immunities and restrictions are therefore indispensable, it certainly does not follow that the juridical justification of such immunities is to be found in the sovereign equality of States. It is thus not surprising that the "representative character" theory is less and less frequently invoked. This tendency can be perceived, for example, in Sir Cecil Hurst's comments in "Diplomatic Immunities—Modern Developments",<sup>189</sup> where he states that the purpose of the diplomatic agent's mission is the maintenance of relations between the country which he represents and the country to which he is accredited, and that the privileges which he is accorded are conditioned and limited by that purpose. Consequently, if the representative is called upon by his own sovereign to perform in the State where he is accredited functions other than those of maintaining relations between his own State and the sovereign of the receiving State,

"... the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to operate in respect to those functions. The extra-territoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is, therefore, due, not to the fact that he is engaged on the business of a foreign government, but to the fact that he is part of the machine for maintaining relations between the two governments."<sup>190</sup>

225. Mr. Diena, the Rapporteur of the Sub-Committee

<sup>185</sup> Collected works of Montesquieu: *De l'esprit des lois*, Book XXVI, chap. XXI, "That we should not decide by political laws things which belong to the law of nations" [trans. by Thomas Nugent (New York, Hafner, 1949), Vol. II, p. 7].

<sup>186</sup> See Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington, D.C. John Byrne and Co., 1936), chap. V.

<sup>187</sup> 7 Cranch, 116, 137, quoted by Ogdon, *op. cit.*, p. 108, n. 12.

<sup>188</sup> Charles de Martens, *Causes célèbres du droit des gens*, 2nd ed. (Leipzig, F. A. Brockhaus, 1858), Vol. II, p. 284.

<sup>189</sup> Hurst, *op. cit.*, p. 111.

<sup>190</sup> *Ibid.*, p. 115.

of the League of Nations Committee of Experts<sup>191</sup> considered that it would be sufficient, in order to safeguard the agent, to prohibit the serving of any writ on the legation building or on the agent in person and to prohibit the execution of any measures against him; the draft conventions examined earlier in the course of this memorandum, such as the 1925 draft of the American Institute of International Law, the 1929 proposals of the Institute of International Law and the Harvard Research draft, which, in effect, repudiate the theory of extritoriality, also seem highly reluctant to accept the theory of the agent's "representative character".

226. The practice of States—we may refer to the many examples quoted by the authorities, particularly by Montell Ogdon<sup>192</sup>—indicates that the theory of "representative character" is, frequently inapplicable. There is, for instance, no unanimous agreement on the measure of immunity to be accorded to an agent crossing a third State while proceeding to the country where he will exercise his functions; a State may require the agent to comply with laws which, in the general national interest, prohibit the import of certain articles. The fact that the exemption of diplomats from customs duties on objects intended for their personal use is considered to be a matter of comity, based on reciprocity, and the principle that immovable property belonging to a diplomat in his private capacity remains subject to the law of the land in the country where he is stationed, and many other examples, prove that the theory of the "representative character" of diplomatic agents is very commonly opposed.

227. Similarly, the replies of Governments to the questionnaire of the League of Nations Committee of Experts indicate that States are increasingly prone to interpret diplomatic privileges restrictively.<sup>193</sup> A few examples should suffice: the German Government advocated "... agreement on the principle that diplomatic representatives are amenable to the laws and regulations of the State in which they reside..."<sup>194</sup> and that "the exemption from all measures of constraint... extends to their person and everything that may seem necessary for the exercise of their functions..."<sup>195</sup>

Brazil wanted to refuse privileges to the servants of diplomatic personnel;<sup>196</sup> Denmark proposed loss of diplomatic privileges if the agent engaged in commercial transactions,<sup>197</sup> while Sweden considered that "it would be fair to impose by an international convention certain restrictions on the absolute immunity of diplomats from civil jurisdiction".<sup>198</sup>

228. Although it seems clear that the theory of the "representative character" of the agent does not always

facilitate a reply to the questions which may arise in practice, the argument which seeks to justify immunities on the grounds of "functional necessity" appears hardly more satisfactory. Its essence is thus expressed by Ogdon:

"In other words, when one is concerned with the problem whether any particular jurisdictional act, upon the part of a receiving State, is contrary to the law of nations as an invasion of the immunity which a diplomatic agent enjoys under the law, he must ask whether the particular act in question violates the security which is necessary for the diplomat's official function as a foreign diplomatic representative. Adequate protection of the diplomatic function thereby becomes the essence of the law and the test of what the law commands."<sup>199</sup>

This view appears to be shared by Lawrence Preuss, who writes:

"The scrupulousness with which the diplomatic character is now respected and the growing security of the legal order in most States make possible a reduction of diplomatic prerogatives without jeopardizing the successful and independent fulfilment of the mission which it is their purpose to secure... The need of the envoy for independence exists today no less than formerly, but it no longer requires that complete immunity from the law and jurisdiction of the receiving State which has found a figurative expression in the fiction of extritoriality..."<sup>200</sup>

229. It is, of course, *petitio principii* to say that the State must ask itself, for example, whether proceedings instituted against a diplomatic agent are likely to violate the security necessary for the agent's official function, as it is still necessary to determine and define that "necessary security" in a manner acceptable to the whole family of nations.

"Certainly", writes Sir Cecil Hurst, "it is not essential to the due performance of his duties that a diplomatic representative should be the owner of a landed estate or should trade in the country in which he is stationed. Nevertheless, principle, convenience, and the practice of governments alike lead to the conclusion that this artificial restriction of diplomatic immunities to what is judged by the writers to be necessary for the due performance of their task is not sound..."<sup>201</sup>

230. The theory of "functional necessity" might nevertheless serve as a basis for an international convention designed to lay down the irreducible minimum of immunities which diplomatic representatives must enjoy wherever they exercise their difficult functions; for it would appear, as Preuss says, in agreement with the League of Nations Committee of Experts and many Governments which replied to its questionnaire, that:

"As a subject involving few of the political factors which have thus far proved to be insurmountable

<sup>191</sup> League of Nations publication, *V. Legal, 1926.V.2* (document C.45.M.22.1926.V), pp. 4 ff.

<sup>192</sup> Montell Ogdon *op. cit.*, pp. 154 ff.

<sup>193</sup> League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), annex II.

<sup>194</sup> *Ibid.*, p. 129.

<sup>195</sup> *Ibid.*, p. 132.

<sup>196</sup> *Ibid.*, p. 143.

<sup>197</sup> *Ibid.*, p. 151.

<sup>198</sup> *Ibid.*, p. 234.

<sup>199</sup> Montell Ogdon, *op. cit.*, p. 175.

<sup>200</sup> Lawrence Preuss, "Diplomatic privileges and immunities of agents invested with functions of an international interest", *American Journal of International Law*, (1931), Vol. 25, p. 694.

<sup>201</sup> Hurst, *op. cit.*, pp. 203 and 204.

obstacles in the way of codification, the law of diplomatic privileges and immunities is eminently suited for restatement and amendment in the form of a general convention . . ." <sup>202</sup>

C. QUESTIONS RAISED BY THE EXISTENCE OF DIPLOMATIC IMMUNITIES, AND ANALYSIS OF CERTAIN RELEVANT JUDICIAL DECISIONS

1. GENERAL OBSERVATIONS

231. The authorities often divide immunities into two categories, essential and non-essential. The first comprises inviolability and the resulting immunity from jurisdiction; the second relates to acts of courtesy, <sup>203</sup> that is to say privileges which States customarily accord to diplomatic agents, on a basis of reciprocity, although not strictly required to do so by any established rule of international law. An example which springs to mind is the exemption of a diplomat's baggage from customs inspection and import duties.

232. These immunities will be considered below; their scope will, as far as possible, be defined and some relevant judicial decisions will be briefly analysed.

2. INVIOABILITY

233. "Inviolability", says Calvo, "is a quality, or status, which renders any person vested with it immune against any form of constraint or proceedings. The right of public ministers to enjoy this privilege is indisputable; it is based, not merely on convenience, but on necessity." <sup>204</sup>

And Fauchille expresses the opinion that "the whole subject is dominated by the principle of inviolability . . . This is the fundamental principle . . ." <sup>205</sup>

234. Oppenheim <sup>206</sup> is no less emphatic in this respect, and it seems hardly necessary to quote from other writers; inviolability is a principle of law recognized by most authorities and by the practice of States. However, its scope, that is to say its exact significance, still needs to be determined.

235. In its strictest sense, it means that no measure of constraint may be employed against the person or liberty of a diplomatic agent by the authorities or citizens of the State to which he is accredited. The State owes him assistance and protection; on the other hand, as the draft conventions and the authorities examined in the present memorandum show, a diplomat should not expose himself to needless risks.

236. Fauchille summarizes the "six rules" of inviolability as follows:

"(a) The privilege of inviolability extends to every class of public minister duly representing his sovereign or his country;

"(b) It extends to all persons forming part of the

official staff of the mission, including the minister's family;

"(c) The privilege applies to all things and all acts necessary to the accomplishment of the public minister's mission;

"(d) The privilege begins on the day on which the public minister enters the territory of the country to which he has been sent, provided that his mission has been announced;

"(e) The privilege lasts for the whole duration of the mission and throughout the minister's entire stay in the territory, until he leaves that territory or, at least, until sufficient time has elapsed to enable him to reach the frontier;

"(f) The inviolability of a minister subsists after a rupture of diplomatic relations between the State he represents and that to which he is accredited, and after a declaration of war or even an outbreak of hostilities, until the time when he leaves the territory." <sup>201</sup>

237. The principle is today embodied in national legislation. In France, the matter is governed by the Decree of 13 Ventôse, year II:

"The National Convention hereby enjoins every established authority not to interfere, in any manner whatsoever, with the person of any envoy of a foreign Government; all complaints against such envoys shall be referred to the Committee of Public Welfare, which enjoys sole competence to adjudicate thereon."

In the United Kingdom, the Diplomatic Privileges Act, section 3, declares null and void

"... all writs and processes . . . whereby the person of any ambassador or other publick minister . . . authorized and received as such by Her Majesty . . . or the domestick servant of any such ambassador or publick minister may be arrested or imprisoned or their goods or chattels may be distrained seized or attached . . ." <sup>208</sup>

In the United States, sections 252 to 254 of title 22 of the United States Code <sup>209</sup> contain provisions similar to those of the English statute.

238. These laws and regulations are only declaratory of existing law; they did not create anything new. This was stressed by Sir Cecil Hurst, when recalling Lord Mansfield's dictum in the case of *Triquet v. Bath*:

"The privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament is declaratory of it." <sup>210</sup>

In France, in the case of *Dientz v. de la Jara* the Court stated that "this immunity must be respected by the courts as a supreme rule of a political character, which they are bound to observe and which prevails over all provisions of private law." <sup>211</sup> Finally, in the United States, in the case *Respublica v. de Longchamps*, which confirmed the principle of the inviolability of the person

<sup>202</sup> Preuss, *op. cit.*, p. 694.

<sup>203</sup> Fauchille, *op. cit.*, p. 60.

<sup>204</sup> Calvo, *op. cit.*, Vol. III, p. 296.

<sup>205</sup> Fauchille, *op. cit.*, p. 63.

<sup>206</sup> Oppenheim, *op. cit.*, p. 707.

<sup>207</sup> Fauchille, *op. cit.*, pp. 65 to 68.

<sup>208</sup> 7 Anne, c. 12. Feller and Hudson, *op. cit.*, p. 212.

<sup>209</sup> Hackworth, *op. cit.*, p. 514, reproduces the relevant provisions.

<sup>210</sup> Hurst, *op. cit.*, p. 193.

<sup>211</sup> *Ibid.*, p. 141.

of a diplomatic agent, Chief Justice McKean held that:

"The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." (1 Dall.111 1784))<sup>212</sup>

239. Having established that the principle of inviolability is universally recognized, we shall now discuss the persons and things protected thereby and the general rule.

(a) *Persons entitled to immunities and especially to inviolability*

240. The authorities and the practice of States appear to be largely in favour of extending diplomatic immunities to the official personnel of a mission and to their wives and families. A third category, which includes non-official staff and domestic servants, has given rise to certain problems which will be discussed below.

241. Sir Cecil Hurst divides the personnel entitled to immunities in the following manner:

"1. The official staff, that is to say, the head of the mission and those who participate in the diplomatic work of the post, the counsellor, the secretaries, the attachés. This heading would also include the doctor and the chaplain... The office staff attached to the mission, registrars, archivists, stenographers, typists and porters should also be included under this heading.

"2. The wives and families of the officials comprised in the first category.

"3. The unofficial staff. This comprises the individuals who are in the employment of official members of the staff, personal private secretaries..."

And Sir Cecil finds that

"The distinguishing characteristic between the first and third categories is that the emoluments of the first category are derived from the State; the emoluments of the third are derived from the individual employers..."<sup>213</sup>

242. As regards the first two categories (official staff and their families), it will suffice to quote a few well-known cases which confirm the accepted trend. The Lord Chancellor decided in 1737, in the case of *Barbuit*,<sup>214</sup> a commercial agent for the King of Prussia against whom a Bill in equity had been filed for non-payment of debts, that, since the defendant was appointed only for the purpose of assisting Prussian subjects in their commerce, he was entitled to no diplomatic immunity; this shows, according to Sir Cecil Hurst, that such immunity is essentially the prerogative of officials entrusted with diplomatic functions. In the case of *Parkinson v. Potter*<sup>215</sup> it was decided by the High Court of Justice, Queen's Bench Division, that an attaché of an embassy or legation is entitled in England to all the immunities enjoyed by

an ambassador or head of legation and his retinue. Mathew, J., ruled that under international law protection extends not only to an ambassador, but also to all those associated with the exercise of his functions.<sup>216</sup> In the United States, in the case of *Girardou v. Angelone*, the Supreme Court of the State of New York held that the appellant, who was commercial attaché at the Royal Italian Embassy, was entitled to diplomatic immunity. This opinion was based on a communication from the State Department, which had advised:

"As such attachés are considered to be exempt from judicial review under our laws, it is believed that the legal proceedings against Signor Romolo Angelone should be dismissed."<sup>217</sup>

In France, the Court of Cassation, Civil Chamber, stated in its judgement of 10 January 1891:

"Whereas one of the consequences of the principle confirmed by the above-mentioned Decree [the Decree of 13 Ventôse, Year II] is that diplomatic agents of foreign powers are, as a general rule, not subject to the jurisdiction of French courts; Whereas this immunity should extend to all persons officially members of the legation..."<sup>218</sup>

243. Perhaps mention should also be made here of the famous case of *Engelke v. Musmann*,<sup>219</sup> in which the House of Lords recognized the diplomatic immunity of the appellant, who was employed at the German Embassy as "consular secretary" and as such on the staff of the commercial attaché. The Court deferred to a communication from the Foreign Office, which stated that the plaintiff

"...is responsible in all that he does to the German Ambassador."

244. As regards the diplomat's family, the Civil Court of the Seine, in the judgement delivered on 18 November 1907 in *Cottenet and Co. v. Raffalovich*,<sup>220</sup> recognized the immunity of a diplomat's wife who was judicially separated from her husband. The Court held that the principle of immunity extended to persons in the agent's official retinue, and that a wife judicially separated from her husband continued to enjoy such immunity, since such separation was essentially provisional and did not dissolve the conjugal relationship.

245. It should be noted, however, that the Commission on the Reform of the Civil Code, set up in France by the Decree of 7 June 1945, apparently wishes to apply the principle of diplomatic immunities in a considerably less liberal manner. Article 101 of the draft provides:

"Article 101. A diplomatic agent shall enjoy total immunity from jurisdiction throughout his mission.

<sup>212</sup> *Ibid.*

<sup>217</sup> H. Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1919-1942, supplementary volume* (London, Butterworth and Co.), pp. 204 and 205.

<sup>218</sup> Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1891), Vol. 18, p. 157.

<sup>219</sup> House of Lords [1928] A.C. 433, cited in Herbert W. Briggs (ed.), *The Law of Nations—Cases, Documents and Notes* (New York, F. S. Crofts and Co., 1938), pp. 373-379.

<sup>220</sup> Deak, *op. cit.*, p. 532, n. 153.

<sup>212</sup> Deak, *loc. cit.*, p. 199.

<sup>213</sup> Hurst, *op. cit.*, pp. 205 and 206.

<sup>214</sup> *Ibid.*, p. 207.

<sup>215</sup> 16 Q.B.D. (1885), 152.

Such immunity shall cease upon the termination of the mission, even with regard to obligations assumed by the agent while his mission subsisted.

"The immunity of a diplomatic agent shall not extend to his family, nor to his domestic staff.

"The aforesaid immunity from jurisdiction shall be enjoyed only by the head of a mission and by the counsellors and secretaries of an embassy or legation; no other person attached to a diplomatic mission shall be entitled to such immunity."<sup>221</sup>

(b) *Unofficial staff*

246. The immunities to which unofficial staff are entitled—*Engelke v. Musmann* would appear to be a borderline case—have given rise to numerous questions, some of which have been tested in court. The problem has been recently studied in detail in a monograph by Mr. Michel Mouskhély, Professor of Law.<sup>222</sup>

247. The author first points out that the problem is a difficult one, which the relevant conventions, with the exception of article 14 of the Havana Convention, have largely ignored. Furthermore, it is a critical problem in that it involves a conflict of jurisdiction between the State in which the official performs his functions and the State which he represents. Very convincing arguments can be adduced in favour of territorial jurisdiction:

"(1) A legal argument of general application . . . : territorial jurisdiction prevails over any other; . . ."

Hence immunity is the exception and the relevant rules must be applied restrictively.

"(2) A legal argument of more limited scope: the jurisdiction of the national authority, being a rule of public law, must necessarily prevail over a functional relationship which is private in nature."

Employees who are nationals of the State or country in which the minister resides must be subject to local jurisdiction "for the simple reason that it is the only jurisdiction possible".

248. By contrast, the members of the retinue who are not nationals of the State to which the mission is accredited enjoy some immunities under the laws of many countries. This privilege is extended to administrative staff of foreign nationality under the Statute of Queen Anne in England, under articles 252 to 254 of the United States Code, under a Danish Ordinance of 1708, and under the draft conventions prepared by learned societies. In the opinion of Professor Mouskhély, however, neither these statutory provisions nor the decisions of Anglo-Saxon courts provide sufficient evidence to warrant the assertion that immunities must of necessity be granted to administrative staff of foreign nationality. He refers, for example, to the case of *Novello v. Toogood*, in which the English court held that although such staff enjoyed the privilege of immunity, exemption ought not to be

granted in every instance but only in respect of acts directly connected with the diplomatic service.<sup>223</sup>

249. A tendency to limit the privileges of such employees can also be seen in the replies of States to the questionnaire of the League of Nations Committee of Experts. Germany, Brazil, Greece, Romania, Switzerland and Sweden are among the States which showed reluctance to extend these privileges to unofficial staff. It will be recalled that Mr. Diena, the Rapporteur of the Sub-Committee of the Committee of Experts, also favoured this restrictive approach. Mr. Mouskhély believes that all these considerations justify the conclusion that: "It is apparent, from a constantly increasing number of precedents, that a new *opinio necessitatis* is in the process of formation."<sup>224</sup>

250. With regard to unofficial staff who are nationals of the country to which the foreign mission is accredited, the author, while recognizing the cogency of the British and United States precedents (the cases of *Novello v. Toogood*, *Engelke v. Musmann* and, in the United States, *Columbia v. Paris*)<sup>225</sup> concludes that

"The case of staff who are nationals of the State whose territorial jurisdiction is involved . . . comes under a positive rule of customary international law. This rule authorizes States to institute an action . . . and proceed therewith."<sup>226</sup>

He recognizes, however, that while the territorial sovereignty remains basically unimpaired, so far as unofficial staff are concerned, it may in practice be subject to certain restrictions, for the general benefit of the diplomatic service, and can only be exercised with due regard to the requirements of diplomatic representation.<sup>227</sup>

251. Other authors, however, are less categorical than Mouskhély. Oppenheim, for example, states that

"It is a customary rule of international law that the receiving State must grant to all persons in the private service of the envoy, whether such persons are subjects of the receiving State or not, exemption from civil and criminal jurisdiction."<sup>228</sup>

Sir Cecil Hurst states<sup>229</sup> that immunities extend to domestic servants, subject always to the condition that the employment must be genuine and *bona fide*; but he draws attention to the lack of unanimity on this question, both among States, in their application of the principle, and among writers on the subject.<sup>230</sup> He cites article 19 of the German Act of 1898, which grants immunity only to non-German nationals. His considered opinion, however, is that the dictum of Lord Mansfield, to the effect

<sup>223</sup> *Ibid.*, p. 51 and n. 26.

<sup>224</sup> *Ibid.*, p. 54. See also article 101 of the draft revised Civil Code referred to in para. 245 above.

<sup>225</sup> Mouskhély, *loc. cit.*, p. 56-58.

<sup>226</sup> *Ibid.*, pp. 59 and 60.

<sup>227</sup> *Ibid.*, p. 60.

<sup>228</sup> Oppenheim, *op. cit.*, p. 725 and nn. 3 and 4. See also: Joyce A. C. Gutteridge, "Immunities of the Subordinate Diplomatic Staff", *The British Year Book of International Law*, 1947 pp. 148 ff.

<sup>229</sup> Hurst, *op. cit.*, p. 212.

<sup>230</sup> *Ibid.*, pp. 256-262.

<sup>221</sup> *Travaux de la Commission de réforme du Code Civil, 1949-1950* (Paris, Librairie du Recueil Sirey, 1951), p. 744.

<sup>222</sup> "Does diplomatic immunity extend to persons in the retinue of the minister?", Michel Mouskhély, *Revue générale de droit international public*, (Paris, Editions A. Pedone) 3rd ser., Vols. XXI and LIX (1950), pp. 43-64.

that the privilege of a foreign minister extends to his family and servants, is still the general rule of international law.<sup>231</sup>

252. The learned author is of the opinion that the lack of jurisdiction in respect of domestic servants who are nationals of the country to which the mission is accredited is hardly likely to give rise to difficulties, since the immunity of a domestic servant ceases when his employment is terminated.<sup>232</sup> In short, the immunity is derivative and, as stated in the case of *Novello v. Toogood*, is limited to matters which are connected with the service.<sup>233</sup>

253. In order to show that Sir Cecil Hurst's opinion is not an isolated one, it will suffice to cite the case of *District of Columbia v. Paris*.<sup>234</sup> The defendant, an American citizen employed by the Japanese Embassy, was charged with certain traffic violations. The court held that the privileges and immunities which the defendant had enjoyed throughout his period of service had ceased to exist upon his discharge therefrom, and that diplomatic agents, who could waive the privileges enjoyed in their interest by their domestic servants, would not protect any such servant in cases of wilful violation.

254. In the case of *in re Reinhardt*,<sup>235</sup> where the domestic servant of the second secretary of the Swiss Legation to the Holy See was accused of infanticide, the Court of First Instance of Rome declined jurisdiction on the ground that the immunities accorded to diplomatic agents must be extended to their servants who are not nationals of the receiving State (25 March 1938).

### 3. EXEMPTION FROM JURISDICTION

#### (a) *Exemption from criminal jurisdiction*

255. The most important consequence of the personal "inviolability" of the diplomatic agent is his exemption from jurisdiction—whether in criminal proceedings or in civil and commercial cases. However, while the immunity against criminal prosecution is absolute, the exemption in civil cases is subject to qualifications. Almost all the various draft conventions prepared by learned societies which were examined in chapter I of this memorandum uphold the principle that a diplomatic agent who in his purely private capacity engages in commercial transactions or holds real property in the country to which he is accredited, cannot plead diplomatic immunity in answer to a suit resulting from such private business. There is a lack of unanimity, however, in the relevant judicial decisions, which will be considered in detail in the following section.

256. Complete exemption of a diplomatic agent from local criminal jurisdiction is fully justified by the requirements of his functions. Montesquieu's famous dictum (see para. 218) is also relevant in this connexion:

<sup>231</sup> *Ibid.*, p. 256.

<sup>232</sup> *Ibid.*, p. 261.

<sup>233</sup> *Ibid.*

<sup>234</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1938-1940*, pp. 432 ff.

<sup>235</sup> *Ibid.*, p. 435.

"...they might be wrongfully accused if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged."

This, however, does not necessarily imply that the diplomatic agent is free to commit crimes and offences with impunity. Authorities on the subject unanimously reject any such implication, and point out that a distinction must be drawn between the exemption from jurisdiction, which operates procedurally and not substantively, and the penal liability of the offending agent, which remains unaffected. Moreover, the receiving Government is not powerless to act against such agent. It may request his recall; it may—as noted in the case of Prince Cellamare—confine him to his residence and have him escorted to the frontier in a manner befitting his rank, or it may ask the Government which the agent represents to institute proceedings in its own courts.

257. Oppenheim, summarizes the situation as follows:

"As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of international law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys... But this does not mean that a diplomatic envoy must have a right to do what he likes."<sup>236</sup>

258. Fauchille does not hesitate to express the same opinion:

"Diplomatic agents, irrespective of rank, enjoy complete exemption from the civil and criminal jurisdiction of the State to which they are accredited";<sup>237</sup> and Sir Cecil Hurst concludes his detailed examination of the question with the statement:

"On the whole it may be stated with confidence that the view that the diplomatic agent and the members of his suite are exempt from the criminal jurisdiction of the country in which they are stationed is not only sound in itself, but is in accordance with the practice of all civilized States."<sup>238</sup>

259. Lastly, we should note the opinion of Francis Deak who, after citing a number of decisions in favour of the absolute exemption of diplomatic agents from jurisdiction, states that:

"The conclusion may be deduced that in a general way the exemption of diplomatic agents from local jurisdiction is an universally recognized rule of international law..."<sup>239</sup>

#### (b) *Exemption from civil jurisdiction*

260. As stated in paragraph 255 above, the question of civil immunity, while universally accepted in principle, nevertheless gives rise to a number of problems.

261. The rule of exemption from civil jurisdiction has not always been recognized by States without a struggle. In Holland, for example, the courts of justice claimed jurisdiction over foreign diplomatic representatives until

<sup>236</sup> Oppenheim, *op. cit.*, p. 708.

<sup>237</sup> Fauchille, *op. cit.* p. 85.

<sup>238</sup> Hurst, *op. cit.*, p. 225.

<sup>239</sup> Deak, *op. cit.*, p. 522.

an edict issued by the States General in 1679, to the effect that foreign ambassadors and their suite could not on arrival, departure or while remaining in the country be subjected to process by the courts;<sup>240</sup> in England this rule seems to have been established as early as 1657. The whole question was carefully considered there in the case *Re the Republic of Bolivia Exploration Syndicate Ltd.*<sup>241</sup> in which it was declared that "a diplomatic agent accredited to the Crown by a foreign State is absolutely privileged from being sued in the English courts..."

262. In the case of *Magdalena Steam Navigation Co. v. Martin*, where the Guatemalan Minister in London was sued for the recovery of an amount due in respect of the shares of a corporation in liquidation, the court found that a diplomatic representative duly accredited to the Queen was privileged from all liability to be sued in civil actions. Lord Campbell, C.J., stated:

"He is to be left at liberty to devote himself body and soul to the business of his embassy... It certainly has not hitherto been publicly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all civil actions; but we think that this follows from well-established principles."<sup>242</sup>

263. In France, the principle was established in 1891 by the *Court de Cassation*, in the case of *Errembault de Deedzele*<sup>243</sup> after the court had listened to the classic pleading of Desjardins, the *Avocat Général*, who, after reviewing the problem as a whole, concluded as follows:

"But, in my submission, the court will at least have to dispose of the point whether a distinction should be made, with regard to exemption from jurisdiction, between acts performed by the diplomatic agent as a representative of his Government and acts which he performs merely as a private individual. I respectfully submit that such a distinction would be erroneous. If a diplomatic agent were to be subject to the jurisdiction of French courts whenever he acted as a private individual, such creditors as he might have would pursue him mercilessly and their litigious manoeuvres—whether legitimate or merely vexatious—might hinder him in the discharge of his duties; this would lead to the very situation which the law of nations sought to avoid in propounding the maxim: *ne impediatur legatio.*"<sup>244</sup>

264. The *Court de Cassation* endorsed the conclusions of the *Avocat Général* by setting aside the decision of the Civil Tribunal of the Seine, by which the defendant, the counsellor of the Belgian Legation in Paris, had been ordered in default to pay to Mr. Foureau de la Tour the sum of 377.05 francs in respect of taxes, paid on his behalf, on an apartment which he occupied.

265. The Italian courts, on the other hand, have shown greater reserve on the subject. For example, the Court of First Instance of Rome, in a decision of 12 December 1937, held that immunity from civil process

could only be successfully claimed in respect of acts relating to the exercise of diplomatic functions in the strict sense of the word.<sup>245</sup> We know, however, that this judgement, which was beginning to be generally accepted by the Italian courts, was overruled in the decision in *Re de Meeus v. Forzano*, in which the *Court de Cassation* of Rome stated, *inter alia*:

"What is disputed is whether the immunity, as far as the exemption from civil jurisdiction is concerned, must be complete and must therefore be extended also to private transactions which the agent carries out in the country to which he is accredited. If it is admitted that the exemption is derived from the inherent quality of the person invested with a diplomatic office, then it does not appear possible to recognize the exemption in part and to deny it in part..."<sup>246</sup>

the Court reached the conclusion that:

"For this reason, in the absence of provisions to the contrary in our municipal law... it must be held that the principle that diplomatic agents accredited to our country are exempt from Italian civil jurisdiction, applies in Italy even in respect of acts relating to the necessities of their private affairs."<sup>247</sup>

266. In a decision of 6 May 1940,<sup>248</sup> the Court of Rome went further, by holding that the privilege of diplomatic immunity could be claimed where the agent, although the plaintiff in the original suit, became the defendant in a counterclaim. The Court stated that

"There can be no doubt that the plaintiff in the principal action, who becomes a defendant in a counterclaim, has the incontestable right to raise and to develop all his arguments... and that the court seized with the principal question must examine the preliminary point as to whether the new action falls within its sphere of jurisdiction and competence or not..."<sup>249</sup>

The Court concluded that a diplomatic representative may plead exemption from jurisdiction even in the case of a counterclaim, that such a plea is well founded and that the counterclaim brought by the defendant cannot therefore be entertained.<sup>250</sup>

267. This view, however, is not generally accepted. For example, Sir Cecil Hurst<sup>251</sup> cites a decision by the Court of Paris, rejecting the application of the first secretary of a foreign legation who, having applied to the Court to be put in possession of the fortune of his wife, then desired to rely on his diplomatic immunity to object to counterclaims brought by the guardians of her infant children. The court ruled:

"Diplomatic agents cannot avail themselves of this exemption as a means of preventing the local courts, in which they have themselves instituted proceedings,

<sup>240</sup> Hurst, *op. cit.*, pp. 227 ff.

<sup>241</sup> [1914] I Ch. 139; Hurst, *op. cit.*, p. 229.

<sup>242</sup> Deak, *op. cit.*, p. 524.

<sup>243</sup> Clunet, *op. cit.*, pp. 137 ff.

<sup>244</sup> *Ibid.*, p. 156.

<sup>245</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1935-1937*, p. 393.

<sup>246</sup> *Idem*, 1938-1940, p. 424.

<sup>247</sup> *Ibid.*, p. 426.

<sup>248</sup> *Idem*, 1941-1942, p. 369.

<sup>249</sup> *Ibid.*, p. 372.

<sup>250</sup> *Ibid.*, p. 373.

<sup>251</sup> Hurst, *op. cit.*, pp. 242 and 243.

from hearing arguments against decisions rendered in their favour.”

According to the same writer, the English courts would assume jurisdiction in the event of a set-off (a cross claim for a liquidated amount) pleaded by a defendant against a diplomat plaintiff, or in the event of a cross-action between the same parties arising out of the same facts.

268. Sir Cecil Hurst concludes<sup>252</sup> that this obligation to submit to jurisdiction is not really an exception to the general principle of immunity from jurisdiction, but merely a consequence “of the rule that if a diplomatic representative submits to the jurisdiction by initiating proceedings, he must submit to the jurisdiction *in toto* . . .”

269. According to Hackworth,<sup>253</sup> American practice is apparently following the same trend. Thus, when the Ambassador of Great Britain notified the Secretary of State on 16 January 1916 that he had received a summons from the United States District Court of Maine commanding him to appear in a civil suit instituted against him, the Secretary, after investigating the matter, informed the Ambassador that on motion by the District Attorney an order had been entered by the Court dismissing the writ.

270. The numerous other examples cited by Hackworth confirm this practice.

271. A question frequently considered in authoritative works and courts is whether a diplomatic agent, or any of his subordinates entitled to privileges, can be sued in the courts of the country to which the official is accredited for the recovery of debts incurred either before or after he assumed his duties. The reply, as some of the decisions already cited also indicate, must apparently be in the negative.

272. Thus, the French *Court de Cassation*, in the case of *Procureur-Général v. Nazara Aga*, stated:

“However, it is hardly relevant whether the diplomatic agent contracted the debt before or after the beginning of his functions; it is sufficient that he was enjoying official status when proceedings were instituted against him . . .”<sup>254</sup>

273. The Supreme Court of Czechoslovakia, in a decision of 9 December 1936, in the case of the secretary of a foreign legation, accredited to Prague, who had inherited real property from a Czechoslovak citizen and had been sued in the Czechoslovak courts for the recovery of a deposit made by a third person for the purchase of the property, held that:

“... the defendant, who enjoys on Czechoslovak territory the privileges of extraterritorial persons according to article 9 of the Code of Civil Procedure, has not submitted to the jurisdiction of the Czechoslovak courts in the case under consideration. The fact that he is sued as a legal successor of a Czechoslovak subject

from whom he inherited real property in Czechoslovak territory is irrelevant for the decision of the question whether the Czechoslovak courts have jurisdiction under article 9 of the Code.”<sup>255</sup>

274. Attention should be drawn, however, to a recent decision of the First Chamber of the Paris Court of Appeal,<sup>256</sup> which would appear to indicate a tendency to limit immunity in France. The Court stated that:

“Although the basic purpose of exemption from jurisdiction, which is to afford the representatives of foreign States the necessary freedom for the performance of their diplomatic functions, warrants the extension of the privilege to the wives of such representatives, it would nevertheless be an abuse of the exemption if the wife of a diplomatic agent were able to invoke her status in order to evade liability in respect of personal debts contracted before her marriage and having no connexion with her husband’s functions . . .”

In reporting the case, the *Journal du droit international* adds that, by its decision, the Paris Court of Appeal showed “a desire to limit the scope of an immunity which may in many instances appear excessive *per se*, at a time when there is a substantial increase in the number of persons benefiting therefrom”.

275. It would appear unnecessary to study in detail this particular aspect of the question of exemption from jurisdiction. It should be recalled, however, that the question of debts contracted by diplomatic agents before or after acquiring official status led to the enactment of the Statute of Anne in England, following the arrest of the Russian Ambassador in London for debt and the ensuing diplomatic complications. In the same connexion, in France in 1772 the Minister of Foreign Affairs, the Duke d’Aiguillon, refused to deliver passports to Baron de Wrech, Minister Plenipotentiary of the Landgrave of Hesse-Cassel, who wished to depart leaving his debts unpaid. In the memorandum which he addressed to the diplomatic corps accredited to Paris,<sup>257</sup> the Duke d’Aiguillon sought to establish the principle that immunity, being based on a tacit agreement between sovereigns, could have but one purpose: “... to preclude anything that might hinder the minister in the exercise of his functions . . .” and that, having regard to the reciprocal nature of any agreement: “... the minister loses his privilege when he abuses it contrary to the firm intention of both sovereigns.” The Duke d’Aiguillon concluded “... that a public minister cannot avail himself of his privilege in order to evade the payment of any debts he may have contracted in the country in which he resides . . .”, as such a refusal would violate “... the first law of natural justice, which was recognized long before the privileges of the law of nations . . .” It was not until the Landgrave de Hesse-Cassel had assumed

<sup>255</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1938-1940*, p. 429.

<sup>256</sup> *Journal du droit international* (Paris, Editions techniques S.A., 1955), p. 391.

<sup>257</sup> The correspondence concerning this famous case is reproduced in: Charles De Martens, *Causes célèbres du droit des gens*, 2nd ed. (Leipzig, F. A. Brockhaus, 1858), Vol. II, pp. 282 ff.

<sup>252</sup> *Ibid.*, p. 244.

<sup>253</sup> Hackworth, *op. cit.*, pp. 533 ff.

<sup>254</sup> Hurst, *op. cit.*, note on p. 230; see also *Journal du Palais*, Bulletin des sommaires (Paris, Librairie du Recueil Sirey, 1921), Part I, p. 121.

responsibility for the obligations of his Minister that the latter was able to obtain his passports and leave Paris.

276. In any event, most authorities and judicial decisions favour the view that debts contracted by the agent in the receiving country before the beginning of his mission are not recoverable therein through legal process, so long as the agent is covered by his immunity.

277. Writers and court decisions also seem to agree that exemption from jurisdiction should be respected even where an agent engages in commercial transactions in the country to which he is accredited.

278. Sir Cecil Hurst is emphatic on this point.<sup>258</sup> By contrast, Mr. Charles Dupuis, in the second part of his lectures on international relations, states that, in his opinion, exemption from jurisdiction would not extend to a diplomatic agent who owns real property in the country in which he serves or who engages in commercial transactions in that country. However, he adds that:

"In doubtful cases, it would be the function not of the local courts but of the sending State to determine the dividing line."<sup>259</sup>

279. Raoul Genet<sup>260</sup> shares the opinion of Sir Cecil Hurst. In support of their view, these two writers cite the decision of the Paris Court of Appeal in 1867, in the *Tchitcherine* case, and the argument of the *Avocat-général* Descoutures, who, referring to the lack of civil jurisdiction of French courts over diplomatic agents, concluded that the same principle should apply in commercial cases:

"...for the consequences are the same, the interference is the same and, in the final analysis, a person who has commercial dealings with a diplomatic agent cannot be unaware of the latter's functions, status and privileges."

In support of the opposite view, however, it is possible to cite the decision of 27 June 1930 rendered by the Second Sub-Section of the Contested Matters Chamber of the Council of State in the case of *Thams*, counsellor of the Legation of Monaco in Paris. Mr. Thams represented a number a business firms in Paris and the Council of State concluded:

"...that he is therefore exercising the profession of commercial agent; that, consequently he has lawfully been required to pay the commercial tax and the municipal tax on commercial premises due from him for the years 1918 and 1919 in his capacity as such an agent."<sup>261</sup>

280. However, the Paris Court of Appeal, in the case of *Breilh v. Mora*, found that there was no need to determine: "...the nature of the debts which the plaintiff seeks to recover from the diplomatic agent" and that

"Immunity from jurisdiction also applies to pro-

ceedings for the recovery of commercial debts incurred by the agent before his appointment."<sup>262</sup>

281. As regards English practice, we may refer to the case of *Taylor v. Best*.<sup>263</sup> Drouet, a second secretary and later Belgian Minister Resident in England, was one of the directors of a commercial firm. He was sued in the English courts, together with his fellow-directors, and pleaded diplomatic immunity. The Court found that:

"...it is equally clear that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the provision in 7 Anne c. 12 s. 5 in the case of an ambassador's servant..."

282. We may also refer to the case of the *Magdalena Steam Navigation Company v. Martin*, cited above together with the pertinent ruling,<sup>264</sup> and the case of *In Re the Republic of Bolivia Exploration Syndicate Ltd.*,<sup>265</sup> in which the Court duly upheld the plea of diplomatic immunity.

### (c) Attendance as witness

283. Before leaving the subject of personal immunity, we should briefly mention that a diplomatic agent cannot be required to appear as a witness in a court of the country of his sojourn; many authorities nevertheless agree that if a request for his testimony is transmitted through the diplomatic channel, he must give evidence in the embassy building before a commissioner appointed for that purpose. We shall merely give a few examples of the view taken by certain Governments and authorities on this question. Hackworth, for instance, refers to a communication dated 21 October 1922 from the Under Secretary of State to the United States Minister to Poland, requesting him to draw the attention of the Polish Minister of Foreign Affairs to the following:

"...that under the generally recognized principles of international law the registered personnel of a foreign mission are exempt from judicial citation and that this government considers that the course followed by the Polish Government... summoning members of the Legation's staff to appear as witnesses, is not in accord with these principles..."<sup>266</sup>

284. Fauchille states that a diplomatic agent cannot: "...be summoned to appear as a witness before a criminal court; he may only be requested to submit his testimony in writing..."<sup>267</sup> Sir Ernest Satow notes that a diplomatic agent: "...cannot be required to attend in court to give evidence of facts within his knowledge, nor can a member of his family or of his suite be so compelled."<sup>268</sup> Calvo refers to the occasion in 1856 when

<sup>262</sup> Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1900), Vol. 27, pp. 953 and 954.

<sup>263</sup> Deak, *op. cit.* p. 523, where the main arguments are cited.

<sup>264</sup> See para. 262.

<sup>265</sup> Deak, *op. cit.*, p. 524.

<sup>266</sup> Hackworth, *op. cit.*, p. 553.

<sup>267</sup> Fauchille, *op. cit.*, p. 93.

<sup>268</sup> Sir Ernest Satow, *A Guide to Diplomatic Practice* (London, Longmans, 1932), p. 187, para. 349.

<sup>258</sup> Hurst, *op. cit.*, pp. 241 ff.

<sup>259</sup> Charles Dupuis, "Liberté des voies de communications. Relations internationales", *Recueil des cours de l'Académie de droit international*, 1924, I (Paris, Librairie Hachette), p. 303.

<sup>260</sup> Genet, *op. cit.*, p. 579.

<sup>261</sup> E. Clunet et André-Prudhomme, *Journal du droit international* (Paris, Editions Godde, 1931), Vol. 58, p. 363.

the Netherlands Minister to Washington was summoned to appear as a witness in a case involving homicide committed in his presence. The Minister refused, and the Netherlands Government, requested by the Secretary of State to order the Minister to appear, put in a demurrer. The United States Cabinet thereupon demanded the Minister's recall.<sup>269</sup>

285. Oppenheim states<sup>270</sup> that no diplomatic envoy can be obliged to appear as the witness in a criminal or administrative court.

286. Generally speaking, however, the authorities support the view that a diplomatic agent whose evidence has been requested through the diplomatic channel should be authorized by his Government to testify in the embassy building before a duly appointed commissioner. This conclusion seems to be borne out by the drafts considered in chapter I of this memorandum. Nevertheless there seems to be no generally accepted rule on the subject and each case should be decided on its own merits by the Governments concerned.

#### 4. WAIVER OF IMMUNITIES

287. There are several opinions on the question whether the agent can waive his immunities. Some writers maintain that he must be authorized to do so in each specific case by the Government he represents. Others consider that this condition only applies to the head of the mission himself, and maintain that the minister is entitled to waive the immunities of his subordinate staff. The basic argument is that immunities are not the personal prerogative of the individual who enjoys them but are granted to the sending State; consequently, only that State is competent to waive them. Sir Cecil Hurst discusses the question in chapter VI of his course of lectures.<sup>271</sup> In his opinion "...there must be some act to which the courts can look as embodying the consent of the sovereign of the country which the diplomatist represents." Furthermore, the waiver must be definite and in due form. The diplomat concerned cannot dispute the decision of his government to waive his immunities before the court, although it is "...doubtful whether it is right for either the Government or the court to ask for any formal evidence of the Government's concurrence other than that expressed through the foreign representative himself..." He would agree that it is sufficient for the head of the mission to waive the immunities of his staff on their behalf and that the minister is certainly competent to waive the privileges of his servants (derived immunity). He emphasizes moreover that immunity may be invoked at any stage of the trial, even if the agent does not plead it when the proceedings are first set in motion.

288. Sir Ernest Satow is of the same opinion and mentions a number of legal decisions to support his contention:<sup>272</sup>

1. The case of *M. C. Waddington*, son of the Chilean

chargé d'affaires at Brussels, who was accused of murder and took refuge in his country's legation. The Belgian authorities waited for the consent of the Chilean Government before arresting the accused (1906).

2. In 1917, in the case of *Suarez v. Suarez*, the Bolivian Minister in London waived his immunity but failed to comply with a court order to pay a certain sum of money into court in his capacity as administrator of the Suarez estate. The Court held that, even under those circumstances, the diplomat could assert and obtain diplomatic immunity.
3. However, in 1925, the Paris Court of Appeal, in the case of *Drtilék v. Barbier*, held that the chancellor of the Czechoslovak legation could not, after referring a rent restriction matter to the French courts, shelter himself behind diplomatic privilege in the event of a counterclaim.<sup>273</sup>

289. In the *Grey* case<sup>274</sup> the Paris Court held that persons enjoying diplomatic immunity may waive that immunity without prior leave; such waiver, which may be inferred from the unambiguous circumstances of the case, revives the competence of the French Courts. The facts in this case were that an attaché of the United States Embassy in Paris entered an appearance in the civil Court in which his wife had filed a divorce petition, put in no demurrer at the preliminary hearing when the Court examined the possibilities of a reconciliation, and proceeded to state his case. The Court found that, in those circumstances, he had quite clearly shown that he wished to waive diplomatic immunity, as he was entitled to do, and to accept the jurisdiction of the French Courts as regards the action brought against him and the consequences thereof. The Court decided that it could therefore rule that the respondent was in default and give judgement on the appeal brought by his wife.

290. Lastly, we might recall that article 26 of the Harvard draft<sup>275</sup> requires the express authorization of the sending Government only where the waiver concerns the chief of mission; in other cases, the waiver may be made by the chief of mission himself on his Government's behalf. The authors of the draft believe "...that the rule laid down... fulfils the requirements of international law." However, there seems to be general agreement that, even where the waiver is made in due form, a subsequent court order against the diplomat cannot be enforced by execution levied on his property or by constraint of his person. Fauchille is quite emphatic on this point:

"Whether the authorization of the sovereign is express or tacit, no measure of enforcement... may in any circumstances be taken either against the inviolable person of the public minister or against his property...";<sup>276</sup>

<sup>269</sup> Calvo, *op. cit.*, pp. 318 and 319.

<sup>270</sup> Oppenheim, *op. cit.*, p. 717.

<sup>271</sup> Hurst, *op. cit.*, p. 249. See also cases cited therein.

<sup>272</sup> Satow, *op. cit.*, pp. 183 ff.

<sup>273</sup> See also the other cases referred to by Sir Ernest Satow.

<sup>274</sup> *Journal du droit international* (Paris, Editions techniques S.A., 1953), pp. 887 and 889.

<sup>275</sup> Harvard Law School, *op. cit.*, pp. 125 ff.

<sup>276</sup> Fauchille, *op. cit.*, p. 97.

this opinion is shared by Genet<sup>277</sup> and almost all other writers.

291. In the case of *Rex v. Kent*,<sup>278</sup> the Court of Criminal Appeal of England, in a judgement of 4 February 1941 concerning a subordinate official indicted on a number of charges, found that the appellant had been discharged on 20 May 1940 and that on the same day, or the day before, the Ambassador had waived the appellant's diplomatic privilege. The Court consequently rejected the appellant's plea of immunity from jurisdiction, ruling that the privilege of a subordinate official was in fact the privilege of the ambassador, recognized by the receiving State in the interests of the mission. The ambassador could therefore waive it with immediate effect in the case of all staff of the appellant's category.

## 5. FISCAL IMMUNITIES

### (a) General observations

292. Of the immunities that remain to be examined, we should first mention exemption from taxation. Fauchille<sup>279</sup> regards this as a privilege extended merely out of courtesy, but it is nevertheless so widely recognized that it may be considered as a generally accepted practice.

293. The points to determine are the scope of the exemption and the charges and taxes to which it usually applies. These questions will be briefly examined below.

### (b) Exemption from personal taxes

294. There is no doubt that a diplomatic agent and members of his family living with him are exempt in the receiving State from all taxes upon their person, their salary, and, as a rule, their personal property. This immunity extends, of course, to their personal possessions, furniture, and so forth. The problematic point is the income derived from the agent's private business in the country where he is stationed. The Harvard Law School in its *Research in International Law*<sup>280</sup> states that those authorities who seek to distinguish between the official and non-official action of the agent are seemingly inclined not to admit that his income, at least that derived from private sources situated in the receiving State, should be immune; the authors then add:

"Here, as in many other situations, there is a confusion between the liability of a diplomat with respect to taxation of his property, and the immunity of the diplomat from any coercion on the part of the receiving State to assert a lien upon property or to force the person to pay the tax".

However, the Harvard Research admits that a diplomat has to pay taxes on services rendered, and that immovable property privately owned by a diplomatic agent is subject to local taxes. The principle of immunity is now embodied in the legislation of many States, while Sir Cecil Hurst thinks that it is difficult to draw a clear distinction

between immovable property occupied by the agent in his private capacity and that occupied in his official capacity.<sup>281</sup>

### (c) Exemptions relating to the official premises of the mission

295. A further problem is raised by immovable property owned by the foreign State or by the agent on its behalf and used for official purposes; this includes the residence of the chief of the mission. The whole question was examined in detail in a decision of the Supreme Court of Canada of 2 April 1943,<sup>282</sup> entitled: "In the matter of reference as to the powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to levy rates on Foreign Legations and High Commissioner's Residences." The City of Ottawa levied rates on the property of foreign legations and the question arose whether it was competent to do so. The majority of the Court decided that no local taxes could be imposed on such property belonging to foreign States. After rejecting the fiction of "extritoriality", the judgement proceeds to an exhaustive analysis of the question whether such property is liable to assessment. A distinction is drawn between taxes which constitute payment for services rendered and taxes in the strict sense. The Court stated that the imposition of the latter form of tax presupposes a person from whom, or a thing from which, it is exacted or collected "...in virtue of superior political authority. It does not require much argument to establish that... such an exaction cannot be demanded by one equal sovereignty from another, or from its diplomatic agent". The Court then considered whether real estate taxes, imposed by a statute in general terms, can be exacted in respect of diplomatic property, and, after referring to a number of statutes and authorities, concluded that in England such taxes are not recoverable in respect of real property occupied by diplomatic agents or owned by them or the States they represent. The judgement goes on to define these taxes as a lien upon the land, by virtue of which the land may be sold by the competent authorities and the proceeds of the sale applied in payment of taxes due and unpaid. In the opinion of the Court, such a sale involves *coactio* (within the meaning of the term as used by Lord Campbell in the *Magdalena Steam Navigation Company v. Martin* case), which might oblige the foreign State to appear before the local judicial authorities in an attempt to assert its rights. The Court then examined the argument, which is frequently relied upon, that a tax enforceable on its real property is not directly imposed upon the foreign sovereignty; the Court held that this argument did not apply to diplomatic property, and stated *inter alia*: "...the creation of the charge amounts to the creation of a *jus in re aliena*, to a subtraction from the property of the foreign sovereign" (see also *Le Parlement Belge* (1880) 5. P.D. 197); such a proceeding would be inconsistent with the principle *par in parem non habet imperium*. The Court finally held that such taxes could

<sup>277</sup> Genet, *op. cit.*, pp. 592 and 593.

<sup>278</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1941-1942*, p. 365.

<sup>279</sup> Fauchille, *op. cit.*, p. 98.

<sup>280</sup> Harvard Law School, *op. cit.*, pp. 115 ff.

<sup>281</sup> Hurst, *op. cit.*, pp. 233 ff.

<sup>282</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1941-1942*, pp. 337 ff.

not be collected from a foreign sovereign or from his qualified representative and that consequently such property could not be listed on the assessment roll.

296. This decision deserves careful consideration. It throws light on the frequently debated question whether the receiving State can rely on the argument that the imposition of real estate taxes on the official premises of the mission and on the minister's private residence does not constitute any encroachment on the independence of the sending Government. The Canadian judgement, after scrutinizing every aspect of the problem, rejects this argument outright.

297. This opinion is also borne out by article 4 of the draft prepared by Harvard Law School;<sup>283</sup> the relevant comments cite some convincing excerpts from the legislation of many States. (See also para. 294 above.)

#### (d) *Exemption from customs duties*

298. There is general agreement among the authorities that the privilege of free entry for articles destined for the official use of the mission, or for the personal or family use of one of its members, rests upon international courtesy alone, and not upon any mandatory rule of the law of nations. We may recall Mastny's opinion in this connexion.<sup>284</sup> Many treaties governing the treatment accorded by each contracting party, in its territory, to the nationals of the other contracting party, expressly provide for this exemption on a basis of reciprocity.

299. Fauchille observes that this is "purely an *ex gratia* concession"<sup>285</sup> and Oppenheim states that, in practice and as a matter of courtesy, many States allow diplomatic envoys to receive free of duty goods intended for their own use.<sup>286</sup> Sir Ernest Satow discusses the provisions governing free entry enacted by various States.<sup>287</sup> Hackworth notes that in the United States this exemption is granted on a reciprocal basis.<sup>288</sup>

#### 6. FRANCHISE DE L'HÔTEL

300. Agreement on the *franchise de l'hôtel* or the inviolability of the official residence of the diplomatic agent is so general that, in the present context, a brief reference to the point should suffice. This privilege is the basis of the rule that officers of justice, police, revenue and customs are forbidden to enter premises occupied by the embassy, or used as a residence by members of the mission, without the express authorization of the chief of the mission. This raises the problem of "diplomatic asylum", which will not be discussed in this memorandum. We need only point out that the minister may not use the official residence to shelter common criminals or, in principle, even persons charged with political offences.

301. Sir Cecil Hurst concludes that "no doubt exists" that the official residence of the Minister and premises used for official purposes are exempt from the local jurisdiction;<sup>289</sup> Oppenheim affirms that the immunity of domicile: "... comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys".<sup>290</sup>

#### 7. POSITION OF THE AGENT IN A THIRD STATE

302. This question may arise when an agent passes through a third State while proceeding to the country to which he is accredited or while returning therefrom. It may also arise with regard to diplomatic couriers.

303. It is accepted as a general rule that diplomatic agents in transit are outside the jurisdiction of the courts of third States, but it is an unsettled point whether they should enjoy the full measure of diplomatic privileges. There is no general rule; however, according to Sir Cecil Hurst, who refers to a number of judicial decisions in support of his opinion,<sup>291</sup> the authoritative view seems to be that a diplomatic agent passing through a third State on his way to or from his post is exempt from the jurisdiction of the courts. This rule would nevertheless only apply if the Government of the third State has been officially notified of the agent's journey and has raised no objections.

304. We may recall that article 15 of the Harvard draft<sup>292</sup> requires the third State to accord only such immunities as are necessary to facilitate the agent's transit; moreover, the third State is only bound by this rule if it has recognized the Government of the agent and is notified of his journey. The article is based on the theory that it is in the common interest of all States to facilitate international intercourse through the agency of duly accredited diplomatic officers.

305. Sir Ernest Satow<sup>293</sup> states that, at the present time, it is usual to extend to diplomats in transit: "... all reasonable facilities and courtesies for the purpose". However, he emphasizes that there is no well-established rule, and cites several authorities, such as Heyking and Deak, who question the absolute right of the diplomatic agent in transit to insist on his diplomatic prerogatives. Deak, for example, states that it is customary to accord special protection to diplomats in transit, but then adds: "There is, nevertheless, no definite rule and certainly no unanimous opinion on this subject..."<sup>294</sup>

306. In support of the view that the agent in transit should enjoy diplomatic immunity, we may quote the reply of the French Minister of Foreign Affairs in the *Veragua* case; the Minister observed that a diplomatic agent passing through France, even if he only has a temporary mission to perform in the State to which he is proceeding, "... should be regarded as an accredited

<sup>283</sup> Harvard Law School, *op. cit.*, pp. 37 ff.

<sup>284</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 88.

<sup>285</sup> Fauchille, *op. cit.*, p. 100.

<sup>286</sup> Oppenheim, *op. cit.*, p. 718.

<sup>287</sup> Satow, *op. cit.*, pp. 214 ff.

<sup>288</sup> Hackworth, *op. cit.*, p. 586.

<sup>289</sup> Hurst, *op. cit.*, p. 214.

<sup>290</sup> Oppenheim, *op. cit.*, p. 713.

<sup>291</sup> Hurst, *op. cit.*, pp. 277-284.

<sup>292</sup> Harvard Law School, *op. cit.*, pp. 85 ff.

<sup>293</sup> Satow, *op. cit.*, pp. 226 ff.

<sup>294</sup> Deak, *op. cit.*, p. 558.

diplomatic agent and, accordingly, as exempt from the local jurisdiction".<sup>295</sup>

However, in the case of *Sickles v. Sickles*, the Civil Court of the Seine, on the hearing of a divorce petition, rejected the proposition that diplomats in transit: "... could claim the same immunities when on foreign territory for reasons in no way connected with their official duties...".<sup>296</sup>

307. Lastly, it is obvious that a diplomat cannot claim diplomatic immunity in the third State if his sojourn therein considerably exceeds the time reasonably required for transit.

#### 8. TERMINATION OF THE MISSION

308. Sir Cecil Hurst maintains that the immunities should continue until the agent leaves or has had time to leave the country.<sup>297</sup> However, it is uncertain whether the agent remains entitled to the full measure of privileges; it is debatable, for example, whether after the termination of the mission criminal proceedings can be instituted against him, or whether exemption from civil jurisdiction may still be pleaded for some specified time.

309. The learned author concludes his discussion of this matter with these words:

"These cases show that the true rule is that the immunities of a diplomatic agent subsist for a period after his functions have come to an end, long enough to enable him to settle up his affairs and return home."<sup>298</sup>

This opinion, further confirmed by a number of decisions cited by Sir Cecil Hurst and by the Harvard Research, is shared by most authorities.

310. As an example, supporting this view, we may mention the decision of the Court of Appeal of Rouen of 12 July 1933.<sup>299</sup> The defendant was a former United States Commissioner in Austria, where he had leased real estate for his family and himself; he had been ordered by the Austrian Courts, after the cessation of his mission, to make certain payments. The French Courts were later asked to order execution of those judgements, as the defendant had removed to France. The Court of Rouen ruled that it had no jurisdiction in the matter and held, *inter alia*, that the decisions of Austrian Courts related to acts entered into by the defendant during his mission in that country and that the immunity attaching to the functions of the agent and to acts connected therewith lasted beyond the discontinuance of those functions.

### CHAPTER III

#### Summary

311. We have attempted, in this study, to trace the

<sup>295</sup> Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1901), Vol. 28, p. 343.

<sup>296</sup> *Ibid.*, (Paris, Marchal et Godde, 1910), Vol. 37, p. 530.

<sup>297</sup> Hurst, *op. cit.*, pp. 292 ff.

<sup>298</sup> *Ibid.*, p. 294.

<sup>299</sup> Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1933-1934*, p. 379.

general outline of the problems raised by the existence of diplomatic immunities and to analyse some related questions.

312. The first step was to review previous attempts at codification; this was followed by a discussion of certain relevant international instruments and draft conventions prepared by learned societies or individual authorities. The work of the League of Nations Committee of Experts and the replies of Governments to the questionnaire submitted to them were then summarized. The next step was to inquire briefly into the meaning usually attributed to the term "diplomatic intercourse" and to determine what it covers. From there we proceeded to indicate the main theories suggested at various times as a rational explanation of the juridical phenomenon which these immunities represent. Finally, we examined each of these immunities in turn, pointing out the aspects which remain controversial; by way of illustration, we cited some pertinent judicial decisions. This survey of the whole field seems to warrant the conclusion that there exists a certain degree of unanimity on the main issues, and that many common rules have either been placed on the statute book of various States or have come to be accepted as part of the law of nations.

313. This consensus of opinion stems from the fact that it is both necessary and in the common interest of the whole family of nations that Governments should maintain relations with each other through agents specially empowered for that purpose. These agents should, in the interests of their mission, enjoy full and unrestricted independence in the performance of their allotted duties. It follows, therefore, that their person, domicile, correspondence and subordinate staff should be inviolable. The principal consequence of this inviolability is that the agent enjoys immunity from criminal and civil jurisdiction throughout the period of his mission and, after the cessation thereof, until he has had reasonable time to leave the country where he was stationed. Furthermore, entry into the official premises of the mission or into the private residence of diplomats is forbidden to all officials of the receiving Government, except with the express authorization of the chief of the mission. The agent's personal income and the immovable property owned by the sending State or by the agent on its behalf are exempt from all charges and taxes, except those imposed in respect of services rendered. No step may lawfully be taken to attach the person of the agent or any article used by him or by his family, nor may execution be levied on any movable or immovable property used by the mission. There is some uncertainty regarding the scope of these immunities where the agent, in his purely private capacity, engages in industry or commerce or practices a liberal profession in the country to which he is accredited. A substantial number of authorities favour a very broad interpretation of the concept of immunity, even in such extreme circumstances; they contend that the State concerned should prevent such situations from arising, either by anticipatory action or by requesting the agent's recall. There is also some doubt regarding the measure of privilege due to an agent passing through a third State while proceeding to the

receiving State; it is agreed, however, that, where official notification is given of his journey, the agent should be protected against any acts which may impede his transit. The immunities survive the cessation of the mission, at least in respect of acts connected with the exercise of the agent's functions. Finally, the agent continues to enjoy immunity in respect of all actions contemporaneous with his mission, even such actions as were of a private nature, until he departs from the country to which he was accredited.

314. Accordingly, it would seem that, apart from some unresolved details, there exists in the field of diplomatic intercourse and immunities a body of rules, recognized and applied by States, which may be regarded as suitable for codification.<sup>300</sup>

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<sup>300</sup> See also Lauterpacht, "The Codification of the Law of Diplomatic Immunity", *Problems of Public and Private International Law* (London, The Grotius Society, 1955), Vol. 40, p. 65.

# STATE RESPONSIBILITY

## DOCUMENT A/CN.4/96

### International responsibility: report by F. V. García Amador, Special Rapporteur

[Original text: Spanish]

20 January 1956

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## CHAPTER I

**The traditional view and the development of international law**

1. The International Law Commission decided, at its seventh session, to undertake the codification of the "principles of international law governing State responsibility" and appointed the author of the present report Special Rapporteur on that topic.<sup>1</sup> As indicated in an earlier memorandum by the author (A/CN.4/80), the inclusion of that topic in the Commission's programme of work inevitably and immediately raises a preliminary question concerning method, namely, the question of examining, in the light of the international law in its present stage of development, the principles which have traditionally governed the responsibility of the State. Before, however, reverting to this question of method, the author will first discuss General Assembly resolution 799 (VIII) and its immediate pre-history.

**1. RESOLUTION 799 (VIII) OF THE GENERAL ASSEMBLY**

2. At its eighth session the General Assembly adopted on 7 December 1953 a resolution requesting the International Law Commission to undertake, as soon as the Commission considered it advisable, the codification of

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, para. 33.*

the principles of international law governing State responsibility. The full text of resolution 799 (VIII) follows:

*"Request for the codification of the principles of international law governing state responsibility*

*"The General Assembly,*

*"Considering that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified,*

*"Noting that the International Law Commission at its first session included the topic 'State responsibility' in its provisional list of topics of international law selected for codification,*

*"Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility."*

3. It will be noted that the foregoing text casts no light on the exact scope of such codification, except for the expression "State responsibility", but even this expression cannot, in the present state of development of international law, be literally and narrowly construed. Nor do the discussions in the Sixth Committee of the General Assembly offer much guidance, for these were concerned only with defining the terms of reference to be given to the International Law Commission with

respect to the timing of the codification of the topic in question.<sup>2</sup>

4. The pre-history of the General Assembly resolution does, however, throw some light upon the true content or scope of the codification and, at least in some respects, illuminates the question of method mentioned above. At an early stage the Commission, in conformity with article 18 of its Statute, surveyed the whole field of international law with a view to selecting topics for codification. In the relevant memorandum submitted by the Secretary-General, it was said that the codification of the law relating to State responsibility "must take into account the problems which have arisen in connexion with recent developments such as the question of the criminal responsibility of States as well as that of individuals acting on behalf of the State".<sup>3</sup> Although, of course, the Commission considered primarily whether or not the topic of State responsibility was suitable for codification, some speakers referred, incidentally, to the way in which, in certain novel respects, the recent development of international law had influenced the matter of State responsibility. (A/CN.4/SR.6).

5. While in the discussion concerning the suitability of the topic for codification, or concerning the timing of its codification, the novel features of State responsibility were referred to incidentally; the existence of these features becomes the central problem when the topic itself is studied with a view to its future codification. Considered in this light, the codification of the topic involves something else than a definition of its content or scope pursuant to the terms of resolution 799 (VIII). In fact, just as the International Law Commission did when it included State responsibility in the provisional list of topics suitable for codification, the General Assembly used the expression which had been traditionally employed to denote international responsibility. The question of the novel features which State responsibility might possess in the present stage of development of international law was not prejudged in any sense. Accordingly, the method of work adopted in the present report is not merely permissible but indeed fully justified.

## 2. METHOD OF WORK

6. In the first place, as the Commission realizes, the subject of responsibility has always been one of the most vast and complex of international law; it would be difficult to find a topic beset with greater confusion and uncertainty. The cause lies not so much in the dominant part played by political factors in the shaping and development of this branch of international law, as in the glaring inconsistencies of traditional doctrine and practice. Perhaps because of the existence and influence of extraneous factors which are not always compatible with the law, artificial legal concepts and principles have been evolved which often appear markedly incongruent.

7. It is not, however, this particular feature that makes

it necessary now to adopt a new method of inquiry and legal analysis for the codification of this topic. Notwithstanding the inconsistencies and incongruities referred to above, traditional doctrine and practice have arrived at the formulation of a number of fundamental concepts and principles which have so far constituted the generally accepted international law on the subject. Except in a few cases, the doubts and differences of opinion have related to particular questions or points of detail rather than to the validity of the concepts and principles themselves. The present problem is quite different, for the question to be considered now is what validity can continue to be attached to some of those concepts and principles in contemporary international law.

8. Several authorities have referred to the problem and pointed out the different forms in which it arises. Professor Jessup was one of the first to discuss it in general terms, when he dealt with the international law relating to the responsibility of the State for injuries to aliens in the light of two developments: the growing tendency to accept the individual as a subject of international rights and obligations, and the increasing acknowledgement of a community interest in breaches of the law.<sup>4</sup> Likewise, Professor H. Rolin has said that the question of responsibility in international law, more than any other, should be re-examined and reassessed on new bases in the light of the evolution which has taken place in the nature of that responsibility, in the personality of the subjects and beneficiaries, in its effects and in its machinery or procedure.<sup>5</sup> Other writers have dealt with particular cases or specific aspects of international responsibility. Bustamante, for example, forecast developments concerning the possible responsibility of certain international organizations for acts or omissions attributable to them;<sup>6</sup> and in a recent course of lectures Eagleton discusses the position of international organizations not only as subjects of responsibility but also as the claimants in respect of the interests or rights which have been infringed.<sup>7</sup> For his part, Professor Eustathiades has described how profoundly traditional ideas have been changed by the Second World War, particularly with regard to criminal responsibility.<sup>8</sup>

9. It is easy to understand why it is necessary to adopt a special approach in order to fulfil in a satisfactory manner the terms of reference given by the General Assembly. As in the case of other topics and institutions of international law, the codification of "the principles which govern State responsibility" is not a task that can

<sup>4</sup> Philip C. Jessup, "Responsibility of States for Injuries to Individuals", *Columbia Law Review*, Vol. XLVI (November, 1946), p. 904.

<sup>5</sup> Henri Rolin, "Les principes de droit international public", *Recueil des cours de l'Académie de droit international*, 1950, II, p. 441.

<sup>6</sup> Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cía, 1936), Vol. III, p. 483.

<sup>7</sup> Clyde Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 335-423.

<sup>8</sup> Constantin Th. Eustathiades, "Les sujets du droit international et la responsabilité internationale, nouvelles tendances", *Recueil des cours de l'Académie de droit international*, 1953, III, pp. 401-404.

<sup>2</sup> *Ibid.*, Eighth Session, Sixth Committee, 393rd and 394th meetings.

<sup>3</sup> *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations Publications, Sales No. 1948.V.1(1)), p. 57.

be confined today to the mere enumeration and analysis of the various legal rules which theory and practice have established. The Commission cannot limit itself to a task of this kind, for what we are concerned with is not codification pure and simple. The relevant rules came into being and developed in accordance with certain concepts and principles which have undergone a profound transformation in contemporary international law. In particular, this transformation has affected in a very substantial manner the legal nature of international responsibility, with regard to which traditional doctrine did not establish a clear differentiation between civil and criminal responsibility as two distinct concepts or factors. Changes which have taken place in the conception of international personality must also of necessity affect the traditional view concerning active and passive subjects of responsibility. The emergence and the recognition of new subjects capable of having or contracting international obligations and of possessing or acquiring international rights, will naturally affect earlier ideas concerning the imputability of responsibility and also the views held in the past concerning the parties entitled to the interest or right which is infringed by the non-performance of an international obligation. For the same reasons, or else owing to the impact of other legal doctrines and principles, traditional doctrines and principles concerning the exercise of diplomatic protection over nationals abroad may also have been affected, as may those concerning grounds for exoneration from responsibility, the nature, purpose and extent of compensation, and the method and procedure for the settlement of international claims.

10. General Assembly resolution 799 (VIII) refers specifically to the *codification* of the principles of international law governing State responsibility. Apart from differences in approach, according to whether the "development" or the "codification" of a given subject is contemplated, the international bodies which discharge both functions, and in particular the Commission, have generally, when concerned with *codification*, construed the term very liberally. In the codification of the law relating to "State responsibility" it is surely both necessary and proper to apply such a liberal interpretation. A pure or strict codification of the legal principles which have traditionally governed the various cases of responsibility would not accomplish at all satisfactorily what is invariably the object of a request for codification. It can be said that it is necessary to do something more than "to codify"; it is necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. In other words, it will be necessary to bring the "principles governing State responsibility" into line with international law at its present stage of development.<sup>9</sup>

11. The foregoing remarks explain both the contents of this report which is submitted to the Commission and the nature of the conclusions arrived at. The topic is vast, owing to the practically unlimited number and variety of the circumstances which can give rise to inter-

national responsibility, but the fundamental questions and principles are common to all. This report confines itself to discussing these questions and principles, which have to be settled before the Commission decides, at its next session, to undertake the codification proper of the topic. To facilitate discussion by the Commission, the Special Rapporteur has departed from the usual practice and, instead of presenting preliminary draft articles, puts forward, in the form of "basis of discussion", a summary of his researches and the conclusions arrived at in certain cases. In this way, the Commission will be able to discuss the various fundamental questions and principles and to settle them, unhampered by the difficulties which are inevitably present when it deals with the more rigid framework of preliminary draft articles.

12. The following chapter sketches the history of the codification of the topic. This historical analysis will facilitate the work of the Commission both with respect to the present report and with regard to its future work. The annexes and bibliography at the end of the report serve the same purpose. The texts of the various drafts prepared by official conferences or organizations and by scientific bodies are reproduced in the annexes; and the bibliography, though not exhaustive, contains bibliographical material sufficient for the work immediately before the Commission.

13. As the Commission is aware, the Director of the Codification Division of the Office of Legal Affairs of the United Nations suggested to the Harvard Law School that it should revise and bring up to date the draft convention on the responsibility of States which Harvard Research had prepared and published in 1929.<sup>10</sup> The Director of the Codification Division said that the revision of the draft would be of great assistance to the International Law Commission when it came to examine the topic. The Harvard Law School accepted the suggestion, and entrusted the organization of the work to the Director of International Legal Studies.

14. In the course of writing his report, the Special Rapporteur visited the Harvard Law School for the purpose of arranging for co-operation, which he considered of great value to the Commission's future work. In this connexion, he wishes to say how valuable has been for him the exchange of ideas, which he had on a number of occasions with Professor Milton Katz, Director of International Legal Studies, and with Professor Louis B. Sohn and Mr. Richard R. Baxter concerning the different aspects and problems of the subject. He also wishes to acknowledge the co-operation which he has received from the Department of International Law and Organization of the Pan American Union; he found it most profitable to exchange views with Professor Charles G. Fenwick, the Director of that Department, in view of the relationship established between the Commission and the inter-American bodies concerned with the development and codification of international law.

## CHAPTER II

### Past efforts to codify the topic

15. Resolution 799 (VIII) of the General Assembly

<sup>9</sup> F. V. García Amador, "State Responsibility in the Light of the New Trends of International Law", *The American Journal of International Law*, Vol. 49 (1955), pp. 339-346.

<sup>10</sup> See annex 9.

does not mark the commencement of a new work of codification. It constitutes rather the resumption of the many efforts made in the past to codify the "principles of international law governing State responsibility". Some of these efforts produced positive results but an entire codification of the topic never materialized. Seen in that light, the purpose underlying the General Assembly resolution appears to be that the United Nations should continue and complete the work of predecessor organizations. Another way of looking at the codification of the topic of State responsibility is to regard it as historically an integral part of and inseparable from the codification of international law in general. As a consequence, it has shared all the vicissitudes of the latter, but at the same time owes many of its advances to the steps taken and the machinery established with a view to codifying other subjects of international law. The account which follows illustrates this phenomenon and, at the same time, indicates to what extent past accomplishments can assist in the future task of codification.

### 3. CODIFICATION UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

16. With the object of increasing the contribution of the League of Nations to the progressive codification of international law, the League Assembly adopted its resolution of 22 September 1924 requesting the Council to convene a committee of experts to prepare a provisional list of the subjects of international law "the regulation of which by international agreement would seem to be most desirable and realizable at the present moment". The Secretariat was to communicate that list to the Governments, and the committee, after examining the replies received, was to report to the Council on the questions which appeared sufficiently ripe to be dealt with by conferences.<sup>11</sup>

17. The Committee of Experts for the Progressive Codification of International Law met at Geneva from 1 to 8 April 1925 and appointed several sub-committees to deal with the various subjects provisionally selected by it. The subject of State responsibility was one of them; it was referred to in the following terms:

"(f) The Committee appoints a Sub-Committee to examine:

"(i) Whether, and in what cases, a State may be liable for injury caused on its territory to the person or property of foreigners;

"(ii) Whether, and, if so, in what terms it should be possible to contemplate the conclusion of an international convention providing for the ascertainment of the facts which may involve liability on the part of a State and forbidding in such cases recourse to measures of coercion before the means of pacific settlement have been exhausted".<sup>12</sup>

<sup>11</sup> For full text of the resolution see League of Nations Publications, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 5; also reproduced in *The American Journal of International Law, Special Supplement*, Vol. 20 (1926), pp. 2 and 3.

<sup>12</sup> League of Nations document C.275.1925.V, p. 5; see also *The American Journal of International Law, Special Supplement*, Vol. 20 (1926), p. 14.

18. The Committee held its second session in January 1926 and drafted questionnaires to be circulated to Governments. Questionnaire No. 4 concerned the "Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners". The report of the Sub-Committee, composed of Mr. Guerrero, Rapporteur, and Mr. Wang Chung-Hui, was attached to the questionnaire as an annex.<sup>13</sup>

19. At its third session, held in March and April 1927, the Committee of Experts examined the replies received from Governments and informed the Council that those replies confirmed the view that the subjects selected were "sufficiently ripe" for codification. With regard to Questionnaire No. 4, twenty-four Governments had replied affirmatively and without reservations; five had replied affirmatively but with certain reservations; and four had expressed the view that the conclusion of a convention was neither possible nor opportune. In its general report on procedure, the Committee recommended that the Council should call a conference, or two or several conferences, to consider and take action with respect to the formulation and submission to Governments of general treaties embodying provisions relating to the subjects concerned.<sup>14</sup>

20. In June 1927, the Council of the League of Nations considered the Committee's reports and decided to place the consideration of these documents on the agenda of the Assembly.<sup>15</sup> In September of the same year, the Assembly decided that a first Codification Conference should be held to examine, *inter alia*, the question of the "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners". By the same resolution it entrusted the Council with the task of appointing a Preparatory Committee with instructions to prepare a report comprising "sufficiently detailed bases of discussion on each question".<sup>16</sup>

21. The Preparatory Committee for the Codification Conference met at Geneva in January, and again in May, of 1929. At its first session, it examined the replies of Governments in response to the request which had been addressed to them for information upon the three questions on the programme of the proposed Conference, and it drew up bases of discussion. At its second session, the Committee reviewed the bases of discussion and drafted them in final form. It was pointed out by the Committee in its second and final report that these bases of discussion were not in any way proposals; they were merely the result of the Committee's examination of the Government replies and the classification of the views expressed therein. The bases of discussion relating to the question of State responsibility covered a wide range of cases of acts or omissions capable of engaging the responsibility of the State, and also certain questions or

<sup>13</sup> League of Nations publication, *V. Legal*, 1926.V.3 (document C.46.M.23.1926.V). (The text of the questionnaire and the conclusions of the report of the Sub-Committee are reproduced in annex 1).

<sup>14</sup> *Ibid.*, *V. Legal*, 1927.V.1 and *V. Legal*, 1927.V.2 (documents C.196.M.70.1927.V., pp. 7 and 267-271, and C.197.M.71.1927.V).

<sup>15</sup> *Ibid.*, *V. Legal*, 1927.V.15 (document A.18.1927.V).

<sup>16</sup> *Ibid.*, *Official Journal, Special Supplement No. 53* (October 1927), p. 9, para. 5.

problems of a general character. The report reproduced, together with the text of the bases of discussion, the points submitted to the consideration of Governments and their comments and observations thereon.<sup>17</sup>

22. The Codification Conference met at The Hague from 13 March to 12 April 1930. The question of the responsibility of States was entrusted to the Third Committee which reported to the Conference that it "was unable to complete its study of the question".<sup>18</sup> Nevertheless, the Committee discussed the question fully and even adopted in first reading a text consisting of ten articles.<sup>19</sup> As stated by the Rapporteur in his draft report: "In the course of its discussions, the Committee was obliged to recognize that the time assigned for its work was not sufficient to allow it to bring to a conclusion the studies which it had pursued with such assiduity. In point of fact, owing to the comprehensive nature and extreme complexity of the problems raised, it was only able to discuss ten out of the thirty-one bases submitted to it. The fact, moreover, that the various questions were closely interdependent, each being subordinated to the others, precluded any attempt to reach a partial settlement. The Committee accordingly, though in agreement as to certain fundamental principles, was unable, owing to lack of time, to determine the exact limits of their application. It therefore decided to refrain from any endeavour to embody them in definite formulae."<sup>20</sup>

23. After The Hague Conference, the League of Nations did not abandon its efforts to promote the progressive codification of international law, but it did not take any further action to continue that task so far as the question of State responsibility is concerned.<sup>21</sup> Although it concerns a different subject, the study made by a Committee of the League of Nations of the question of international loan contracts should be mentioned, particularly its suggestion for the establishment of an international tribunal competent to deal with disputes concerning rights and obligations under such contracts.<sup>22</sup>

#### 4. CODIFICATION BY INTER-AMERICAN BODIES

24. The subject of State responsibility has contributed one of the most significant chapters to the history of codification in the Americas. Although the decision to undertake a complete codification of the topic was not taken until later, the First International Conference of American States, and nearly all the subsequent Conferences, studied the problem of State responsibility and some of them adopted resolutions or conventions relating to the subject. The work was sometimes carried out in

co-operation with the technical bodies concerned with the codification of international law, but on other occasions, particularly during the earlier Conferences, the Conference itself formulated certain principles and rules which gave expression to the political and legal outlook of the Continent.

25. The first Conference (Washington, 1889-1890) adopted a recommendation concerning "Claims and Diplomatic Intervention" which referred to the enjoyment by foreigners of civil rights and legal remedies open to natives, and to the obligations and responsibilities of the State.<sup>23</sup> The Second Conference (Mexico City, 1902) adopted a "Convention Relative to the Rights of Aliens".<sup>24</sup> At the same Conference a "Treaty of Arbitration for Pecuniary Claims" was signed, which deals with the obligation to submit claims of that nature to arbitration.<sup>25</sup> The Third Conference (Rio de Janeiro, 1906) adopted another Convention which extended the period of validity of the Convention of 1902.<sup>26</sup> The same Conference resolved "To recommend to the Governments represented therein that they consider the point of inviting the Second Peace Conference, at The Hague, to examine the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin".<sup>27</sup> At the Fourth Conference, (Buenos Aires, 1910) yet another Convention was signed which was to enter into force upon the expiry of the Convention of 1902 as extended.<sup>28</sup>

26. The codification of the law relating to State responsibility in the Americas is closely bound up with the development and codification of a kindred subject, namely, the legal status of aliens. Apart from the instruments referred to in the foregoing paragraph, which deal with the question strictly from the point of view of responsibility, there are other instruments which relate to the subject and therefore form part of the inter-American codification with which this chapter is concerned. At the invitation of the Fifth Conference (Santiago de Chile, 1923), the International Commission of Jurists,<sup>29</sup> at its second session (Rio de Janeiro, 1927), prepared a draft convention relating to the "Status of Aliens"<sup>30</sup> the provisions of which were in substance incorporated in the Convention signed at the Sixth Con-

<sup>17</sup> *Ibid.*, V. Legal, 1929.V.3 (document C.75.M.69.1929.V). The text of the bases of discussion is reproduced in annex 2.

<sup>18</sup> *Ibid.*, V. Legal, 1930.V.7 (document C.228.M.115.1930.V), p. 17.

<sup>19</sup> For the text of these articles see annex 3.

<sup>20</sup> League of Nations publication, V. Legal, 1930.V.17 (document C.351(c).M.145(c).1930.V).

<sup>21</sup> See in this connexion "Historical Survey of Development of International Law and its Codification by International Conferences", document A/AC.10/5, Part III, D.

<sup>22</sup> See *Report of the Committee for the Study of International Loan Contracts*, League of Nations Publications, II. Economic and Financial, 1939.II.A.10 (document C.145.M.93.1939.II.A).

<sup>23</sup> *The International Conferences of American States, 1889-1928*, (New York, Oxford University Press, 1931) p. 45. (The text of the recommendation is reproduced in annex 4).

<sup>24</sup> *Ibid.*, pp. 90 and 91. (The text of the Convention is reproduced in annex 5).

<sup>25</sup> *Ibid.*, pp. 104 and 105.

<sup>26</sup> *Ibid.*, pp. 132 and 133.

<sup>27</sup> *Ibid.*, pp. 135 and 136. (At the Peace Conference held at The Hague in 1907 a "Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts" was signed. For the text of the pertinent articles see chapter IX, section 30).

<sup>28</sup> *Ibid.*, pp. 183-185.

<sup>29</sup> The Commission was established by the Third Conference (*ibid.*, p. 144) and held its first session at Rio de Janeiro in 1912.

<sup>30</sup> See Bustamante, *La Comisión de Jurisconsultos de Rio de Janeiro y el Derecho Internacional* (Havana, 1927), pp. 206 and 207, concerning the draft prepared by the Commission.

ference (Havana, 1928).<sup>31</sup> The first three articles of the "Bustamante Code" (annexed to the Convention on Private International Law, also signed at the Sixth Conference) deal with the same subject.<sup>32</sup>

27. One of the items dealt with at the Seventh Conference (Montevideo, 1933) was "the study of the entire problem relating to the international responsibility of the State". The Conference reaffirmed certain principles which had been laid down at previous Conferences and resolved that the study in question should be entrusted to the competent agencies concerned with codification "and that their studies be co-ordinated with the work of codification being done under the auspices of the League of Nations".<sup>33</sup> The Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) dealt once again with the problem of pecuniary claims and adopted a resolution requesting the Committee of Experts which had been established by the Seventh Conference to undertake the co-ordination and study of the principles of the subject.<sup>34</sup> The Committee held its first session in Washington in 1937 to organize its work; it met again at Lima on the eve of the Eighth Conference. At that second session, the Committee prepared a report the annex to which reproduced the drafts and memoranda submitted by its members.<sup>35</sup> The Eighth Conference (Lima 1938) only adopted a resolution concerning procedure, to the effect that all the documents submitted be referred back to the Committee of Experts for further study and reports and for submission first to the International Conference of American Jurists which was to meet shortly thereafter and then to the Ninth Conference.<sup>36</sup>

28. The Ninth Conference did not meet till 1948 (Bogotá). The question of State responsibility was not dealt with at that Conference, except in certain declarations and isolated provisions which were adopted concerning specific points. The Tenth Conference (Caracas, 1954), however, adopted the following resolution con-

cerning "Principles of International Law governing the responsibility of the State".

*Whereas:*

The General Assembly of the United Nations, during its Eighth Session, requested the International Law Commission to proceed to the codification of the principles of international law that govern the responsibility of the State;

Pursuant to the provisions of the pertinent instruments, closer relations and co-operation between the International Law Commission of the United Nations and the inter-American organs charged with the development and codification of international law should be encouraged; and

The American Continent has made a notable contribution to the development and codification of the principles of international law that govern the responsibility of the State,

The Tenth Inter-American Conference

*Resolves:*

To recommend to the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee of Rio de Janeiro, the preparation of a study or report on the contribution the American Continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State.<sup>37</sup>

29. At its third session, which opened in Mexico City on 17 January 1956, the Inter-American Council of Jurists is considering this resolution and will decide how to proceed in order to prepare promptly and efficiently, the study or report mentioned in it.

##### 5. CODIFICATION BY PRIVATE BODIES

30. Private bodies have played a very important part in the history of official codification, particularly so far as the subject of State responsibility is concerned. Not only have jurists in the course of a general codification produced individual drafts, but also learned societies or institutions have drafted texts relating to State responsibility. Owing to limitations of space, only the drafts belonging to the second group will be referred to in this report; they will be mentioned in chronological order. The drafts in question are, moreover, of special significance, because they were prepared with a view to the codification work being undertaken under the auspices of the League of Nations or by inter-American conferences and bodies.

31. In 1925 the American Institute of International Law, at the invitation of the Governing Board of the Pan American Union, prepared thirty "projects" dealing with various subjects of (public) international law. Two of them are concerned with questions relating to State responsibility. One, entitled "Responsibility of Governments", gives a brief indication of the fundamental premises on which that responsibility rests. The other, entitled "Diplomatic Protection", is a systematic and

<sup>31</sup> *The International Conferences of American States, 1889-1928*, pp. 415 and 416.

<sup>32</sup> *Ibid.*, p. 327. Under the auspices of the League of Nations, an International Conference on Treatment of Foreigners was held in Paris in 1929 but it did not arrive at any agreement. See League of Nations Publications, *II. Economic and Financial, 1930.II.5* (document C.97.M.23.1930.II). For a reference to the draft convention prepared by the Economic Committee of the League of Nations, see chap. VI, section 21, below.

<sup>33</sup> *The International Conferences of American States, First Supplement, 1933-1940* (Washington, Carnegie Endowment for International Peace, 1940), p. 91. (The text of the resolution is reproduced in annex 6 below. The Codification Conference held at The Hague adopted, *inter alia*, a recommendation that the "work undertaken with this object [a co-ordination of all the efforts made for the codification of international law] under the auspices of the League of Nations and that undertaken by the Conferences of American States... be carried on in the most complete harmony with one another". See League of Nations Publications, *V. Legal, 1930.V.7* (document C.228.M.115.1930.V), p. 18).

<sup>34</sup> *Ibid.*, pp. 165 and 166. The Committee of Experts was established by the Seventh Conference when it reorganized the work of codification. *Ibid.*, pp. 84-87.

<sup>35</sup> *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), p. 41.

<sup>36</sup> *The International Conferences of American States, First Supplement, 1933-1940*, pp. 249 and 250.

<sup>37</sup> *Tenth Inter-American Conference, Final Act* (Pan American Union, Washington, D.C., 1954), p. 103.

much more elaborate statement of the principles which govern State responsibility in the various possible cases, and of the methods of pacific settlement of the international controversies which may arise.<sup>38</sup>

32. The Institute of International Law, as will be seen hereunder, has dealt with the problem of State responsibility on several occasions. At its Lausanne session in 1927 it adopted a complete draft concerning "International responsibility of States for injuries on their territory to the person or property of foreigners", in contemplation of the Codification Conference to be held at The Hague. The draft deals with numerous contingencies in which acts or omissions on the part of organs of the State, or acts committed by private persons, or internal disturbances, can give rise to responsibility on the part of the State; it also contains provisions concerning the nature and extent of "reparation", and a *voeu* concerning the pacific settlement of international disputes which may arise in connexion with any cases of State responsibility.<sup>39</sup>

33. The draft convention prepared by Harvard Research (1929) was meant, like that of the Institute, to be a contribution, at the technical level, to the codification which had been entrusted to The Hague Conference. For this reason, the two drafts deal broadly with the same questions and the Harvard draft concurs with the Institute's draft in many of its conclusions. It is presented in the form of a restatement; hence, each article is followed by extensive comments which cite the treaties, judicial decisions and writings of authors relied on.<sup>40</sup>

34. Lastly, though they form part of a general declaration, it is also pertinent to mention the provisions which have a bearing on the topic of State responsibility in the *Déclaration sur les données fondamentales et les grands principes du droit international moderne*, submitted by Alejandro Alvarez and approved by the International Law Association, the Académie diplomatique internationale and the Union juridique internationale. In particular, section VII deals with the rights and duties of aliens, lays down in what measure the State is responsible for acts or omissions, and specifies in which case the alien's remedy is to apply to the internal authorities and in which cases the proper course for disposing of claims made through the diplomatic channel is judicial settlement by an international body.<sup>41</sup>

### CHAPTER III

#### Legal content and function of international responsibility

35. The legal content of international responsibility did not give rise to any major difficulties in traditional doctrine and practice. It was regarded as a consequence of the breach or non-performance of an international obligation, the State being then under a "duty to make reparation" for the injury occasioned. In this sense, the

<sup>38</sup> The text of both projects is reproduced in annex 7.

<sup>39</sup> The text of the draft is reproduced in annex 8.

<sup>40</sup> The text of the draft is reproduced in annex 9.

<sup>41</sup> The text of the relevant draft provisions is reproduced in annex 10.

term "responsibility" was identified with the "liability" (*responsabilité civile, responsabilidad civil*) of municipal law. Contemporary international law, however, similar in this respect to municipal law, considers that the notion of responsibility covers not only the duty to make reparation for damage or injury, but also the other possible legal consequences of the breach or non-performance of certain international obligations; the obligations in question are those the breach of which is punishable. In the event of the breach of obligations of this type, the immediate consequence is criminal responsibility, which carries with it the punishment of the offender; upon proof of criminal responsibility, in the proper manner and form, the next consequence is reparation of the injury caused to the victim or to his successors in interest. To sum up, in international law in its present stage of development, the term "responsibility" can include both civil and criminal responsibility, according to the nature of the obligation the breach or non-performance of which gave rise to the responsibility.

36. It is true that both resolution 799 (VIII) of the General Assembly and the resolution adopted at the Conference of Caracas deal only with the principles of international law governing *civil* responsibility, and that therefore *criminal* responsibility as such falls outside the scope of both resolutions. But it is no less true that the recognition by contemporary international law of the concept of criminal responsibility, clearly defined in certain cases, must perforce affect in some measure the views and principles traditionally held with respect to civil responsibility. This is all the more true since, even in the traditional conception of that responsibility, the "duty to make reparation" has been influenced by ideas concerning criminal responsibility. The writer of the present report remains within the bounds of his terms of reference, and is indeed carrying them out more fully, by studying the legal nature of civil responsibility in the light of the recent development of international law relating to criminal matters.

#### 6. RESPONSIBILITY AS THE "DUTY TO MAKE REPARATION"

37. In point of fact, traditional doctrine and practice saw in international responsibility a duty to make reparation for the injury sustained, a duty incumbent upon the State which violated, or did not comply with, an international obligation. This view is the prevailing one in the abundant legal literature existing on the subject of responsibility. It was reflected in the judgement in the *Chorzów Factory* case, in which the former Permanent Court of International Justice stated that "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form". In a later judgement concerning the same case, the Court reiterated this view in similar terms: "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".<sup>42</sup> In effect, the ruling of the Court means that the responsibility for the breach

<sup>42</sup> See Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 9 (Leyden, A. W. Sijthoff), p. 21; and series A, No. 17. p. 29.

of an engagement and the duty to make adequate reparation for the injury are, in law, coterminous.

38. The same fundamental view appears in the draft codifications concerning State responsibility. The Harvard Research draft (1929) sets it out in clear and unequivocal terms in its article 1: "A State is responsible . . . when it has a duty to make reparation to another State for the injury sustained by the latter State as a consequence of an injury to its national".<sup>43</sup> The same view is taken in the articles adopted in first reading by the Third Committee of the Codification Conference (The Hague, 1930): "The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation".<sup>44</sup> The authors of both drafts accordingly considered responsibility as identifiable with, or at least inseparable from, the duty to make reparation for the injuries occasioned. In this view, wherever responsibility lies, there also lies a duty to make reparation: that is the only consequence which may be derived from failure to comply with an international obligation.

39. Learned authors tend to agree in viewing responsibility in the same light. Eagleton, for example, commences his well-known work on the subject with the following words: "The study of the responsibility of States in international law involves an examination of the theory upon which reparation may be demanded by one State of another, and of the processes by which it may be obtained". In a later passage he expresses the same idea in more explicit terms: "Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent State".<sup>45</sup> Anzilotti, also a leading exponent of the traditional doctrine, was an even stronger advocate of this manner of viewing responsibility. He says:

"When a wrongful act—by which is meant, as a rule, the violation of an international right—is committed, the consequence is that a new relationship comes into existence, in law, between the State to which the act is imputable (that State being under a duty to make reparation) and the State with respect to which there exists an unperformed obligation (this State having a claim to reparation). This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of States, can attribute to the wrongful act . . .".<sup>46</sup>

Thus, according to Anzilotti, a breach or non-performance of an obligation has no other consequence in international law than that of giving rise to a duty to make good the damage.

40. Is it really true that, in law, the sole consequence of a breach or non-performance of an international obligation is that it gives rise to a duty to make reparation

for the injury occasioned? This question cannot be studied and dealt with adequately if we rely only on the criteria and arguments which have traditionally guided practice and theory. Other considerations must be taken into account, and the subject must be studied in the light of certain ideas and principles which underlie the present structure of international law. These ideas and principles are concerned with precisely the possible consequences of a breach or non-performance of certain international obligations. A study in this light is essential as being the only manner of determining how far the traditional view of responsibility tallies with international law in its present stage of development. For this purpose, however, it is necessary first to consider the nature of the acts or omissions which give rise to international responsibility.

#### 7. ACTS OR OMISSIONS WHICH GIVE RISE TO INTERNATIONAL RESPONSIBILITY

41. An analysis of the traditional doctrine and practice shows that the acts or omissions which give rise to international responsibility fall into the one or other of the following two categories of wrongful acts: (a) acts which affect a State as such, i.e., those which injure the interests or rights of the State as a legal entity; and (b) acts which produce damage to the person or property of its nationals. The first category comprises the most diverse acts or omissions, some being ill-defined or even undefinable. Acts in this category include failure to comply with the terms of a treaty, whatever the nature or purpose of the treaty, failure to respect diplomatic immunities and, in general, the violation of any of the rights which are intrinsic attributes of the personality of the State—political sovereignty, territorial integrity, property rights. The second category includes acts or omissions which give rise to the "responsibility of States for damage done in their territories to the person or property of foreigners". This is the principal subject of the literature, private and official codifications and judicial decisions which treat of the responsibility of States.

42. As will be seen hereunder, the above classification, from the traditional point of view, is more concerned with form than with substance, for it has been said that, whichever category they fall into, the acts or omissions in question have this in common: they damage interests which, in the final analysis, vest in the State exclusively. Apart from this aspect of the question, which will be examined in its proper context in a later chapter (chapter V) the classification may become meaningless in some cases which come within the scope of both categories. An example of such a case would be the non-performance of a treaty, where the interests of the nationals of one of the contracting States are prejudiced and the claim is based on this prejudice. In any case, for the specific purposes of the present chapter, we shall now consider what acts or omissions are more generally regarded as giving rise to an international responsibility on the part of the State.

43. Acts in the second category have been subdivided into: (i) acts or omissions on the part of the authorities of the State; and (ii) acts of private persons, which

<sup>43</sup> See annex 9.

<sup>44</sup> See article 3 in annex 3.

<sup>45</sup> Eagleton, *The Responsibility of States in International Law* (New York, The New York University Press, 1928), pp. 3 and 22.

<sup>46</sup> Dionisio Anzilotti, *Corso di Diritto Internazionale*, 3rd ed. (Rome 1928), Vol. I, pp. 416 ff.

include internal disturbances. Within the first subdivision, a further distinction is drawn according to whether it is the legislature, the judicature or the executive which has committed the wrongful act. The acts of the legislature may give rise to international responsibility on the part of the State, for example if a measure is enacted which discriminates between nationals and aliens, or if nationalization and compulsory expropriation legislation is passed which affects the property of aliens in a manner contrary to the rules established by international law. The judicature may involve the State in responsibility if it acts, or fails to act, in such a way that a "denial of justice" to an alien may be said to have occurred (e.g., unwarranted delay in the proceedings, or judgement manifestly unjust or arbitrary from the point of view of international law). In practice, however, wrongful acts or omissions on the part of the executive offer perhaps the commonest and the most varied instances. These include abuses by police officers, which can be very serious (physical ill-treatment; killing without any death sentence having been pronounced; the improper collection of fines or illegal contributions; illegal confiscation of property). Lastly, this group of wrongful acts or omissions includes the non-performance by the State—through the agency of any of its organs—of a contract entered into by the State with an alien, in which case the State is responsible for non-performance.

44. Within the second subdivision, too, the wrongful acts capable of giving rise to responsibility on the part of the State are not all of the same character. Although in these cases the international responsibility does not originate in the act itself but rather in the conduct of the State in relation to the act (failure to exercise due diligence, connivance, manifest complicity, etc.), the nature of the act committed by a private person or of acts committed during internal disturbances is bound to influence the way in which the law regards the State's conduct as a source of international responsibility. Typical examples of wrongful acts which can be committed by private persons are: attacks or insults against a foreign State, in the person of the head of that State, its agencies or diplomatic representatives; acts offensive to its national flag; and illegal acts—whatever their degree of seriousness may be—which cause damage to the person or property of the nationals of a foreign State. When disturbances occur in a State, the acts concerned are usually of a more serious character; in some cases, they are specifically intended to cause damage to the property or person of foreigners.

45. Although not exhaustive, the foregoing enumeration presents a fairly accurate picture of the acts and omissions which according to traditional doctrine and practice, give rise to international responsibility on the part of the State. In any case, it makes it possible to define the character of those acts and so to determine the type of responsibility to which they can give rise.

## 8. CIVIL RESPONSIBILITY AND CRIMINAL RESPONSIBILITY

46. According to the idea which prevailed in the traditional doctrine, the various acts or omissions mentioned in the preceding section cannot have any other effect than that

of giving rise to a "duty to make reparation" for the injuries occasioned; in other words, they only involve the State in *civil* responsibility. This restrictive view of international responsibility is attributable principally to the way in which the acts or omissions giving rise to responsibility were formerly regarded for the purpose of the law. They were regarded as simply "wrongful" or "unlawful", i.e., as contrary to international law and incompatible with the rules of State conduct prescribed by that law. All those acts and omissions, whatever their intrinsic or specific nature, were dealt with judicially and defined in identical manner; consequently, identical legal consequences were ascribed to them.

47. Anzilotti, who was one of the few writers of the traditional school to examine this aspect of the question, based his view (which is cited earlier in this chapter) on the following arguments:

"This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of States, can attribute to the wrongful act. Within the State, by contrast where relations between individuals and the community are likewise governed by rules of law, an unlawful act may give rise to two distinct legal relationships: a relationship between the person committing it—or rather the person to whom the law imputes the act—and the person sustaining the injury; and also, as between the former of the two and the community represented by the State. Hence the distinction between civil responsibility and criminal responsibility, between damages and punishment. These distinctions are unknown to international law and repugnant to it; the situation recalls, in this respect as in others, an earlier stage of social history in which the State was at yet powerless to assert itself as the guardian of the law, so that the latter found its expression in the reaction of the individual or of the group which had sustained the injury against the author of it; compensation was also a penalty, and the commonest penalty was reparation of the injury caused."<sup>47</sup>

48. The stage of development reached by international law at that time explains, and up to a certain point justifies, this kind of reasoning.<sup>48</sup> In point of fact, according to traditional international law, no distinction was drawn between *civil* responsibility and *criminal* responsibility (the idea of reparation proper and the idea of punishment), because strictly speaking, they were an integral part of one and the same rule, namely, "the duty to make reparation" for the injury occasioned.

49. It is certainly of importance to note, however, that the traditional conception of responsibility already contained not only the idea of reparation in the strict sense of the word but also the idea of punishment. In a later chapter dealing with the legal nature and function of

<sup>47</sup> *Ibid.*

<sup>48</sup> In the same sense, see Ladislas Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Librairie du Recueil Sirey, 1938), p. 209; and Georges Berlia, *De la responsabilité internationale de l'Etat*, in *La technique et les principes du droit public, Etudes en l'honneur de Georges Scelle* (Paris, Librairie générale de droit et de jurisprudence, 1950), Vol. II, p. 886.

reparation, it will be shown that in practice some of the forms of reparation had a distinctively punitive purpose, so much so that the view has recently gained currency that in the traditional practice reparation sometimes in effect took the form of "punitive damages". In other words, reparation has on occasions been claimed or ordered as a punishment for the breach or non-observance of an international obligation (chapter VIII, section 27, *below*). If this view is correct, it is logical to assume that traditional practice was familiar with the notion of criminal responsibility in so far as reparations were intended to be punitive; only on that basis can the existence of punitive damages be explained. Actually, the existence of "damages of a punitive character" implies the imputation of responsibility of a criminal nature. The extent to which "criminal" has become segregated and distinct from "civil" responsibility is another matter, which does not necessarily affect the intrinsic notion of criminal responsibility.

50. If the foregoing is true even of traditional international law, the present state of that law does not admit of any doubts whatsoever. Particularly since the Second World War, the idea of international criminal responsibility has become so well defined and so widely acknowledged that it must be admitted as one of the consequences of the breach or non-observance of certain international obligations. Therefore, while international criminal responsibility *per se* is outside the scope of the present codification, there are important reasons why it should not be ignored completely in the study of some at least of the cases of responsibility with which this codification is concerned. If even while it was an undistinguishable element in the "duty to make reparation" it had a bearing on civil responsibility, then *a fortiori* criminal responsibility is bound, now that it has become something distinct, to affect in novel ways the ideas and principles on which civil responsibility has traditionally rested. This is not hard to understand if one remembers what, in law, is the root of criminal responsibility: the definition of certain acts as offences or the transformation of certain other acts, until then regarded as merely wrongful, into punishable acts. In short, the matter becomes clear if one thinks of the criminal quality which now attaches to the breach of certain international obligations.

51. Thus, a re-examination of the acts or omissions (as enumerated in the preceding section) which according to traditional international law gave rise to civil responsibility will show that they are not all *eiusdem generis*. International law in its present stage of development does not enable us to distinguish in every case between punishable acts properly so called and acts or omissions which are merely wrongful, but the distinction can be drawn without difficulty in most cases. For example, the non-performance of a contract entered into by a State with an alien and, in general, a denial of justice, clearly constitute acts of omissions which are merely wrongful, that is, contrary to international law but not involving criminal responsibility. On the other hand, certain violations of fundamental human rights of foreigners (if the violation is so serious that it corresponds or is analogous to what is now known as a "crime against

humanity"), besides being wrongful, now involve international responsibility of a criminal character. Moreover, States have undertaken a certain type of obligations the non-observance of which may also have new implications. For example, under articles I and V of the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>49</sup> the contracting parties explicitly undertake to "prevent and punish" acts of genocide, the authors, instigators or accomplices of which, in the words of the Convention, may be either private individuals or the rulers and public officials of the State itself. Without exhausting the list of new situations, it may be recalled that the General Assembly of the United Nations has described as "aggression" the act of "fomenting civil strife in the interests of a foreign Power" (resolution 380 (V))—an act which is regarded as merely wrongful by the Convention on the Duties and Rights of States in the Event of Civil Strife (Havana, 1928)—and that a similar change has occurred in the case of some of the acts which the International Law Commission has defined in its draft code as "offences against the peace and security of mankind".

52. From the foregoing, certain conclusions can be drawn which may materially affect the present codification and which should perhaps at this stage be formulated in general terms. In the first place, the consequences of a breach or the non-fulfilment of an international obligation may be either criminal responsibility or civil responsibility, or both, according to the character of the obligation. The character of the obligation concerned depends, in turn, on whether international law regards the act in question as a criminal or as merely a wrongful breach or omission. Lastly, in the cases in which both a criminal and a civil responsibility exist, the first involves punishment while the second involves reparation properly so called of the damage occasioned. None of these conclusions concerning the criminal character which may attach to responsibility in contemporary international law implies in any way, however, an unwarranted departure from the one real purpose of this codification. Rather, the implication is that it is necessary to take them into account in so far as they affect the traditional concepts and principles of civil responsibility.

53. Furthermore, it will be easily understood that the recognition of these two types of international responsibility can affect this branch of the law as a whole, and, in a special manner, the question of imputability (i.e., which subject or subjects of international law should be considered internationally responsible) as also, the form and object of reparation (whether reparation will invariably be determined in the same manner, irrespective of which type of responsibility is involved). The second problem will be dealt with in a later chapter of this report (chapter VIII). The chapter which follows deals with the problem of imputability. It will be useful, however, to deal briefly first with another problem which is of equally great importance in the study of the foundations on which the law of international responsibility rests.

<sup>49</sup> General Assembly resolution 260 A (III), annex.

9. FUNCTION OF THE PRINCIPLES GOVERNING  
INTERNATIONAL RESPONSIBILITY

54. In keeping with one of the most characteristic tendencies of the traditional doctrine, the study of international responsibility has been concerned primarily with the content of that responsibility and with questions relating thereto, neglecting its purposes or objects, or else dealing with the latter indirectly as something incidental to the former. As is the case with any other branch of international law, however, a study of the functions which responsibility performs is just as important as and, in a certain sense, even more important than all the other questions usually discussed in connexion with its content.

55. Dunn, who was perhaps the first to concern himself with this question of the object of State responsibility, noted that the traditional approach to its study had taken the form of a "juristic" analysis of the rules and principles of international law governing the subject; but, he said, it was necessary to study "the practice of diplomatic protection as a man-made institution designed for particular social ends". In his opinion, concentrating exclusively on legal rules and principles produces only a very incomplete and often inaccurate picture of the process by which decisions were actually reached on questions of diplomatic protection. He adds in this connexion that the "problem is ultimately connected with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige."<sup>50</sup> Jessup also points out that the history of this branch of international law during the nineteenth and twentieth centuries exemplifies the way in which a body of customary law develops in response to the need for adjustment of clashing interests. He stresses that the driving force behind the legal phenomenon was the desire of Governments for political influence in certain countries, the scramble for markets and for sources of raw materials. "The history of the development of international law on the responsibility of States for injuries to aliens is thus an aspect of the history of 'imperialism', or 'dollar diplomacy'". Concurring with Dunn, he says: "The function of the law of responsibility of States for injuries to aliens, in terms of the modernization of international law, is to provide, in the general world interest, adequate protection for the stranger, to the end that travel, trade, and intercourse may be facilitated."<sup>51</sup>

56. Examining the same question from another point of view, Eagleton says that the responsibility of the State has been acknowledged only in relation to other States; that "the law of responsibility was not conceived of in terms of duties to the community of nations; there was no thought that an injury to one State might be an injury to the whole community of nations... The re-

sponsibility of State (legal person) to State (legal person) will not disappear; but I hope, it will be more clearly delimited, and that procedures will appear, so that we move in the direction of a legal order able to punish disobedience in the name of the organized community of nations."<sup>52</sup> Similarly, Eustathiades argues that the effects of an international wrong are no longer limited to the reaction of the State which is directly injured, but impinge on the whole community as well. In his opinion, recent events demonstrate that international offences can no longer be considered merely in terms of the reparation due to the injured State, but should rather be treated as a general question.<sup>53</sup>

57. It will be noted that the study of the function of the law of State responsibility discloses novel aspects which may influence decisively our inquiry into the traditional rules and principles governing this responsibility. As indicated in chapter I with reference to the question of method, these rules and principles came into being and development in accordance with other rules and principles which have undergone a profound transformation in contemporary international law. And it is precisely the purposes of international law which have been most profoundly affected by this transformation. International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State. Hence it is no longer true, as it was for centuries in the past, that international law exists only for, or finds its sole *raison d'être* in, the protection of the interests and rights of the State; rather, its function is now also to protect the rights and interests of its other subjects who may properly claim its protection. Likewise, States are no longer the only subjects of the obligations prescribed by international law. It is not difficult to understand, therefore, how greatly this new situation can influence the function performed by the law of international responsibility. This approach to the topic will be the central idea of the discussion of its diverse aspects in the chapter which follow.

#### CHAPTER IV

##### The active subjects of responsibility and the problem of imputability

58. It has been shown in the previous chapter that international responsibility, of whatever specific type, is invariably the consequence of the breach or non-performance of an international obligation. This statement, however, refers only to the act or omission which gives rise to international responsibility, whereas there is another condition which must necessarily be fulfilled before the act or omission in question can bring into operation the law of international responsibility with all its consequences. It is this: in order to give rise to international responsibility, the wrongful act or omission must also be legally imputable to the subject of the obligation.

<sup>50</sup> Frederick Sherwood Dunn, *The Protection of Nationals* (Baltimore, The John Hopkins Press, 1932), pp. 1 to 3.

<sup>51</sup> Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948), pp. 95-96 and 105.

<sup>52</sup> Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, p. 423.

<sup>53</sup> Eustathiades, *loc. cit.*, p. 433.

Thus, imputability is an indispensable condition for the existence of international responsibility, whatever the act or omission may be, and irrespective of who is the subject of the obligation. There are, of course, other conditions which vary according to the different cases of responsibility, but the condition of imputability is common to all of them. Very understandably, therefore, the question of imputability has been one of the crucial problems in the doctrine and practice of international responsibility.

59. Traditional doctrine and practice had, however, considered the problem solely with the object of determining international responsibility so far as imputable to the State; consequently, earlier treatment of the subject was concerned only with those aspects which had a bearing on that object, to the exclusion of all others. It is, of course, still necessary to deal with the cases in which the responsibility of the State is engaged; indeed, these are still the most numerous and, as a rule, the most important cases. But it is necessary also to consider the question of imputability in relation to other cases of responsibility and in these cases, too, to inquire how far traditional rules and principles accord with international law in its present stage of development. Although General Assembly resolution 799 (VIII) and the resolution of the Tenth Inter-American Conference only refer to the principles which govern the responsibility of the State, a complete reappraisal of the entire problem is necessitated by the emergence of new subjects of international law, capable of possessing or assuming international obligations, some of which were formerly attributed to the State. Such a reappraisal is essential for the purposes of the present report, because only in that manner is it possible to determine, in accordance with contemporary international law, who is, in any particular case, the actual active subject of responsibility.

#### 10. IMPUTABILITY AS AN ESSENTIAL CONDITION OF INTERNATIONAL RESPONSIBILITY

60. First, what is meant by "imputability"? Anzilotti's definition related it to the theory of the juridical personality. He says: "To impute a deed to a subject of the law implies an assumption that that subject has duties and rights peculiar to it; therefore, imputation presupposes juridical personality, or rather, is coterminous with it: a subject of legal imputation and a person (in the legal sense) are synonymous terms".<sup>54</sup> Kelsen defines imputability by distinguishing it from legal obligations; he says: "Legal responsibility for the delict is upon the person against whom the sanction is directed, whereas legal obligation is upon the one who by his own behaviour may commit or refrain from committing the delict, the actual or potential delinquent. Legal obligation and legal responsibility are two different concepts; but the subject of the obligation and the subject of the responsibility may—but not necessarily do—coincide".<sup>55</sup>

61. Anzilotti and Kelsen concur with the majority of

the writers who have studied the question in the view that imputability is the condition which determines the responsibility of a legal person, irrespective of the possibility that the injury giving rise to that responsibility may have been caused by a third party. In international law, the "subject of legal imputation", the "subject of the responsibility", is the State, upon which that law lays obligations, and for whose acts or omissions no other party can therefore be considered as internationally responsible.<sup>56</sup>

62. It will now be clear why the traditional treatment of the imputability of international responsibility was so narrow. Because traditional doctrine admitted only the responsibility imputable to the State, it dealt with only a few aspects of the general problem of imputability: the vicarious "indirect" responsibility of the State for the acts of individuals and for injuries caused during internal disturbances; and the equally vicarious responsibility of the State for acts or omissions on the part of subdivisions (in the case of a federal State) or of its colonies and dependencies, or else for acts or omissions committed on its territory by another State. Outside these cases, the State has a "direct" responsibility which, accordingly, presented no problems other than those relating to the wrongfulness of the acts or omissions of its agencies.

63. It is true that, as stated above, the General Assembly resolution and the resolution of the Tenth Inter-American Conference at Caracas refer to "the principles of international law governing State responsibility". If this phrase were to be interpreted in accordance with traditional doctrine and practice, our only task would be to codify the principles governing the responsibility directly or indirectly imputable to the State. For according to traditional doctrine and practice it is immaterial who committed the wrongful act which causes the injury that gives rise, directly or indirectly, to responsibility: only the State is capable of incurring international responsibility and only the State has an international duty to make reparation for the injuries.

64. The position, however, is not so simple in the present stage of development of international law. Responsibility is a consequence of the breach or non-observance of an international obligation. Its imputability therefore necessarily depends upon who is or are the subject or subjects of that obligation. International doctrine and practice have developed in accordance with a conception of international law in which the State is the only subject capable of possessing or assuming international obligations. In contemporary international law, however, the State is no longer the sole subject upon which international law directly lays obligations. The individual has now also definitely become the direct subject—and sometimes the sole subject—of certain international obligations. This development naturally must have some bearing upon the imputation of the international responsibility which in the past was ascribed entirely to the State.

<sup>54</sup> Anzilotti, *op. cit.*, pp. 230 ff.

<sup>55</sup> Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law", *The Jewish Yearbook of International Law*, 1948, p. 226.

<sup>56</sup> See also Bustamante, *Derecho internacional público*, Vol. III, p. 481; and J. G. Starke, "Imputability in International Delinquencies", in *The British Year Book of International Law*, 1938, pp. 104 ff.

65. The position is similar with respect to traditional doctrine and practice regarding the imputation of international responsibility for acts or omissions of certain political entities which enjoy internal autonomy but the international relations of which continue to be in the hands of a sovereign State. The fact that the international responsibility of some of these entities is now being in some measure recognized may perhaps also involve a reappraisal of the traditional idea that, in these cases, responsibility is imputable only to the sovereign State in question.

66. Nor can the problem of the imputation of responsibility, in contemporary international relations, be circumscribed to those cases in which a State may directly or indirectly be called upon to perform the duties resulting from that responsibility. It is true that traditional international law did not have to deal with, nor was it indeed aware of, any other cases of responsibility, and that General Assembly resolution 799 (VIII) does not contemplate any other cases. Nevertheless, certain international organizations may, by reason of their character or of the nature of their functions, find themselves in a certain sense and in some measure in a position analogous to, or even identical with, that of a State, inasmuch as they may commit acts or omissions giving rise to international responsibility. With reference to this case, Bustamante very properly stresses that "if the political action of its higher representative organs or the administrative conduct or action of one of the agencies of international co-operation wilfully and consciously causes injury, it is inconceivable that the victims thereof should be deprived of all recourse or remedy, and that the agencies concerned should enjoy absolute impunity".<sup>57</sup> This new form of international responsibility, as will be seen hereunder, is not without its practical precedents at least so far as some of its aspects are concerned.

67. The foregoing shows how necessary it is to abandon the traditional view concerning imputability and to consider the law of international responsibility in its widest scope, as warranted by the present stage of development of international law, even though the General Assembly and the Tenth Inter-American Conference did not make any explicit reference to the new cases mentioned above. To refuse to admit that this broad treatment is necessary would mean ignoring the fact that, in contemporary international law, the State is no longer the only subject to which the international responsibility arising out of a breach or non-observance of international obligations, as well as the international obligation to make reparation in certain cases for injuries, can be imputed.

#### 11 INTERNATIONAL RESPONSIBILITY IMPUTABLE TO THE STATE

68. For the purpose of determining in what cases and circumstances international responsibility is imputable to a State the acts or omissions enumerated in the previous chapter must be grouped in four great categories: (a) acts or omissions of the legislative, judicial and executive

branches of the State; (b) acts or omissions on the part of political subdivisions of a State, its colonies or other dependencies; (c) acts or deeds committed by private persons, including those occurring during internal disturbances; and (d) acts committed in the territory of a State by a third State or by an international organization. This classification, which is the one usually followed, makes it possible to discern the conditions under which, and the circumstances in which, responsibility may be imputed to a State in the various cases and situations which may occur in practice.

69. The cases in the first category are those which involve the State directly in international responsibility, but even in these cases there is no universal test of imputability. The situation varies according to the authority or organ to which the particular act or omission is traceable. If the legislative branch (or, where applicable, the constitution-making authority) is involved, imputability is generally based on the fact that legislative (or constitutional) measures have been adopted which are contrary to, or incompatible with, the international obligations (under a convention or otherwise) of a State, or else on the failure to adopt or to apply the measures which are necessary for the purpose of discharging such obligations. Whatever the legality or the validity of those acts or omissions from an internal point of view, international responsibility may arise and be imputable to the State as a consequence of any of those acts or omissions which constitute a breach or non-performance of an international obligation.

70. The problem of imputability becomes much more complex when we come to consider the acts or omissions of the judiciary. Here again the first step is to differentiate among the situations which are the most common in practice; these are known generically as cases of "denial of justice". If the denial of justice takes the form of the refusal on the part of a judge or court to act in a certain matter, or to deal with a certain case, then one has to determine whether the reason for the refusal is lack of jurisdiction, or whether the judicial authority has declined to act even though it possesses jurisdiction. In the first case, the problem would amount to determining whether such lack of jurisdiction is contrary to international law, in other words whether it implies an omission on the part of the constitution-making authority or of the legislature, inasmuch as the State is under an obligation to make provision for such jurisdiction. In the second case, to which can be added the analogous cases of unwarranted or unjustified delay in the proceedings or in reaching a judgement, the situation is simpler: in the majority of these cases "denial of justice" will exist. But perhaps the most difficult question, for the purposes of imputing responsibility, is that of unjust decisions. Clearly, of course, one cannot inquire into the intrinsic merits of a judicial decision, nor can one debate whether it is reconcilable with the municipal law of the State concerned; the only issue is this: Is the decision compatible or incompatible with international law? And for the purpose of answering this question the usual test is to ask: Does the decision, independently of all other factors, constitute an action comporting a breach or non-observance of an international obligation incumbent upon the State?

<sup>57</sup> Bustamante, *Derecho internacional público*, Vol. III, p. 483.

71. In the case of acts or omissions on the part of the executive or of public officials, where the problem of imputability is equally complex, other principles apply. In the first place, three different situations may arise: the case of an official acting in the performance of his public duties and within the limits of his competence; the case of an official acting in the performance of his duties but exceeding the powers with which he has been invested; and, finally, the case of an official acting as a private person. The first case is, of course, a straightforward one if the act or omission concerned violates an international obligation of the State. The same is true of the third case, in which the status of the official as such is immaterial, for an act committed by him in his private capacity would be on a par with the act of a private person, which does not directly involve the international responsibility of the State. The case which really presents difficulties is the second, for there the factor determining imputability might be either the status of the official *qua* official or the capacity in which he acted (objective responsibility), or else some other circumstance or consideration of the type occasionally admitted in practice.

72. In the case of acts or omissions on the part of political subdivisions of the State, or its colonies or dependencies, the problem of imputability naturally arises in a different manner. In essence, it has been said, there are two decisive considerations: the degree of control or authority exercised by the State over the internal affairs of its political subdivision, colony or dependency; and the extent to which the State responsible for the international relations and representation of the entity is concerned. It is apparent, however, that the mere application of these two tests does not dispose of all the possible cases, as is shown by the conflicting decisions arrived at in practice and by the divergent opinions held on the subject. Each case has in reality to be examined and dealt with on its own merits. Nevertheless, in a case involving a protectorate or like entity (these being the only cases presenting serious difficulties) one must determine whether, in addition to enjoying full internal autonomy, the entity in question has a measure of international personality and whether this personality carries with it the capacity to enter directly into international commitments with other States. This legal phenomenon, which is to be observed with increasing frequency in contemporary practice, is of great significance when the issue to be decided is: To whom should responsibility be imputed for the acts or omissions of those semi-sovereign entities?

73. The case of acts of private persons, acting either individually or as members of a group (internal disturbances), is in a way the most complex. In accordance with the more generally accepted doctrine in practice, the State's responsibility is not involved directly by such wrongful acts or deeds, but is rather the consequence of the conduct of its authorities with respect to them. The principle is that the State can only be held answerable for "its own acts". Viewed in these terms, the imputation of international responsibility will necessarily depend on the existence of factors and conditions extraneous to the actual event which caused the injury. This explains why, in doctrine and in practice, there has been so much argu-

ment, and such divergence of opinions, concerning the conditions which have to be present in order that the State can be truly said to be responsible. Here again the problem is whether the State should be treated as *objectively* responsible, or whether it is a condition of its responsibility that its conduct with respect to the act of the private person (failure to exercise due diligence to prevent it, failure to enforce the relevant penalties, etc.), must imply a certain deliberate attitude on the part of the State organ concerned (fault, *culpa*). Where imputability is determined by this indirect process, it is easy to see that what is in essence imputed to the State is not really the act or deed which causes the injury, but rather the non-performance of a duty, a duty which on occasions is very difficult to define and is sometimes quite undefinable. This peculiar process of legal reasoning may produce the consequence, among others, that responsibility is imputed for one reason and the decision concerning reparation relies on another, totally different, reason.

74. The last case to be considered in this context is that of the international responsibility of a State for acts committed in its territory by another State. This case, which is less frequent in practice than those discussed above, is in some respects analogous to that examined in the foregoing paragraph, inasmuch as what is involved is some act the commission of which cannot be directly imputed to the State. Hence once again it will be necessary to be guided by extraneous considerations in deciding whether the State is involved in international responsibility by reason of its conduct with respect to the wrongful act in question. Naturally, one will have to consider what degree of authority and control the State exercised in its territory and whether in fact the State in question had any authority or control at all (e.g., where both are exercised by the State committing the act or even by a third State). A similar situation, though not necessarily in identical terms, may arise as the result of the activities performed by international organizations in the territory of a State. Since the contingency is not dealt with in traditional doctrine and practice, it should, it is thought, be studied in the light of the character of the acts which may be committed by such organizations and which may give rise to indirect responsibility on the part of the State.

75. The foregoing gives a general idea of the difficulties involved in determining when a State is internationally responsible. These difficulties still exist, but they are no longer the only ones. A study of international responsibility should deal with, and solve, in addition to the above difficulties, those which have come into being in consequence of the recent development of international law and which are concerned with the nature of certain international obligations and the subjects of those obligations. Neither traditional doctrine nor traditional practice drew any distinction between acts and omissions which are merely unlawful and those which, in addition to being unlawful, are also punishable, or, if they drew such a distinction, they did not attach any special significance to it; neither did they admit that international responsibility might be imputable to a subject other than the State. International responsibility was regarded as something indivisible, and the State as the

only responsible subject. It has, however, been shown in the previous chapter that contemporary international law draws, in certain cases, a distinction between civil responsibility *stricto sensu* and criminal responsibility. Consequently, it will be necessary in each particular case to determine who is the real subject of the international obligation in question.

## 12. THE RESPONSIBILITY IMPUTABLE TO INDIVIDUALS

76. The idea that the State is the only subject capable of having or assuming international obligations was one of the fundamental premises of the report adopted by the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law of the League of Nations (Guerrero report):

“As we have shown, the body of law established by the will of international society is the only law which can govern the mutual relations of States, in other words, the rights and duties which States have accorded to or imposed upon themselves in their relations *inter se*. The violation of any of these rights involves the international responsibility of the offending State... Under this system, States alone possess international rights and duties.

...

“According to the above definitions, therefore, the individual is not a subject of international law, and the violation of a rule of international law does not involve the individual in any responsibility.

“Similarly, as international law imposes duties on States only, the individual is incapable of committing an offence against that law.”<sup>58</sup>

77. It is not hard to see that the premise upon which that report was based is not correct so far as the active subjects of certain international obligations are concerned. Even in traditional international law, piracy and the other *delicta juris gentium*, as also the so-called “war crimes”, are punishable offences which only individuals can commit. As indicated in the previous chapter, the position in contemporary international law is not open to any doubts whatsoever: an individual may be the subject of international obligations the breach of which is punishable; indeed, one modern view holds that the individual is the only subject or beneficiary of the rules which make provision for those obligations.

78. For the purposes of the present codification, however, there are certain other questions which must be dealt with. When once it is admitted that the individual is capable of having or contracting international obligations, the first question is whether the *civil* responsibility arising out of the breach or non-observance of an international obligation, or of an obligation of a penal character (if the act is punishable at international law), can or cannot be imputed to the individual who committed the act or omission. Lauterpacht states that strictly speaking all obligations, as well as any responsibility for non-fulfilment, are attributable to human

beings and to human agencies. He admits, however, with regard to the fulfilment of normal obligations of treaties or of customary international law in matters of commerce, finance, or international administration, that “it is just and proper that, in law, responsibility should be imputed to the State as a whole and that the State should appear exclusively as the subject of international law for that purpose”. In his opinion, however, the position is not identical with regard to tortious responsibility, as for instance in the case of the denial of justice. In practice, the subject of international responsibility in the matter of tort has been the State, and responsibility has on occasions assumed the form of penal damages. He adds in this connexion: “But, intrinsically, there is nothing—save the traditional doctrine on the question of the subjects of international law—to prevent the tortious responsibility of the State from being combined, in the international sphere, with the responsibility of the organs directly liable for the act or omission in question”. Enlarging upon these ideas, Lauterpacht maintains that there would appear to be no reason why the official responsible should not be made jointly liable with the State; criminal responsibility, however, should be imputed solely to the official.<sup>59</sup>

79. This appears to be the consensus of those writers who have dealt with the question. Berlia, for example, inclines to the view that civil responsibility should be imputed to the State and criminal responsibility, where applicable, to the individual, on the ground that attempts to impute the latter to the State have failed; he adds that the system he suggests would tend to prevent international offences.<sup>60</sup> Rolin, on the other hand, considers that the idea of criminal responsibility on the part of State organs or officials cannot be admitted in international law, at least in its present stage of development.<sup>61</sup>

80. Different opinions have, however, been expressed on the subject. In the two Committees on International Criminal Jurisdiction which met at Geneva (1951) and New York (1953) respectively, the question was discussed whether the proposed international criminal court should be competent to award damages. Some members of the 1951 Committee proposed that the court should be competent to decide the civil responsibility of an accused person for the crimes of which he might be found guilty, and to adjudicate damages. In addition, it was proposed that the court should be competent to declare a State or other legal entity jointly liable for the payment of damages which the court might impose upon a convicted individual who acted on behalf of the State or other legal entity. These proposals were put forward again in the 1953 Committee. In both cases, however, it was agreed that, since the draft statute for the court was concerned exclusively with the criminal responsibility of individuals,

<sup>58</sup> Sir Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens and Sons, 1950), pp. 40-43. See also chapter VIII, section 27 below.

<sup>60</sup> Berlia, *loc. cit.*, pp. 889 and 891.

<sup>61</sup> Rolin, *loc. cit.*, p. 450. The same opinion is held by Dautricourt (A/CN.4/39, section 79) and Stefan Glaser, *Introduction à l'étude du droit international pénal* (Brussels, Etablissements Emile Bruylant, 1954), p. 70.

<sup>58</sup> League of Nations Publications *V. Legal, 1926.V.3* (document C.46.M.23.1926.V), p. 4.

it was unnecessary to make any reference to those civil actions.<sup>62</sup> In this connexion, a recent instance may be mentioned, that of the Court provided for by the Treaty of 18 April 1951 constituting the European Coal and Steel Community. Under article 40 of that Treaty, this Court has jurisdiction to give rulings concerning the interpretation and the application of its provisions and the implementing regulations; it also has jurisdiction to assess damages against any official or employee of the Community, in cases where injury results from a personal fault of such official or employee in the performance of his duties. Furthermore, if the injured party is unable to recover damages from such official or employee, the Court may assess an equitable indemnity against the community.<sup>63</sup>

81. It will be seen that, although the traditional doctrine is no longer tenable, it cannot be said either that a definitive doctrine has evolved concerning the type of responsibility to be imputed to the individual. The reason is that the problem, when examined with care, raises other issues. In point of fact, it is not sufficient to determine to whom *civil* responsibility should be imputed and to whom *criminal* responsibility (if any). The more logical and practical course is to impute civil responsibility in international law to the State; if it is urged that individuals should be considered as subject to civil responsibility, the individual's responsibility should be supplemented by the joint responsibility of the State lest, owing to the insolvency of the individual concerned, insufficient reparation, or no reparation at all, be made for the injury. But even if one were to admit that the State is the sole subject of *civil* responsibility, this would not answer all the problems which may arise. The "duty to make reparation" which civil responsibility implies, varies according to the character and function of reparation in particular cases.

82. As will be explained later, "reparation" does not always take the same form, nor does it in every case have the same purpose. In cases of reparation *stricto sensu* (restitution, damages, or both) there is no problem. But in the case of punitive damages, as pointed out in the previous chapter, reparation contains in it at least some element of criminal responsibility. Thus, even within the scope of the law of *civil* responsibility, the problem of imputability arises too, inasmuch as it is necessary to determine who shall be the object of the sanction, or the measure of penalty, embodied in the reparation. Viewed in this light, the problem of imputability raises issues the study of which has to be postponed until a later chapter in which the character and function of reparation are discussed (chapter VIII below). As pointed out by some writers, however, the two types of responsibility are not mutually incompatible; to impute the one does not mean that the other is necessarily excluded or that its

imputability is prejudged.<sup>64</sup> This view is reflected in the charter and judgement of the Nürnberg Tribunal. It was also endorsed by both the 1951 and the 1953 Committees on International Criminal Jurisdiction mentioned above, and by the International Law Commission when it prepared its Draft Code of Offences against the Peace and Security of Mankind.

### 13. THE RESPONSIBILITY IMPUTABLE TO INTERNATIONAL ORGANIZATIONS

83. A brief reference will be made to the cases in which responsibility is imputable to international organizations; in a sense, these cases do not present complications and difficulties as to other subjects of international law. In the first place, the international personality of these organizations, particularly of some of them, is no longer in doubt, especially so far as their rights and their capacity to exercise them are concerned, as will be seen in the next chapter. Nor can there be any doubt concerning their duties, for some of these are explicitly prescribed in their constitutions or rules and regulations. Accordingly, it cannot be denied that the non-performance of those obligations, like the breach or non-observance of any other international obligation, necessarily involves them in responsibility. In some respects, it is even possible to establish a definite analogy with the responsibility imputable to the State.

84. It will simplify the study of the responsibility of international organizations if the following three cases are treated separately: (a) responsibility towards officials or employees or towards persons or legal entities having contractual relations with the organization; (b) responsibility for acts or omissions on the part of the organization's administrative organs, or in respect of injury arising from its political or military activities; and (c) responsibility for damage to third parties (indirect responsibility). This classification will doubtless be improved upon when an exhaustive study is made of the practice, although the latter is not as yet sufficiently developed to allow of a complete systematic analysis of the rules and principles which govern the responsibility of international organizations. Meanwhile, however, the above classification may serve as the point of departure for a future and more elaborate study.

85. The first type of responsibility is the one best illustrated by practice. The first Assembly of the League of Nations adopted a recommendation to the effect that all members of the Secretariat and of the International Labour Office appointed for a period of five years or more would, in the case of dismissal, have the right of appeal to the Council or the Governing Body of the International Labour Office, as the case might be.<sup>65</sup> In 1927, the Assembly established an Administrative Tribunal which by its Statute was competent *inter alia* to hear and to decide upon any dispute between officials and the Secretariat of the League (or the International Labour Office) concerning compensations payable to the

<sup>62</sup> See Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, *Official Records of the General Assembly, Seventh Session, Supplement No. 11*, para. 95, and Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12*, para. 88.

<sup>63</sup> *The American Journal of International Law*, Supplement, Vol. 46 (1952), p. 120.

<sup>64</sup> See Eustathiades, *loc. cit.*, p. 493.

<sup>65</sup> League of Nations, *The Records of the First Assembly, Plenary Meetings* (1920) pp. 663-664.

officials under the staff regulations. The Tribunal decided twenty-one cases but left twenty pending.<sup>66</sup>

86. In the United Nations, an Appeals Board was set up as early as 1947 to advise the Secretary-General, with whom the final decision rested, with respect to appeals by members of the staff.<sup>67</sup> By resolution 351 (IV) of 9 December 1949, however, the General Assembly established an Administrative Tribunal competent to to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. After the Tribunal had given certain judgements in 1953, ordering the Secretary-General to pay a large indemnity (and costs) to officials whose appointment had been terminated, the question was raised in the Assembly whether the latter had the right to refuse to give effect to an award of compensation made by the Tribunal and, if so, what were the principal grounds upon which the General Assembly could lawfully exercise such a right. By resolution 785 (VIII), both these questions were submitted to the International Court of Justice for an advisory opinion. The advisory opinion given by the Court naturally dealt primarily with the various aspects of these two questions, but in one of the passages setting forth its reasoning the Court states that the contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of the Organization as its representative. The Court added that "the Secretary-General . . . engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts."<sup>68</sup>

87. This type of responsibility only affects the Organization internally. It is international in character because of the legal relationship from which it springs but it does not arise from the obligations which that Organization has or may acquire with respect to private individuals outside it or with respect to other political entities—which is the case of the two other types of responsibility referred to above. An international organization can, of course, be involved in responsibility towards third parties for injuries due to acts or omissions on the part of its agents. For example, in connexion with the implementation of the technical assistance programme the Secretary-General of the United Nations disclaims responsibility for the recommendations made and reports drafted by its experts in the performance of their duties, though he does accept responsibility if he revises these recommendations and reports and adopts them as his own. Likewise, in the agreements relating to technical assistance, the Secretary-General only accepts re-

sponsibility for injuries which are directly attributable to a United Nations official acting in the performance of his duties and within the limits of his competence. As the activities of the United Nations, and indeed of any other international organization, are essentially carried on in the territory of States, this and similar cases of responsibility have given rise to problems that must be dealt with in conformity with the peculiar situation which results from those activities.<sup>69</sup> The necessity for this was strikingly demonstrated during the United Nations action in Korea, in connexion with certain claims alleging violations of neutral rights on the part of the forces of the Unified Command.<sup>70</sup>

88. The third type of responsibility mentioned in the above classification presents problems of a similar nature. There can be no doubt that, however small or limited in scope the territorial jurisdiction exercised by international organizations may be, the inviolability enjoyed by the premises of their headquarters and offices makes it possible for acts to be performed therein which are outside the competence of the local authorities. If such an act causes injury, and if it was possible for the act to occur by reason of the failure of the security services of the Organization to take action, then the Organization would be involved in responsibility on account of its failure to exercise due diligence. *A fortiori*, if the Organization should be responsible for the administration of a territory (as would have been the case if Trieste or Jerusalem had been actually placed under an international regime, as was originally contemplated), its position would be virtually that of a State. The Organization would then, in effect, have the same duties as a State with regard to the action to be taken by its organs and officials for dealing with the wrongful acts of third parties.<sup>71</sup>

#### 14. THE IMPUTATION OF RESPONSIBILITY AND THE DEFENCE OF "MUNICIPAL LAW"

89. The problem of imputability is not fully disposed of when once it is decided who is the subject of an international obligation, and hence whose responsibility is involved by the breach or non-observance of such an obligation. With regard to the State in particular, the further question arises whether it can avoid responsibility by pleading, in defence, provisions of its municipal law, under which the act or omission in question, said to be contrary to international law, is not wrongful. The question is of general importance, but has a special bearing on the validity and application of three fundamental principles: the principle of the international standard of justice; the principle of the equality of nationals and aliens; and the rule of local redress (chapters VI and VII, below.)

<sup>66</sup> See Manley O. Hudson, *International Tribunals, Past and Future* (Washington, Carnegie Endowment for International Peace and Brookings, 1944), chap. XIX, and E. F. Ranshofen-Wertheimer, *The International Secretariat* (Washington, Carnegie Endowment for International Peace, 1945), pp. 259-262.

<sup>67</sup> *Official Records of the General Assembly, Second Session, Supplement No. 1*, p. 77.

<sup>68</sup> See *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954*, p. 53.

<sup>69</sup> Cf. Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 385 *et seq.*

<sup>70</sup> See R. R. Baxter, "Constitutional Forms and Some Legal Problems of International Military Command", *The British Year Book of International Law*, 1952, p. 336.

<sup>71</sup> For a discussion of this type of responsibility, see Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 393-401.

90. Point I of the bases of discussion drawn up by the Preparatory Committee of the Codification Conference of The Hague deals with this specific problem under the title: "Distinction between the responsibility of the State under municipal law and its responsibility under international law"; it says:

"The responsibility of a State in international law for damage caused in its territory to the person or property of foreigners must be distinguished from the responsibility which under its laws or constitution such State may have towards its nationals or the inhabitants of its territory. In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."<sup>72</sup>

91. The statement in the first sentence of the paragraph cited above was not disputed at the Conference; indeed, it had been accepted before by traditional doctrine and practice. In its conclusions, the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law (Guerrero report) had already said:

"Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form."<sup>73</sup>

The Governments, in their comments concerning this point of the bases of discussion, agreed with the opinion of the Preparatory Committee.<sup>74</sup>

92. Admitting for the moment the distinction drawn between the two types of responsibility and, naturally, the assertion that the only one with which international law is concerned is that which arises out of the breach or non-observance of obligations imposed by international law upon the State, we shall now consider the second statement in the text prepared by the Preparatory Committee, namely, that "a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law." This idea, expressed in similar or identical terms, has met with general acceptance in the literature, in codifications and in arbitral awards; it has been repeatedly upheld in decisions of the former Permanent Court of International Justice.<sup>75</sup> It has, however, been and often still is, received with reserve in certain quarters; on occasions it has even been rejected as a matter of

principle.<sup>76</sup> The reason for these strictures and objections is, in effect, the refusal to admit the fundamental implication of this principle in law, which is that international prevails over municipal law, with all the consequences which necessarily derive from the admission that the latter is the inferior order in the hierarchy of legal norms.

93. Strangely enough, upon close examination, these objections appear not to be totally unfounded. Indeed, to accept a formal distinction as between two types of responsibility, and as between two types of obligations, is to admit implicitly that there exists a distinction between the two legal orders (the internal and the international) with the consequence that one can argue and differ about their "hierarchical" position. This is precisely the approach of the so-called "dualistic" theory, which holds that international responsibility cannot be imputed unless responsibility exists under municipal law. For the above-mentioned principle to be valid, therefore, any distinction which may lead to or imply the "dualistic" character of the relations between municipal law and international law must be rejected.

94. It would therefore appear necessary, in strict legal logic, to drop the distinction drawn by the Preparatory Committee which traditional doctrine and traditional practice have explicitly or tacitly accepted. Obligations and responsibilities under international law are surely at the same time internal obligations and responsibilities. Where the State is under an international obligation to perform, or to desist from performing, a certain act, it cannot be suggested that a provision of its internal legislation which is contrary to, or incompatible with, that obligation, can possibly be valid. Such a provision would in fact be null and void; and hence it could not even be relied on internally as a defence to an international obligation. From the international point of view, there do not exist two systems of obligations (one internal and the other international), for international obligations bind the State internally no less than internationally; those which do not have this double effect are only concerned with the internal order of the State.

95. In connexion, therefore, with the question of the two alleged types of responsibility, the present writer adopts the "monistic" approach, and holds, moreover, that in the case of a conflict between an international obligation and an internal obligation, that is, between the responsibility which may be imputed to the State under international law and that imputable to it under municipal law, the international obligation prevails. Strictly speaking, there can be no question of a State escaping its responsibility by appealing to the provisions of its municipal law, for there cannot exist international obligations and internal obligations prescribing different rules of conduct. What is more, this "monistic" con-

<sup>72</sup> League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 16.

<sup>73</sup> See annex I.

<sup>74</sup> League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), pp. 16 ff.

<sup>75</sup> See Georg Schwarzenberger, *International Law*, vol. I, *International Law as Applied by International Courts and Tribunals*, 2nd ed. London, Stevens and Sons, 1949), pp. 27-29.

<sup>76</sup> See, for example, the comments by Poland and Romania concerning the Preparatory Committee's text (League of Nations publication, *V. Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 18); and the observations made, concerning article 13 of the draft declaration on rights and duties of States prepared by the International Law Commission, in the summary records of the Sixth Committee (*Official Records of the General Assembly, Fourth Session, Sixth Committee*, pp. 186 ff.).

ception of the obligations of the State is the only one which is consistent with the principle, formulated by the Sub-Committee of the Committee of Experts, by virtue of which obligations having an international character prevail, so that this conception can be considered as implicitly contained in that principle, in spite of its apparent ties with the "dualistic" doctrine.<sup>77</sup>

## CHAPTER V

### The passive subjects of responsibility and the capacity to bring an international claim

96. The two previous chapters have dealt with the legal content and function of international responsibility as well as with the problem of its imputability in the various cases which may occur. The present chapter deals with the law of international responsibility so far as it relates to the parties that can assert the right or interest which is injured by the breach or non-performance of an international obligation, in other words, the passive subjects of responsibility. Traditional theory and practice were concerned with this question to a limited extent only. They regarded the State as the only entity capable of qualifying for this legal status, whether the State, as a legal person, was the direct object of the injury, or whether the injury was suffered by one of its nationals. This doctrine likewise has its origin in the traditional view concerning the subjects of international law, according to which only the State can have or acquire international rights. Consequently, it was held, international responsibility could only arise *vis-à-vis* the State.

97. It is not hard to see how greatly this view concerning the subjects of international rights, as well as the principles derived from it, are at variance with the rules of modern international law. International law today recognizes that individuals and other subjects are directly entitled to international rights, just as it places upon them certain international obligations. Accordingly, for an understanding of the development of international law in this direction it is again necessary to review, in their entirety, the traditional views and principles concerning the passive subjects of responsibility. The question in whom the interest or right vests, in any particular case in which responsibility for injury to an interest or right is to be determined, naturally raises important issues of substance, and especially the issue of the international capacity to claim reparation. This will be one of the matters discussed in the present chapter.

#### 15. THE STATE AS CLAIMANT

98. It is an established principle of international case law that, in all cases of responsibility, the interest or right

<sup>77</sup> With reference to the traditional distinction, Maúrtua points out that "it cannot be said that there are two different conceptions of responsibility, according to whether individuals or States are concerned... There can only be one conception of legal responsibility. Its basis is the same whether it is in municipal law or in international law. This basic unity of the law has now been acknowledged by learned jurists..." "La Responsabilidad de los Estados por Daños Causados en su Territorio a la Persona o Bienes de los Extranjeros", in V. M. Maúrtua, *Páginas Diplomáticas* (Lima, Librería e Imprenta Cie, S.A., 1940), vol. I, p. 523.

injured as a result of the wrongful act or omission is always an interest or right belonging to the State. This principle has been frequently stated by courts in explicit terms. In one of its first judgements, the former Permanent Court of International Justice held as follows:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

"The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint."<sup>78</sup>

99. Codifications have also drawn inspiration from this same principle and have sometimes proclaimed it explicitly. The report adopted by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Guerrero report) did not acknowledge that any subject other than the State could have or acquire international rights. It states that individuals "move on a lower plane, where their lives are regulated in accordance with standards set up by a single will—the will of the State. In their own sphere individuals possess rights and duties and can accordingly incur responsibility, or, correlatively, invoke the responsibility of the State to which they belong."<sup>79</sup> Consequently, the conclusions of the report only referred to "...a wrongful act, contrary to international law, committed by one State *against another State*..."<sup>80</sup> Article 1 of the Harvard Research draft affords another example of the same trend. It refers to the duty of a State to make reparation to another State "for the injury *sustained* by the latter State as a consequence of an injury to its national."<sup>81</sup> In this connexion the comment to the article states:

"The injury for which a State is responsible is always an injury to another State. Such injury to the State arises from what was originally loss or damage inflicted upon its national."<sup>82</sup>

100. Writers have endorsed this theory concerning the passive subjects of international responsibility. Borchard was one of the first to state it. In his opinion, any omission in the duties of a State towards aliens involves the responsibility of the delinquent State not only toward the individual directly (if so provided by municipal law), but also towards his home State, "which in international

<sup>78</sup> See Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2 (The Mavrommatis Palestine Concessions), p. 12. The Court reaffirmed this principle in later judgements: see series A, Nos. 20/21 (Case concerning the payment of various Serbian loans issued in France), p. 17, and *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 16.

<sup>79</sup> League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 93.

<sup>80</sup> Annex 1.

<sup>81</sup> Annex 9.

<sup>82</sup> Harvard Law School, *Research in International Law*, II. *Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929), p. 141.

theory is considered as injured in the person of its citizen". He adds:

"The national State enforces its own right, therefore, in presenting an international claim, although the pecuniary benefits of an indemnity may ultimately be awarded to the injured individual himself."<sup>83</sup>

Anzilotti is equally categorical, in his opinion, if a State does not fulfill its duty to treat aliens in a particular manner, "... it is not the right of the individual which is violated, but rather the right of the State to see that the individual be treated in accordance with international law."<sup>84</sup>

101. Some exponents of the traditional doctrine, while accepting this theory, have tried to explain it otherwise, and to base it on other reasons. Thus Brierly says that, even if we reject its supposed justification in the dogma that individuals cannot have rights or duties at international law, it is still possible to hold that the theory itself is sound as reflecting the essential facts of the situation in which an international claim arises. Such a view, according to Brierly, does not, as it sometimes suggested, introduce any fiction of law; nor does it rest on anything so intangible as "the wounding of national honour"; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, "... but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated." He sums up his view by stating that, in an international claim, "a State has a larger interest than the mere recovery of damages."<sup>85</sup>

102. This reasoning on the part of Brierly is defensible and is in fact justified in a large number of practical instances, but in essence it amounts to expressing the same views as the traditional theory which considers the State as the only entitled claimant in respect of the injured interest, in spite of Brierly's implicit admission that there are two interests involved in the cases of international responsibility. As will be seen in a later chapter, however, this new idea affords some indirect assistance in the recognition of the individual, jointly with the State, as a passive subject of international responsibility in cases of injury to the person or property of foreigners.

103. The traditional view concerning the passive subjects of international responsibility has its obvious drawbacks. It will be shown below that the right of the State to claim damages in respect of injury caused to aliens is subject to the rule of the "nationality of the claim". In consequence of this rule, persons having no nationality have been deprived of the benefit of the "treatment recognized by the generally accepted principles of international law" concerning aliens, to use the terms employed by the Permanent Court of International

Justice,<sup>86</sup> although the position of such persons in municipal law is, for all practical purposes of the law of responsibility, that of aliens. The treatment of these "foreigners without any nationality" is absurd from the legal point of view. One Claims Commission even went so far as to say:

"A State... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently no State is empowered to intervene or complain on his behalf either before or after the injury."<sup>87</sup>

104. This artificial view concerning the passive subjects of international responsibility also accounts for many problems and difficulties in cases of dual or multiple nationality. The principles which have been evolved for the application of the rule of the "nationality of the claim" sometimes lead to situations similar to that described in the previous paragraph. Not only is it difficult to say what test should be applied for the purpose of determining which of the nationalities in question shall prevail, but the rule itself becomes inoperative if one of the nationalities attributed to the injured party is the nationality of the respondent State. As will be seen in a later chapter, the application of this rule raises other difficulties, particularly when "continuity of nationality" is insisted upon as one of its corollaries.

105. These are not, however, the only drawbacks of the traditional view. When we come to consider what tests should be applied for the purpose of determining the character and the measure of reparation (chapter VIII, section 28, below) we shall find that because the State is deemed to be enforcing its own right, reparation is also considered as "a reparation due to the State", the consequence being that the injury sustained by the private individual will only serve to "indicate the adequate measure" of such reparation. According to this view, it is again the State (and not the aggrieved individual or his successors in interest) that is held entitled to fix the reparation of the injury. The traditional doctrine has yet other defects from the point of view of the foreign individual (these will become evident in chapter VI, below, which deals with the theory of diplomatic protection), and also from the point of view of the rights of the State in which the injured party resides (chapter IX).

## 16. OTHER SUBJECTS OF INTERNATIONAL LAW AS CLAIMANTS

106. It is undeniable that the State can be in certain cases the true and only claimant entitled to assert the right or interest which has been injured. In the case of acts or omissions which affect the State as such, that is, which injure its rights and interests as a legal entity

<sup>83</sup> Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, The Banks Law Publishing Co., 1915), p. 178.

<sup>84</sup> Anzilotti, *op. cit.*, p. 461.

<sup>85</sup> J. L. Brierly, "The Theory of Implied State Complicity in International Claims", *The British Year Book of International Law*, 1928, p. 48.

<sup>86</sup> See chap. VI, section 20, below, and Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7 (Case concerning certain German interests in Polish Upper Silesia), p. 21.

<sup>87</sup> *Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by subsequent Conventions, between the United States and Mexico, (October 1930 to July 1931)* (Washington, United States Government Printing Office, 1931), p. 188.

(for examples, see chapter III), only the State itself can be considered as the passive subject of the international responsibility to which these acts give rise. But in circumstances other than these, the traditional view, besides being incompatible with certain contemporary legal realities and theories, is patently inconsistent with itself.

107. For to argue that in the cases of responsibility for injury to the person or property of foreigners, the right which is violated is not that of a private individual but rather the right of the State of which he is a national, is to uphold an idea which conflicts with certain other fundamental principles recognized by international doctrine and practice. Podestá Costa points out that, in these instances, "the right violated is, primarily, the right of the injured individual"; he adds, in support of this view, that "according to a universally accepted rule, the corresponding legal action must be taken in the first place by the injured individual himself in the courts of the local State."<sup>88</sup> In a later chapter, dealing with the legal character of international claims, it will be shown that the existence of the rule mentioned by Podestá Costa discloses a manifest inconsistency as regards the subject who, after local remedies have been exhausted and an international claim has been lodged, appears as the claimant in respect of the injured right (chapter IX, section 29). In view of this, and of the consequences of the rule requiring "continuity of nationality of the claim", Politis, Dumas and other members of the Institute of International Law have described the theory that the State "is injured in the person of its nationals" as obsolete, on the grounds that it ignored the fact that, in making the claim, the State acts as the advocate of its nationals "whose interests are primarily involved". Although the Institute did not adopt any resolution on the subject, it voted against the traditional rule.<sup>89</sup>

108. In cases of responsibility for the breach of contractual rights, only a mere fiction of law, intended mainly to safeguard the political prestige and other interests of the claimant State, can buttress the argument that the rights in question do not belong to the private foreign individual who has entered into a contract with the State in the territory of which he resides. One Claims Commission, in admitting the validity of a waiver of diplomatic protection through the operation of the *Calvo Clause*, has said:

"... To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of inter-

national law and does not tend to promote goodwill among nations."<sup>90</sup>

109. Surely, the rights which a foreign private individual acquires by virtue of a contract with the State of his residence cannot be converted, by the mere fact of their violation, into rights belonging to the State of his nationality. Quite apart from the question of the validity of the *Calvo Clause*, which will be dealt with in a later chapter (chapter VII, section 24), if those rights are violated and a case of international responsibility arises, the beneficiary of the rights cannot change by reason of the fact that the State whose nationality he possesses espouses the claim; this is particularly true if—as is logical and usual—the sole object of the claim is to secure performance of the contract on the part of the State of residence, or damages in lieu of performance.

110. Nor is it consistent with other tenets and principles of traditional international law to argue, in the other cases of responsibility for injury to the person or property of foreigners (including that just mentioned) that the injured right or interest belongs to the State and not to its national. These tenets and principles are the rule concerning "treatment recognized by the generally accepted principles of international law", which has been repeatedly proclaimed by the former Permanent Court of International Justice, and the rule of the "international standard of justice", which has also been pleaded and applied precisely in order to show that an alien has certain fundamental rights which the State wherein he resides cannot violate without incurring international responsibility. Without prejudice to the relevant comments made below (chapter VI, section 20), it may be said at this point that both rules are undoubtedly concerned with the international recognition of certain specific rights of aliens. How, then, could it be said that these rights, if violated, came to vest, not in the individual concerned, but in the State of his nationality?

111. The traditional view is *a fortiori* incompatible with the present international recognition of the fundamental human rights and freedoms. At a time when a private person's status as an alien was considered an essential condition of his enjoyment of certain international rights, it was not implausible that these rights should be thought of as identical with, or at any rate inseparable from, the rights of the State of the nationality. Strictly speaking, the nationality link was the basis of those rights, and their only *raison d'être*. But the position in contemporary international law is completely different. Aliens (and even stateless persons) are on a par with nationals in that all enjoy these rights not by virtue of their particular status but purely and simply as human beings. In the recent international recognition of the right of the individual, nationality does not enter into consideration. This means that the alien has been internationally recognized as a legal person independent of his State: he is a true subject of international rights.<sup>91</sup>

112. Now, in what has been said above there is nothing to rule out the possibility that, in certain circumstances,

<sup>88</sup> Podestá Costa, "La Responsabilidad Internacional del Estado" in "Cursos Monográficos de la Academia Interamericana de Derecho Comparado e Internacional" (Havana, 1952), Vol. II, p. 206.

<sup>89</sup> See *Annuaire de l'Institut de droit international* (1931), Vol II, pp. 201-212, and (1932), pp. 479-529.

<sup>90</sup> *The American Journal of International Law*, Vol. XX, (1926), p. 802.

<sup>91</sup> See chapter VI.

the State of nationality may have a concurrent interest in a case in which the rights of its nationals have been violated. In his award of October 1924 concerning the British claims in the Spanish Zone of Morocco, Judge Huber pointed out that every law aims at assuring the coexistence of interests deserving of legal protection, and referred to "... the interest of the State in seeing the rights of its nationals in a foreign country respected and effectively protected"<sup>92</sup> With respect to the application of the *Calvo Clause*, one Claims Commission has similarly held that the State of the nationality "... frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens"<sup>93</sup> These decisions show what the factual and legal situation may be in certain cases of responsibility for injury to the person or property of foreigners. In all of them, the injured right is the right of an individual, but in some of them the national State may claim a "general interest" separate from, and supplementary to that of the private individual. It will, of course, not always be easy to determine whether this duality and concurrence of interests and rights should be admitted, for everything depends on the circumstances of each particular case. The tribunal dealing with the case may be guided, in deciding this point, by such factors as the gravity of the act or omission, the frequency of the wrongful acts, and evidence of a manifestly hostile attitude towards the foreigner. This view conforms with the legal realities of these cases, and furthermore considerably facilitates their practical solution, as will be seen in the following section.

113. The recognition of the private individual as a passive subject of international responsibility does not dispose of all the problems connected with the question under examination. There are instances of responsibility in which other subjects of international law, namely international organizations, are similarly subjects of responsibility. The General Assembly by its resolution 258 (III), requested an advisory opinion of the International Court of Justice on the subject of "Reparation for injuries suffered in the service of the United Nations"; the specific questions were:

"I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

"II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

114. While reserving the other questions dealt with by the Court for discussion at a later stage, we shall deal here with the specific question of the capacity of international organizations to assert the interests or rights

which have been injured in those instances of responsibility.

115. On this point, the Court admitted the possibility of "damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian".<sup>94</sup> With respect to the measure of reparation, the Court stated that it "should depend upon the amount of the damage which the Organization has suffered as a result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law".<sup>95</sup> Accordingly, the Court held that the Organization, as a legal entity, was capable of possessing interests and rights of its own, and that their violation gave rise to a duty to make reparation. Establishing a further analogy with the traditional conception of the responsibility of State to State, the Court said:

"The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected... In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization".<sup>96</sup>

116. It should be noted, of course, that the analogous instance which the Court had in mind was that in which a State makes a claim in respect of injury caused to its officials or agents, and not the case of injury to nationals who are private individuals (the former Permanent Court of International Justice considered these, too, as injuries to the State itself).<sup>97</sup>

#### 17. THE CAPACITY OF THE STATE TO APPEAR AS CLAIMANT

117. Where an act or omission directly and solely affects the State as a juridical person, there is naturally no doubt concerning its international capacity to claim damages in respect of the injury sustained. The State, being the only beneficiary of the injured interest or right, is consequently the only subject to which such capacity may be attributed; and when we say "State" we do not, of course, exclude those semi-sovereign political entities which have acquired a sufficient degree of international personality for these purposes. It is the cases of injury to foreigners or private persons which present difficulties. A further complication has cropped up in modern times: the foreigner or private person

<sup>94</sup> *I.C.J. Reports 1949*, p. 180.

<sup>95</sup> *Ibid.*, p. 181.

<sup>96</sup> *Ibid.*, p. 184.

<sup>97</sup> For a fuller treatment of this question, see *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 19 and 30; and Eagleton, "International Organization and the Law of Responsibility" in *Recueil des cours de l'Académie de droit international*, 1950, I, pp. 352 ff.

<sup>92</sup> Lauterpacht, *The Function of the Law in the International Community*, (Oxford, Clarendon Press, 1933), p. 121.

<sup>93</sup> Schwarzenberger, *op. cit.*, p. 74.

concerned may have suffered the injuries in the service of an international organization, in which case it will be necessary to reconcile the claim with "such rights as may be possessed by the State of which the victim is a national". We shall deal with this particular case when examining the question of the capacity of international organizations to bring claims for damages; for the moment, we shall consider the other problems.

118. Traditional international law tried to solve all these problems by conferring the international capacity to bring the claim upon the State of the nationality of the private individual who had sustained the injury, in accordance with the familiar principle of the "nationality of the claim", to which reference has been made above. The question is also related to the so-called doctrine of the diplomatic protection of nationals abroad, which will be examined in the following chapter. The Preparatory Committee of the Hague Conference of 1930, in the light of the replies received from Governments and of the abundant international case law, enunciated the principle in its Basis of Discussion No. 28, as follows:

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

"Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

"In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."<sup>98</sup>

119. In one of its last awards, the former Permanent Court of International Justice related the principle of the "nationality of the claim" to the right of the State to afford diplomatic protection:

"... This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond or nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim for which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse."<sup>99</sup>

120. As the second paragraph of the basis of discussion of the Preparatory Committee implies, the rule of the

"nationality of the claim" is not an absolute one; in fact, the advisory opinion of the present International Court of Justice which is referred to in the preceding section explicitly admits that "... there are cases in which protection may be exercised by a State on behalf of persons not having its nationality".<sup>100</sup> It constitutes, however, the general rule, and must be taken as the basis of the capacity of the State to appear as claimant in the cases of responsibility which are being examined here. The first difficulty that we encounter is the condition of the "continuity of nationality", for this condition has received two different interpretations both in theory and in practice: one view is that the nationality must continue unchanged until the claim is decided upon, while another view holds that it is sufficient if the nationality subsists until the time when the claim is made.<sup>101</sup> The greatest difficulties are, naturally, those traceable to the condition laid down in the third paragraph of the Basis of Discussion. Thus, in the *Stevenson claim* the British-Venezuelan Commission of 1903, even though the claim had arisen during the lifetime of Stevenson, only made the award on behalf of the two children who possessed the nationality of the claimant State (Britain).<sup>102</sup>

121. In another respect, the rule of the "nationality of the claim" is open to serious objection both from the point of view of the protection of the foreign individual concerned and from the point of view of the general interests of the national State. As has been said before, the State does not act in the name and on behalf of the private individual concerned when affording diplomatic protection and making an international claim, but it rather acts in its own name and asserts "its own rights". In consequence of this "public character" of an international claim the person really interested is not a party to it, while at the same time an unjustifiable and unnecessary burden is placed on his country of origin. Besides, owing to the intervention of the national State, a claim acquires a political tinge, so that frequently international friction with the State of residence develops. As will be seen in a later chapter (chapter IX) the difficulties caused by the rule of the "nationality of the claim" are at times so serious that they cannot be overlooked.

122. The foregoing criticisms are not intended, however, to suggest that it is necessary or desirable to drop the rule itself. Provided that it is reformulated in terms which remedy its present deficiencies and shortcomings, the rule as such is still necessary and desirable in the present state of international relations. In reformulating the rule, it will be necessary to bear in mind two fundamental considerations: firstly, the injured interest or right in the cases of responsibility to which the rule applies is primarily that of the private individual and not that of the State; secondly, where the national State cannot claim a "general interest" in the injury resulting

<sup>100</sup> *I.C.J. Reports 1949*, p. 181.

<sup>101</sup> See Borchard, "The Protection of Citizens Abroad and Change of Original Nationality", *Yale Law Journal*, Vol. 43 (1934), pp. 359-392.

<sup>102</sup> Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, 1952), p. 735.

<sup>98</sup> See annex 2.

<sup>99</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The *Panevezys-Saldutiskis Railway Case*), p. 16.

from the wrongful act or omission, the private individual must have remedies at his disposal for the purpose of bringing an international claim when once internal remedies have been exhausted. This second statement naturally involves the recognition of the international capacity of the individual to bring claims. As will be seen hereunder, however, this would not mean introducing any innovation in the practice of international claims.

#### 18. THE CAPACITY OF THE INDIVIDUAL OR PRIVATE PERSON

123. The problem of the direct right of access of individuals to international courts was raised and discussed in some detail when the Statute of the former Permanent Court of International Justice was being prepared. During the debate in the Committee of Jurists, two of its members, Loder and de la Pradelle, suggested that the Court should have competence to deal with disputes between States and individuals and that the latter should have direct access to the Court. One of the objections to this suggestion was based on the general argument that international cases are interstate disputes, private individuals not being subjects of international law.<sup>103</sup> Whatever may have been its validity at the time, the argument has by now become wholly untenable. There may still be some discussion concerning the nature and scope of the international rights which the individual is held to possess—in what sense or to what extent he is the subject of international law—but there can be no doubt that the recognition of those rights implies some degree of international personality.

124. Other arguments raised in the Committee of Jurists were that it was inconceivable for diplomatic negotiations to proceed between a private individual and a Government, and that a State would never permit itself to be sued before a Court by a private individual.<sup>104</sup> Here again, it is largely academic to inquire into the theoretical validity of these arguments in so far as they are clearly out of line with the present realities of international practice. In the International Prize Court established by The Hague Convention of 1907, private individuals were given direct access to the Court in the cases covered by the Convention if they fulfilled the conditions laid down in it.<sup>105</sup> The Central American Court of Justice, which functioned at Cartago, Costa Rica, from 1907 to 1917, could deal with the questions which private individuals of one of the five Central American countries "... may raise against any of the other contracting Governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not; and provided that the remedies which the

laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown".<sup>106</sup> But the most significant expression of this tendency is the practice of conferring *locus standi* upon private persons before the Arbitral Tribunals set up pursuant to articles 297 and 304 of the Treaty of Versailles (1919-1920), and especially their much more independent standing before the Arbitral Tribunal of Upper Silesia set up by the German-Polish Convention regarding Upper Silesia of 15 May 1922.<sup>107</sup> Further evidence of the same practical trend, although relating to disputes between private individuals and international organizations, is afforded by the capacity of individuals and other persons to institute proceedings in the Administrative Tribunals of the League of Nations<sup>108</sup> and the United Nations.<sup>109</sup>

125. Post-war practice does not disclose a uniform trend. The early treaties of peace did not revive the system established by the Treaty of Versailles; instead, they treat the problem of claims, and modes of settlement, as matters strictly between States.<sup>110</sup> The position is, however, different under the Convention on the Settlement of Matters arising out of the War and the Occupation signed on 26 May 1952 with the Federal German Republic. The Charter annexed to the Convention sets up an Arbitral Commission, direct access to which is open to the nationals or residents of the States or territorial entities referred to in the Charter and to bodies corporate constituted under the laws of those States and entities.<sup>111</sup> Although not strictly comparable in scope or object, the Treaty of 18 April 1951 to constitute the European Coal and Steel Community should be mentioned in this context (see also para. 80). In the Court set up by this Treaty, persons and bodies corporate have direct access for the different purposes provided for in chapter IV of the Treaty.<sup>112</sup>

126. Enough has been said to show that past international practice amply supports the recognition of the

<sup>106</sup> Article 2 of the Convention signed in Washington on 20 December 1907. See *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909*, compiled by William M. Malloy (Washington, U.S. Government Printing Office, 1910), Vol. II, p. 2400.

<sup>107</sup> Georges Kaeckenbeeck, *The International Experiment of Upper Silesia* (London, Oxford University Press, 1942), p. 811.

<sup>108</sup> Ranshofen-Wertheimer, *op. cit.*, pp. 259 ff.

<sup>109</sup> See General Assembly resolution 351 (IV). By resolution 957 (X) of 8 November 1955, the General Assembly adopted a procedure for the review of Administrative Tribunal judgements and amended the Statute of the United Nations Administrative Tribunal so as to allow Member States, the Secretary-General "... or the person in respect of whom a judgement has been rendered by the Tribunal (including anyone who has succeeded to that person's rights on his death) ..." to appeal from the judgement and to ask the Committee established by that resolution to request an advisory opinion of the International Court of Justice on the matter.

<sup>110</sup> See for example Treaty of Peace between the Allied and Associated Powers and Italy (10 February 1947), *United Nations Treaty Series*, Vol. 49, and the Treaties of Peace with Hungary and Romania of the same date, *United Nations Treaty Series*, Vol. 41, p. 135 and Vol. 42, p. 3, respectively.

<sup>111</sup> See articles 6 and 11 of the Charter, *The American Journal of International Law*, Supplement, Vol. 49 (1955), pp. 116-118.

<sup>112</sup> *Ibid.*, Supplement, Vol. 46 (1952), pp. 117 ff.

<sup>103</sup> See the observations of Mr. Arturo Ricci-Busatti, Baron Des-camps and Mr. Raul Fernandes in: Permanent Court of International Justice—Advisory Committee of Jurists—*Procès-Verbaux of the Proceedings of the Committee* (The Hague, Van Langenhuyens en Brothers, 1920), pp. 208, 209 and 215 respectively.

<sup>104</sup> See the observations of Lord Phillimore and Mr. Elihu Root, *ibid.*, pp. 206 and 207 respectively.

<sup>105</sup> See article 4 of the Convention in *The Hague Conventions and Declarations of 1899 and 1907*, ed. Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), pp. 189-190.

right of interested private individuals to appear in the capacity of claimants before an international tribunal. The idea in itself is therefore, in principle, quite practicable. At its New York session (1929), the Institute of International Law expressed the view that "...there are certain cases in which it may be desirable to grant to private persons the right of direct recourse to an international tribunal, under conditions to be determined, in respect of their disputes with States".<sup>113</sup> Many writers who have dealt with the manifold aspects of the problem share the same view.<sup>114</sup>

127. The only questions to be settled then are in what cases, and subject to what conditions, individuals or private persons are to have this capacity to bring international legal action. Should the individual be regarded as having this capacity in all cases or only in those in which the State of the nationality does not possess a "general interest" in the injury caused by the wrongful act or omission? Should he have the capacity in all or only in some cases of responsibility for injury to the person or property of an alien?<sup>115</sup> So far as the conditions are concerned which must be fulfilled before the individual can exercise this capacity, some of the possible prerequisites are: (a) that the State whose nationality he possesses must have declined to present the claim; (b) that the said State consents to, or does not oppose the recognition of this capacity by the State of residence; (c) that the State of nationality supports the claim or is in some other way a party to the proceedings; (d) that only the immediate victim of the injury (or, as the case may be, his heirs or beneficiaries) can present the claim; (e) that the alien in question must possess a nationality, and, if he possesses two or more nationalities, must fulfil certain special conditions (to be defined).<sup>116</sup>

128. To sum up: whatever may be the case or cases in which the individual is to be regarded as having this capacity, and whatever may be the conditions to which its exercise is to be subordinated, the recognition of the right to institute proceedings would not imply a denial of the general principle under which the State has authority to protect its nationals abroad. Indeed, in much the same way it had to be admitted, as another principle, that diplomatic protection cannot be exercised in favour of an alien without his consent, lest (as has happened

<sup>113</sup> *Annuaire de l'Institut de droit international (1929), Vol. II*, p. 267.

<sup>114</sup> See in particular: L. Fleury, *L'accès des particuliers aux tribunaux internationaux* (1932); Schule, *Le droit d'accès des particuliers aux juridictions internationales* (1934); Kaeckenbeeck, *op. cit.*

<sup>115</sup> The Committee of the League of Nations for the study of international loan contracts recommended the setting up of an International Loans Tribunal to which groups of shareholders would have direct access. See *Report of the Committee for the Study of International Loan Contracts*, League of Nations Publications, II. *Economic and Financial*, 1939.II.A.10 (document C.145.M.93.1939.II.A), p. 26.

<sup>116</sup> With regard to stateless persons (and to refugees who lack the protection of their national State and are therefore in an identical situation), these conditions should be examined with a view to conferring on an international organization, which might be the United Nations High Commissioner for Refugees, the right of diplomatic protection which hitherto has been exercised exclusively by States.

in the past) a State exercise this right for purposes other than protection.

#### 19. THE CAPACITY OF INTERNATIONAL ORGANIZATIONS

129. It will be recalled that the advisory opinion, given at the request of the General Assembly by the International Court of Justice, concerned the question whether the United Nations has "...the capacity to bring an international claim... with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him". This, of course involved answering the fundamental question whether international organizations, and the United Nations in particular, had an international personality. With reference to this point the Court stated that "...the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane". The Court went on to examine whether "the sum of the international rights of the Organization comprises the right to bring the kind of international claim described" in the Assembly's request for an opinion. On this latter question, the Court held that Member States "...have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions".<sup>117</sup>

130. The next question which the Court had to decide was: In the event of one of its agents, in the performance of his duties, suffering injury in circumstances involving the responsibility of a State, has the United Nations the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused to the Organization? The Court held that: "It cannot be doubted that the Organization has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it", adding that it was impossible to see how the Organization could obtain reparation unless it possessed capacity to bring an international claim.<sup>118</sup> In their oral statements, the representatives of the Secretary-General related this question to the international right of the Organization to protect its agents, arguing that the violation of that right gave rise to a claim for reparation which the Organization could bring at the international level.<sup>119</sup>

131. The Court, however, considered the right to protect the Organization's agents in connexion with the question concerning the reparation of the damage caused to the victim or to persons entitled through him. In the

<sup>117</sup> See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, pp. 179 and 180; and *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 22-27.

<sup>118</sup> See *I.C.J. Reports 1949*, p. 180.

<sup>119</sup> See *Reparation for injuries suffered in the service of the United Nations: Oral Statements by Dr. Ivan S. Kerno, Agent, and A. H. Feller, Counsel, on behalf of the Secretary-General of the United Nations, 7-8 March 1949*, pp. 32-36.

opinion of the Court, the traditional rule that diplomatic protection is exercised by the national State did not involve answering that question in the negative. This rule, the Court said, "... rests on two bases. The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent does so by invoking the breach of an obligation towards itself. Thus the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in question I (b)." This reasoning led the Court to the conclusion that the Organization also had the capacity, when claiming an adequate reparation, to include in its assessment the damage suffered by the victim or by persons entitled through him.<sup>120</sup>

132. Finally, let us examine the opinion given by the Court concerning question II submitted to it by the General Assembly, namely, how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national? The Court held that, in view of its affirmative reply on point I (b), when the victim had a nationality, cases could clearly occur in which the injury suffered by him might engage the interest both of his national State and of the Organization. In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise. The Court held, however, that there was no rule of law which assigned priority to the one or the other, or which compelled either the State or the Organization to refrain from bringing an international claim. The risk of competition between the Organization and the national State could only be reduced or eliminated either by general convention or by agreements entered into in each particular case. The Court also considered the case where the agent concerned had the nationality of the defendant State. In that case, as the claim of the Organization was not based on the nationality of the victim but on his status as agent of the Organization, the Court considered that the traditional rule was not applicable.<sup>121</sup>

133. The foregoing gives only a general idea of the problems which may arise when the United Nations or some other international organization exercises its right to bring an international action. Closer examination would reveal other aspects of the problem, and also the degree of development which post-war practice has reached with regard to the capacity of these subjects of international law to bring claims in the different cases of responsibility in which their interests or rights are injured. When this subject is studied more fully, it will certainly become apparent how necessary it is to formulate rules which will improve upon present practice; but at this stage it is sufficient to note, in particular, the suggestion which is being made more and more frequently of late, namely, that of conferring on the United Nations

the capacity to appear before the International Court of Justice when the latter is performing its international judicial functions.<sup>122</sup> This suggestion, which could equally apply to other international organizations, can be supported by three fundamental reasons: the capacity which nearly all these organizations have to appear before national courts; the capacity of the United Nations, and of the specialized agencies which are duly authorized, to request advisory opinions from the International Court of Justice; and the Court's own unqualified recognition of international personality of the United Nations in the advisory opinion referred to above.

## CHAPTER VI

### Diplomatic protection and the international recognition of the essential rights of man

134. In traditional international law the "responsibility of States for damage done in their territory to the person or property of foreigners" frequently appears closely bound up with two great doctrines or principles: the so-called "international standards of justice", and the principle of the equality of nationals and aliens. The first of these principles has been invoked in the past as the basis for the exercise of the right of States to protect their nationals abroad, while the second has been relied on for the purpose of rebutting responsibility on the part of the State of residence when the aliens concerned received the same treatment and were granted the same legal or judicial protection as its own nationals. Although, therefore, both principles had the same basic purpose, namely, the protection of the person and of his property, they appeared both in traditional theory and in past practice as mutually conflicting and irreconcilable.

135. Yet, if the question is examined in the light of international law in its present stage of development, one obtains a very different impression. What was formerly the object of these two principles—the protection of the person and of his property—is now intended to be accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law.

#### 20. THE "INTERNATIONAL STANDARD OF JUSTICE"

136. As noted in chapter V, traditional international law had recognized a State's right to bring a claim against another State in respect of the injury caused to the person or property of its nationals. The right of "diplomatic protection", which is the name usually given to this prerogative, therefore proceeds from a State's right to protect its nationals abroad. The former Permanent Court of International Justice stated in one of its earlier judgements:

<sup>122</sup> See Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international*, 1950, I, p. 421.

<sup>120</sup> See *I.C.J. Reports 1949*, pp. 181-184.

<sup>121</sup> *Ibid.*, pp. 185-186.

"It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."<sup>123</sup>

137. In one of its last judgements (cited in para. 119) the same Court related the "right of diplomatic protection", to a State's "right to take up a claim and to ensure respect for the rules of international law".<sup>124</sup>

138. Writers of the traditional school have endorsed this view of the right of diplomatic protection, which they consider as a sort of safeguard against the non-observance of the international obligations which a State has towards aliens. Borchard, for example, states in this connexion:

"While the right of every State to exercise sovereignty and jurisdiction within its territory over all persons within it is recognized, foreign nations retain over their citizens abroad a protective surveillance to see that their rights as individuals and as nationals receive the just measure of recognition established by the principles of municipal and international law. Non-interposition is the rule only so long as States are careful to observe their international duties. Diplomatic protection, therefore, is a complementary or reserved right invoked only when the State of residence fails to conform with this international standard."<sup>125</sup>

139. Borchard, like all the other exponents of the traditional doctrine, considers the right of diplomatic protection as the right of a State to require from other States that they respect the person and property of foreigners in the manner prescribed by international law.

140. The connexion between the right of diplomatic protection and the principle of the "international standard of justice" has been fully endorsed by international practice, including international case law. In the *Neer* case, the General Claims Commission (United States and Mexico) held "that the propriety of governmental acts should be put to the test of international standards". And in the *Hopkins Case*, the same Commission, elaborating upon this idea, said:

"... it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under municipal laws... There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favour of aliens. It is not a question of discrimination but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law, aliens may enjoy rights and

remedies which the nation does not accord to its own citizens."<sup>126</sup>

141. In several of its decisions, the Permanent Court of Arbitration was guided by this idea in determining the measure of protection to which aliens are entitled with respect to their property; and the Permanent Court of International Justice too, in some of its judgements, relied on the same idea in upholding the principle of respect for "vested rights", "a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law".<sup>127</sup> In none of these cases, however, was the "international standard of justice" contemplated as the extensive principle which it is sometimes considered to be. Verdross, for example, takes the view that the "international standard of justice" is contained in the "generally accepted principles of international law" (*droit international commun*).<sup>128</sup>

142. Some codifications also mention the legal doctrine of the international standard of justice. Article 5 of the Harvard Research draft, for example, provides: "A State has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals". The comment to the article, however, states that "The object of article 5 is to indicate the minimum measure of the State's obligation... The redress afforded to nationals may be so inadequate that it will not satisfy the State's international obligation... The subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law."<sup>129</sup> The article and the comment both refer to the application of the "standard" in a particular situation, rather than to its general application; they refer, in fact, to the rule of the exhaustion of local remedies, which will be examined in the next chapter. The principle of the international standard of justice is expressed in general terms, however, in article 2 of the draft adopted in first reading by the Third Committee of the Hague Conference, which says:

"The expression 'international obligations' in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations."<sup>130</sup>

143. The records of the discussions at the meetings of the Third Committee seem to indicate that the terms "the rules accepted by the community of nations" were intended to give the widest and most general expression to the principle in question.<sup>131</sup>

<sup>126</sup> Eagleton, *The Responsibility of States in International Law*, pp. 84 and 85.

<sup>127</sup> Schwarzenberger, *op. cit.*, pp. 99 to 103.

<sup>128</sup> Alfred Verdross, "Les règles internationales concernant le traitement des étrangers", *Recueil des cours de l'Académie de droit international*, 1931, III, pp. 330 ff.

<sup>129</sup> Harvard Law School, *op. cit.*, pp. 147 and 148, and *The American Journal of International Law*, Supp., Vol. 23 (1929), p. 147.

<sup>130</sup> Annex 3.

<sup>131</sup> League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c).M.145(c).1930.V), pp. 159 to 161.

<sup>123</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2 (The Mavrommatis Palestine Concessions), p. 12.

<sup>124</sup> *Ibid.*, *Judgments, Orders and Advisory Opinions*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 16.

<sup>125</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 28.

144. In the Americas, too, the right of a State to protect its nationals has received general acceptance but it is subordinated to another principle, the principle of the equality of nationals and aliens. But as will be seen below, this latter principle, whether in its theoretical formulation or in its practical application, does not necessarily imply the complete repudiation of the traditional rules of international law which are intended to protect aliens.

## 21. THE PRINCIPLE OF THE EQUALITY OF NATIONALS AND ALIENS

145. The abuses which had occurred in the exercise of diplomatic protection by certain States led, understandably, to a reaction against the very principle which used to be invoked as the foundation of the responsibility of the State. The Argentine jurist, Carlos Calvo, referring to this state of affairs, proclaimed the doctrine which has since been pleaded in answer to international claims based on the violation of the "international standard of justice". In his opinion, "Aliens who establish themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection."<sup>132</sup> Calvo's novel thesis was endorsed by the First International Conference of American States (Washington, 1889-1890), when it recommended "the adoption as principles of American international law, of the following:

"(i) Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be afforded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

"(ii) A nation has not, nor recognizes in favour of foreigners, any other obligations or responsibilities than those which in favour of the natives are established, in like cases, by the constitution and the laws."<sup>133</sup>

146. The principle was reaffirmed in identical terms on several later occasions and incorporated into international agreements. Thus, the Convention on Rights and Duties of States, signed at the Seventh International Conference of American States (Montevideo, 1933), provides in its article 9:

"The jurisdiction of States within the limits of national territory applies to all the inhabitants.

"Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals."<sup>134</sup>

147. It will be noted that the fundamental idea underlying this principle is that aliens are entitled to "equal

protection". This idea has its origin in the rules of municipal law which have been applied to them in their capacity as mere aliens in transit or as residents. It is noteworthy that the constitutions and the legislation of the American countries, and the inter-American conventions which relate to the status of aliens, treat aliens as on a footing of equality with nationals for the purposes of the enjoyment of civil rights and individual guarantees.<sup>135</sup> Analogous rules providing for equality of legal and judicial protection are laid down in the Draft Convention on the Treatment of Foreigners prepared as a basis of discussion by the League of Nations Economic Committee for the International Conference on Treatment of Foreigners, which was held in Paris in 1929 under the auspices of the League.<sup>136</sup> The principle of "equality of nationals and aliens" thus constitutes, at the international level, an expression of the efforts made in municipal law to ensure to aliens the same protection as is enjoyed by nationals.

148. With reference to this last point, it may of course be said that the fundamental problem is the measure or extent of such protection. The principle of equality was interpreted as follows in the report of the Sub-Committee of the League of Nations Committee of Experts (Guerrero report):

"The maximum that may be claimed for a foreigner is civil equality with nationals. This does not mean that the State is obliged to accord such treatment to foreigners unless that obligation has been embodied in a treaty. We thereby infer that a State goes beyond the dictates of its duty when it offers foreigners a treatment similar to that accorded to its nationals."<sup>137</sup>

149. Such interpretations of the principle of equality and the corresponding practical applications of it, explain why adverse criticisms have been so frequently levelled at the principle itself. It has been said, for example, quite inaccurately that "Strictly speaking, this doctrine would prevent all recourse on the part of injured aliens to their own States for assistance, since no national can appeal for redress for a wrong suffered at home to any authority outside his own country", and, similarly, that "the equality standard implies that, in order to obtain compensation for injury suffered by one of its nationals abroad, a State must prove discrimination against him as a foreigner".<sup>138</sup>

150. The principle of equality between nationals and aliens, as a principle of international law, should not produce any such results or other similar results that have been attributed to it, so long as it is interpreted and applied in accordance with the purpose and scope for

<sup>135</sup> See in this connexion article 5 of the Convention on the Status of Aliens (Havana, 1928), and articles 1 and 2 of the "Bustamante Code", in *The International Conferences of American States, 1889-1928*, pp. 415 and 327 respectively.

<sup>136</sup> League of Nations publication, *II. Economic and Financial, 1928.II.14* (document C.174.M.53.1928.II), p. 11. The Paris Conference did not reach agreement on the text of a convention. See League of Nations Publications, *II. Economic and Financial, 1930.II.5* (document C.97.M.23.1930.II) *passim*.

<sup>137</sup> *Ibid.*, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p.94.

<sup>138</sup> See P. E. Corbett, *Law and Society in the Relations of States* (New York, 1951), pp. 179 and 181.

<sup>132</sup> Charles Calvo, *Le droit international*, 5th ed. (Paris, Marcel Rivière, 1885), Vol. VI, p. 231.

<sup>133</sup> See Recommendation on "Claims and Diplomatic Intervention", *The International Conferences of American States, 1889 to 1928* (New York, Oxford University Press, 1931), p. 45.

<sup>134</sup> *The International Conferences of American States, First Supplement, 1933-1940*, p. 122. See also annex 5, articles 1 and 2.

which it was conceived. This is the approach taken in the Convention Relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico, 1902), which explicitly says that claims through the diplomatic channel can be made "in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of international law".<sup>139</sup> In its "project" on diplomatic protection, the American Institute of International Law later took the same line.<sup>140</sup> The same conception of the principle of equality is to be found in the *Déclaration sur les données fondamentales et les grands principes du droit international moderne*; approved by the Académie diplomatique internationale, the Union juridique internationale and the International Law Association. Article 30 of this Declaration provides that "aliens may in no case claim rights greater than those of nationals", but qualifies this formula with a proviso concerning the "minimum rights" which all civilized countries have a duty to ensure.<sup>141</sup> Interpreted in this manner, the principle of equality between nationals and aliens does not preclude the right of a State to protect its nationals abroad nor does it disregard the essential rights of man.<sup>142</sup> If the purpose of the "international standard of justice" is to protect these "minimum" rights, then the principle of equality is not incompatible with international law. The question will repay further study, in the various forms in which it appears in the present stage of development of international law.

## 22. SYNTHESIS OF THE TWO PRINCIPLES: THE INTERNATIONAL RECOGNITION OF THE ESSENTIAL RIGHTS OF MAN

151. As has been stated earlier in this report, the international recognition of the essential rights of man constitutes one of the most outstanding achievements of our epoch. This political and legal phenomenon is bound also to affect materially the aspect of international responsibility with which this chapter is concerned. The questions of diplomatic protection and the position of aliens is the subject of a declaration adopted by the Inter-American Conference on Problems of War and Peace (Mexico City, 1945) which reads as follows:

"International protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man."<sup>143</sup>

152. In the first place, the declaration has the clear object of making it impossible for diplomatic protection to be used in a manner inconsistent with the principle

of non-intervention, or with the principle of the equality of nationals and aliens so far as the essential rights of man are concerned. But it does not go any further: the Conference simply meant to eliminate the *improper use* of diplomatic protection; it did not mean either to abolish that protection itself or to deny the State the right to protect its nationals abroad. The "international protection" of the essential rights of man was the means by which the Conference hoped its intentions would be realized. We shall examine at a later stage the methods which have been resorted to in order to counteract the dangers of abuse which are inherent in the direct exercise of diplomatic protection (chapter IX); for the moment we shall deal with that protection in so far as it is relevant to the specific subjects of this chapter.

153. The institution of diplomatic protection, and the principle underlying it, do not appear to constitute the most efficient means of protecting the rights and interests of aliens. In the first place, although diplomatic protection, being one of the functions of the national State, should constitute a duty on its part, history and international practice show that it has never been treated as such. Except for a very few writers, the bulk of legal opinion has never considered diplomatic protection as a duty of the State of nationality. Borchard himself describes it rather as a *moral* duty "which is unenforceable by legal methods".<sup>144</sup> Neither national nor international practice has recognized it as a duty. It is purely and simply a right which the State may exercise, or choose not to exercise, in its absolute discretion. Conclusive evidence of this is provided by the fact that, on occasions, the State concerned has refused to grant protection although requested to do so by the interested party and although the claim was justified; on the other hand, there have been cases in which no application had been made and yet protection was exercised, sometimes even against the will of the interested party, and this for purely political reasons far removed from the purposes of the institution of diplomatic protection. Small States not infrequently choose not to exercise this right for fear of creating a difficult situation in their relations with the powerful State against which the claim is being made.<sup>145</sup>

154. For its part the principle of the "international standard of justice", whether it is taken on its own merits or as a complement of diplomatic protection, has always suffered from a fundamental defect: its obvious vagueness and imprecision. None of the international bodies which have accepted and applied the principle has been able to define it: either no attempt to do so has been made, or, in the few cases where it has been made, or, in the few cases where it has been made, it has been with little success. They have usually merely referred to it as a ground for their decision, or applied it to particular cases on which they tried to build up a general rule by means of inductive reasoning. When invoked

<sup>139</sup> Annex 5, article 3.

<sup>140</sup> Annex 7, article 3.

<sup>141</sup> Annex 10.

<sup>142</sup> See Maúrtua, *loc. cit.*, p. 557; Accioly, *Derecho internacional público* (Rio de Janeiro, 1945), Vol. I, pp. 370-371; Podestá Costa, *loc. cit.*, pp. 207 ff.

<sup>143</sup> *Inter-American Conference on Problems of War and Peace, Mexico City, February 21-March 8, 1945, Report submitted to the Governing Board of the Pan American Union by the Director-General* (Washington, Pan American Union, 1945), p. 69.

<sup>144</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 29 and 30.

<sup>145</sup> For actual cases, see Dunn, "The International Rights of Individuals", *Proceedings of the American Society of International Law* (1941), pp. 14, 16 and 17.

directly by the State, the international standard of justice presents even greater disadvantages. One of its most determined advocates admits that "powerful States have at times exacted from weak States a greater degree of responsibility than from States of their own strength".<sup>146</sup> The origin of the "standard" may be traced to the sort of reasoning which gave rise to the system of capitulations or extraterritoriality that was for long imposed upon the peoples of Asia and Africa. The consequent discrimination in favour of the foreign groups of the population, and the infringement of the principle of equality among nations, became repugnant to public opinion and to legal thinking in the countries concerned. In all these respects, therefore, the "standard" is seen to be a distinctly imperfect rule and one which is only of very relative usefulness. Except in the case of a violation of the essential rights of man, i.e. of the *minimum* rights recognized by all countries, it is manifestly difficult to apply; its application is actually impossible in the majority of cases of responsibility.

155. The principle of equality between nationals and aliens is likewise inadmissible, if its interpretation, or its practical application, should conflict with international law. It is certainly inadmissible in its extreme form—as an absolute principle which is not subject to any limitations whatsoever. For the same reason it is inapplicable if the conduct of the organs of the State does not respect those rules and safeguards which in all countries protect the person and property of individuals. The fact that nationals suffer equally from such a situation cannot constitute a valid excuse for a State to evade its international responsibility. However, apart from these cases, it would appear difficult, both legally and politically, to accept treatment giving preference to and implying privileges in favour of aliens. Aliens cannot rationally expect a privileged status as compared with nationals, especially when no greater obligations and responsibilities are required of them; in fact, they have fewer obligations and responsibilities than nationals.

156. Now, both the "international standard of justice" and the principle of equality between nationals and aliens, hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule incorporating the essential elements and serving the main purposes of both.<sup>147</sup> The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human

beings, as such, are under the direct protection of international law.<sup>148</sup>

157. It will be easily seen how, from a purely legal point of view, both of the two traditional principles have been rendered obsolete by the development of international law. The "international standard of justice" was evolved and obtained recognition at a time when ideas differed from those which prevail at present: international law recognized and protected the essential rights of man in his capacity as an alien, or, in other words, by virtue of his status as a national of a certain State. The principle of equality between nationals and aliens, in its turn, was formulated in order to counteract the consequences of the difference in status which the law attached to nationals and aliens. Both principles had therefore the same basis: the distinction between two categories of rights and two types of protection. That distinction was recognized by the first principle but denied by the second. The distinction itself, however, disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens.

158. The fact, however, that these two traditional principles are no longer applicable does not necessarily imply that the new legal system must ignore their essential elements and their basic purposes. On the contrary, the "international recognition of human rights and fundamental freedoms" constitutes precisely a synthesis of the two principles. In fact, from a study of the instruments in which these rights and freedoms have received international recognition, and of the two great declarations and other international instruments defining these rights and freedoms, it becomes evident that all of them accord a measure of protection which goes well beyond the *minimum* protection which the rule of the "international standard of justice" was meant to ensure to aliens. Moreover, in all these documents there is no reference to any case or circumstance in which aliens enjoy a legal status more favourable than that of nationals. In reality, the idea of equality of rights and freedoms constitutes the very essence of these instruments.

159. Accordingly, it would be illogical, in law as in practice, to endeavour to maintain either of the two traditional principles in a codification of the law of international responsibility. Both principles have become obsolete and to press the case for either of them would be tantamount to ignoring one of the political and legal realities which is most clearly apparent in the contemporary world situation.

## CHAPTER VII

### Exoneration from responsibility and attenuating and aggravating circumstances

160. Traditional theory and practice made no formal or clear distinction between grounds of exoneration from responsibility properly so-called and the extenuating or aggravating circumstances which might attend the breach or non-observance of an international obligation. Schwar-

<sup>146</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 178.

<sup>147</sup> See in this connexion Jessup, *A Modern Law of Nations*, p. 102; and *Survey of International Law in relation to the Work of Codification of the International Law Commission* (memorandum submitted by the Secretary-General), (United Nations publication, Sales No.: 1948.V.1(1)), p. 47.

<sup>148</sup> See Maúrtua, *loc. cit.*, p. 558.

zenberger correctly points out that international jurisprudence does not speak with one voice on the question whether "absolute responsibility or culpability is required in the case of delictual acts or omissions."<sup>149</sup> The problem is certainly by no means simple, but it cannot be ignored in the future codification of the principles of international law which govern responsibility. It will be recalled that when the question of the imputability of certain acts or omissions of the State was examined (chapter IV), it was seen that responsibility sometimes depends on the presence of some factor other than the act which originally gave rise to responsibility. Any one of these factors may influence the conduct of the State in such a way that it may be said to affect the extent of the responsibility actually imputable to the State.

161. One of the objects of this chapter is to consider whether in all cases the choice lies strictly between absolute responsibility and absence of responsibility—the only choice admitted by the theory of "objective responsibility"—or whether it is possible also to speak of exonerating, attenuating and aggravating circumstances.

### 23. THE RULE OF THE EXHAUSTION OF LOCAL REMEDIES

162. One of the principles most firmly laid down in international law is that there is no international duty to make reparation, and hence no right to bring an international claim, so long as local remedies have not been exhausted. While the principle itself has never been disputed, its practical application has provoked some difference of opinion with regard to its true content and scope. The first problem is that of the "effectiveness" of the local remedies, either as a means of obtaining the reparation which is sought or else for the purpose of determining the moment as from which the State is involved in international responsibility. Secondly, and this problem is closely linked with the first, at what point, or in what circumstances, can local remedies be said to have been "exhausted"? Thirdly, does the condition of the exhaustion of local remedies constitute a mere procedural formality, or is it rather a substantive condition upon which the very existence of the State's international responsibility hinges? It may well be that the problem is more theoretical than practical, but it must be examined here because its implications may affect other aspects of the law of international responsibility.

163. The problem of the effectiveness of local remedies has usually been stated thus: Are the remedies granted by the State adequate to ensure the satisfactory reparation of the damage sustained and, consequently, to exonerate it from international responsibility? The case-law of arbitral tribunals and commissions does not provide any precise definition of what is meant by "adequate" or "effective" remedies. The reason is that the problem which has usually arisen is the second of those mentioned above, namely: At what point, or in what particular circumstances, can local remedies be said to have been "exhausted"? The same is largely true of codifications. In its "project" on the responsibility of Governments, the American Institute of International Law held that

each Government is obliged "to maintain on its own territory the internal order and governmental stability indispensable to the fulfilment of international duties".<sup>150</sup> In the draft adopted at its Lausanne session (1927) the Institute of International Law was perhaps more specific when it referred to the wronged individual having at his disposal "effective and sufficient means to obtain for him the treatment due him", and to an "effective means of obtaining the corresponding damages".<sup>151</sup> Another source, the Harvard Research draft, says that a State has no other duty than that of affording to an alien "means of redress for injuries which are not less adequate than the means of redress afforded to its nationals".<sup>152</sup> It will be noted that these attempts at a definition use terms and specify conditions which, in their turn, require more precise definition. The crux of the problem is really finding a criterion valid for all cases which can serve to determine whether the means of redress available, both in name and in fact, are sufficiently adequate and effective to justify the State's exoneration from international responsibility. Regarded in this way, the question is simply one aspect of the general problem examined in the previous chapter; in other words, is the effectiveness of these local remedies to be judged by reference to the rule of the "international standard of justice" or by reference to the principle of equality between nationals and aliens?<sup>153</sup> If that is the case, it will be sufficient to make use of the legal theory developed in that chapter.

164. This last consideration apart, it should be noted that the question of the "effectiveness" of local remedies is intimately connected, and may at times coincide, with the question of knowing at what point, or in what circumstances, those remedies should be considered as "exhausted". This other problem is naturally of much greater significance in practice and it can arise in two different sets of circumstances, although only one of them (the second) is directly relevant for our purposes. For example, can the local remedies rule be invoked in a case in which States have agreed to submit any disputes between them to arbitration or to some other method of settlement? Certain decisions have replied to this question in the negative. In other decisions, however, the reply was in the affirmative; thus in the *Salem* case (1932), the Tribunal rejected a plea that the mere existence of an agreement of this kind implied an intention to waive the local remedies rule.<sup>154</sup> Actually, it seems, no definite answer valid for all cases can be given. It would be necessary to determine whether the particular dispute is included among those covered by the arbitration agreement and, if so, whether that agreement meant, explicitly or implicitly, to waive the application of the local remedies rule in those disputes. In other words, the application of the local remedies rule will necessarily depend not only on the purpose and scope of the agreement, but also on the circumstances of each particular case.

<sup>150</sup> See annex 7, article I.

<sup>151</sup> See annex 8, article XII.

<sup>152</sup> See annex 9, article 5.

<sup>153</sup> See in this connexion the comment to article 5 of the Harvard Research draft, quoted in section 20 of the previous chapter.

<sup>154</sup> Briggs, *op. cit.*, p. 636.

<sup>149</sup> Schwarzenberger, *op. cit.*, p. 243.

165. The situation which really concerns us is, however, a different one. In the *Panevezys-Saldutiskis Railway case* (1939), the Permanent Court of International Justice held as follows:

“There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given.”<sup>155</sup>

166. The Harvard Research draft expresses a similar view when it says that a State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien “...if local remedies have been exhausted without adequate redress”.<sup>156</sup> In marked contrast with this view of the rule, the draft of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (*Guerrero report*) says:

“6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.”<sup>157</sup>

167. Inter-American instruments have adopted a different and, in a way, intermediate position. In its resolution concerning the “International Responsibility of the State”, the Montevideo Conference (1933) reaffirmed:

“... that diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the differences may have arisen.”<sup>158</sup>

168. In substantial agreement with this approach, although different in its language, the American Treaty on Pacific Settlement (Pact of Bogotá, 1948) provides as follows:

“Article VII. The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.”<sup>159</sup>

169. In the face of these diverse interpretations of the rule, at what point, or in what circumstances, can local remedies be truly said to have been “exhausted”? The two criteria which have been suggested in the Harvard draft and the case-law of the Permanent Court—one, that

the reparation for the injury must be adequate and the other, that local remedies are of no avail—both have the disadvantage of leaving the appraisal of the situation to the discretion of the claimant State. While it is true that the whole purpose and the justification of the rule lie in a desire to ensure the satisfactory reparation of the injury by internal means, yet none of the interested parties must be in a position to decide this point unilaterally. For similar reasons, it would be open to objection to say (as the Guerrero report says) that the rule is satisfied when the alien concerned has been given full access to the local courts and these have given their decision, irrespective of whether in that decision, or in the procedure leading to it, an act or omission has been committed which constitutes a patent denial of justice. It is the third interpretation of the rule (the inter-American one) which seems the most practical and useful. It does not seem incompatible with the essential purpose of the rule under discussion to require the alien to exhaust all the local remedies, subject to a proviso concerning cases of denial of justice, or to require the State not to exercise diplomatic protection in any form if its nationals had free access to the local courts. In any case, such a requirement is not incompatible with the view that the rule should be interpreted as being subject to the condition of the adequacy of reparation. If the reparation does not fulfil this condition, then either some form of denial of justice will have occurred, in which event an international claim can be brought, or else the case will be one of those (and they are relatively frequent) in which the municipal law of no country has been able to offer any protection more effective than that which it is hoped to secure through treating the claim as an international claim. Since, in the final analysis, it is a question to be weighed in each particular case whether the reparation is adequate, the respondent State could raise the local remedies rule as a preliminary issue before the tribunal or body dealing with the case and the latter could rule on it as a preliminary point. In this way, the validity of the rule itself would be upheld and at the same time it would not be left to the discretion of either State to decide, unilaterally, whether an international claim lies.

170. The third and last of the problems mentioned at the beginning of this section is whether the rule concerning the exhaustion of local remedies constitutes a mere procedural requirement which must be complied with before an international claim can be brought, or whether it is, rather, a condition *sine qua non* of international responsibility. Briefly expressed, the question is whether the requirement is purely procedural or else a substantive condition on which the very existence of international responsibility depends. Let us first examine the case-law on the subject.

171. In a decision which dealt—indirectly—with the question, the Permanent Court of International Justice stated that international responsibility is established as between two States as soon as a violation of a right of one State can be attributed to the other; in these circumstances denial of justice whether resulting from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supple-

<sup>155</sup> Publications of the Permanent Court of International Justice, *Judgements, Orders and Advisory Opinions*, series A/B, No. 76, p. 18.

<sup>156</sup> See annex 9, article 8.

<sup>157</sup> See annex 1.

<sup>158</sup> See annex 6.

<sup>159</sup> *Annals of the Organization of American States*, Vol. I, No. 1 (1949), p. 91.

ment its deficiencies, does not exercise any influence on the responsibility ensuing from the wrongful act.<sup>160</sup> However, in another judgement (cited in para. 165) the Court explicitly acknowledged that the rule "subordinates the presentation of an international claim" to the exhaustion of the remedies afforded by municipal law.<sup>161</sup> In the *Finnish Ships Arbitration Case* (1934) the Tribunal held in substance: (a) that State responsibility is incurred as a result of a breach of international law, provided the breach constitutes a direct act of the Government of that State; and (b) that although the act in question gives rise to international responsibility an international claim does not lie unless and until local remedies have been exhausted.<sup>162</sup>

172. This view is shared by legal opinion almost unanimously. Eagleton, for example, states that the rule of local redress is the dividing line between the substantive and the procedural aspects of responsibility. According to him, liability exists from the moment in which the internationally illegal act is established, and it is always a direct responsibility owed by one State to another; but when it is a matter of the methods by which the responsibility may be discharged, diplomatic interposition is justified only when local remedies have been resorted to.<sup>163</sup> Starke deals with the problem by relating it to the question of imputability, and states that the rule appears as a combination of substantive and of procedural law, viewed from each aspect of the situation which forms the basis of claim.<sup>164</sup>

173. The problem is indeed intimately connected with that of imputability, but the really important question is to determine what international consequences are to ensue from the admission of an interstate responsibility which cannot be enforced, i.e. if a claim cannot be brought so long as local remedies have not been exhausted. Legal opinion is unanimous on this last point: the rule implies a suspensive condition, which may be procedural or substantive, but to which the right to bring international claims is subordinated. Responsibility may or may not exist, as the case may be, but unless and until the said condition is fulfilled, the claiming State has only a potential right. Responsibility as such may be imputable, but the duty to make reparation cannot be claimed. Consequently, in pure legal theory, failure to exhaust local remedies may or may not be grounds for exoneration from international responsibility, according to circumstances, but it will always constitute a complete bar to the bringing of an international claim.

#### 24. THE WAIVER OF DIPLOMATIC PROTECTION: THE CALVO CLAUSE

174. The "waiver of diplomatic protection" may also

<sup>160</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 74 (Phosphates in Morocco), p. 28.

<sup>161</sup> *Ibid.*, No. 76 (The Panevezys-Saldutiskis Railway Case), p. 18.

<sup>162</sup> Fachiri, "The local remedies rule in the light of the Finnish Ships Arbitration", *The British Year Book of International Law*, 1936, p. 33.

<sup>163</sup> Eagleton, *The Responsibility of States in International Law*, pp. 23-24, 77 and 98.

<sup>164</sup> Starke, *loc. cit.*, pp. 107-108.

constitute grounds for exoneration from international responsibility, or at any rate, condition the right of the State to bring an international claim. In spite of the abundant legal literature on the subject, which might tend to create a different impression, the problems involved are neither as numerous nor as complex as those which proceed from the local remedies rule. The simplest approach is to deal separately with the two possible cases: (a) the renunciation by the State itself of its right of diplomatic protection by agreement with the State of residence, and (b) the renunciation by the private foreign individual concerned of such protection, under the terms of a contract with the State of residence (*Calvo clause* properly so-called).

175. The first case naturally does not give rise to any serious difficulties. The practice became quite prevalent in the nineteenth century for States to conclude bilateral treaties limiting the right of diplomatic protection. The purpose, common to all those agreements, was to limit the exercise of that right to a few expressly specified situations. As a rule, a saving clause was inserted concerning cases of denial of justice, though different treaties interpret "denial of justice" very differently. None of the agreements, however, goes so far as to provide for a complete renunciation of the right of protection itself.<sup>165</sup> Article VII of "Pact of Bogotá" (cited in para. 168) might, in a way, be regarded as a provision of this kind if it is to be construed in the sense indicated. That article lays down that the contracting States "bind themselves" not to make diplomatic representations of any kind in order to protect their nationals "when the said nationals have had available the means to place their case" before the competent domestic courts.

176. This practice has occasionally been criticized. Thus the Institute of International Law, at its Neuchâtel session (1900), adopted a resolution recommending States to abstain from inserting in treaties such "reciprocal non-liability clauses" (*clauses d'irresponsabilité réciproque*). In the opinion of the Institute, "... these clauses err inasmuch as they exonerate States from their duty to protect their nationals abroad and from their duty to protect aliens in their territory".<sup>166</sup> Apart from the doubtful character of the alleged "duty to protect", there are really no serious grounds, whether legal or otherwise, for denying the validity and propriety of waiving a right which can perfectly well be renounced, so long as the renunciation does not affect the principle upon which diplomatic protection is based. An examination of the terms and the scope of the stipulations to which reference has been made will show that the principle in question is not affected by them. Their purpose is simply to limit the exercise of the right of diplomatic protection, not to abolish that right. As to the duty of the State to protect aliens in its territory, the State of residence is not exonerated from this duty by these stipulations which limit its international responsibility; the latter are meant, rather, to define that

<sup>165</sup> For examples of these treaties, see Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (New York, Longmans, 1938), pp. 490-496.

<sup>166</sup> *Annuaire de l'Institut de droit international*, Vol. 18, p. 253.

duty in clear and precise terms, not only for the benefit of that State, but also for the benefit of an alien who may be injured by a wrongful act imputed to it.

177. Similar problems are involved in cases in which it is the foreign private individual who himself renounces diplomatic protection. The same arguments are really valid, but in this second category of cases there has been much greater objection to admitting such renunciation as grounds for exonerating a State from its responsibility. These objections to the *Calvo clause*, as this renunciation is usually called, are based on the frequently expressed views concerning the nature and scope of such "waiver clauses", as well as on the theory that an alien cannot renounce a right which belongs to his national State. As will be seen hereunder, none of these arguments has stood in the way of the recognition of the validity and efficacy of the *Calvo clause* in practice (including arbitrations).

178. The *Calvo clause* may, and in fact does take in practice, several forms. Sometimes it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, both the foreigner and the local Government concerned mutually undertake to submit any disputes which may arise between them to arbitrators appointed by both parties. On occasions, the *Calvo clause* embodies a more direct renunciation of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for purposes of the contract. In several countries, there exist constitutional or legislative provisions whereby contracts entered into with aliens [by the State] are only valid if they include a clause of this type. In this latter case, the foreign individual's renunciation of diplomatic protection operates as a tacit clause, i.e., it is deemed to be an implicit term of any contract.<sup>167</sup> The most important point, however, is that, whatever form it may take, the *Calvo clause* invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of contracts.<sup>168</sup>

179. In spite of the limited content and scope of the *Calvo clause*, its inclusion in a contract is considered by certain codifications and by certain legal writers as conflicting, or as capable in certain circumstances of conflicting, with international law. Article 17 of the Harvard Research draft states:

"A State is not relieved of responsibility as a consequence of any provision . . . in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien

of the protection of the State of which he is a national."<sup>169</sup>

180. Freeman considers the *Calvo clause* as void *ab initio* in so far as it is framed so as to involve a complete waiver of the right of diplomatic protection—in other words, so as to reject the principle of responsibility for judicial activity which produces a denial of justice.<sup>170</sup> More recently, it has been stated that if the purpose of the *Calvo clause* is simply to require recourse to local remedies, then the clause is a mere confirmation of the rule which requires that these remedies must be exhausted before an international claim can be brought, but that, in so far as it may purport to constitute a waiver of the rights of a foreign State in international law, or to evade the jurisdiction of an international tribunal, the *Calvo clause* will be legally ineffective.<sup>171</sup>

181. This trend of legal opinion has had no influence on international case-law, which treats the *Calvo clause* as compatible with the rules of international law governing State responsibility. The most significant examples are afforded by the decisions in the *North American Dredging Co. case* (1926) and the *Mexican Union Railway, Ltd., case* (1930). In both cases, the Claims Commission conceded that a national cannot deprive the Government of his country of its indisputable right to claim international reparation for injury caused to him. Not infrequently, that Government has a greater interest in maintaining the principles of international law than in obtaining reparation for the injury sustained by its national, and it is evident that such national cannot tie the hands of his Government by means of a contractual stipulation. Nevertheless, both decisions held the *Calvo clause* to be valid and effective, and it is interesting to see the grounds on which this ruling was chiefly based. The Commission which decided the first of these two cases said:

"As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. . . . To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote goodwill among nations."<sup>172</sup>

The Commission added that the purpose of the *Calvo clause* might well be "to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable for any self-respecting nation and are prolific breeders of international friction."<sup>173</sup>

<sup>167</sup> For examples of these various forms of the clause, see Eagleton, *The Responsibility of States in International Law*, pp. 168-169, and the comment to article 17 in Harvard Law School, *op. cit.*, pp. 203 ff., and *The American Journal of International Law*, Supp., Vol. 23 (1929), pp. 203 ff.

<sup>168</sup> See, in the same sense, Podestá Costa, *loc. cit.*, p. 216.

<sup>169</sup> See annex 9.

<sup>170</sup> Freeman, *op. cit.*, pp. 487-490.

<sup>171</sup> See K. Lipstein, "The Place of the Calvo Clause in International Law", *The British Yearbook of International Law*, 1945, pp. 130 *et seq.*

<sup>172</sup> Schwarzenberger, *op. cit.*, p. 74.

<sup>173</sup> *Ibid.*, p. 75.

182. The weight of these arguments should not be underestimated, particularly if the rights which are waived are by their nature capable of being renounced: that is, in so far as the rights waived do not involve an interest or right of which the State may consider itself as the titular claimant in accordance with the views expressed on that question by the two Claims Commissions. But apart from these cases, there are no grounds whatsoever, other than the traditional doctrine concerning the subjects of international law, for denying the validity of the *Calvo clause*. It cannot now be contended, as the Harvard Research draft contended, that the responsibility [of a State] is determined "by international law or treaty" notwithstanding anything to the contrary "in its agreements with aliens".<sup>174</sup> If the individual or private person is the direct subject of certain international obligations and if he is held, regardless of his nationality, to possess international rights, it follows that he should be regarded as having the capacity to enter into an agreement with a foreign State concerning matters which do not affect the interests of third parties, and that any such agreements should be internationally valid and operative. For these reasons, the *Calvo clause*, within the limitations indicated, must continue to have the effect of denying jurisdiction to any international body before which the national State may bring a claim, or else that of exonerating the State of residence from international responsibility if the national State attempts to exercise diplomatic protection.

#### 25. OTHER EXONERATING, EXTENUATING OR AGGRAVATING CIRCUMSTANCES

183. It would be too long and complex, and indeed unnecessary for the essential purposes of the present chapter, to go into a detailed examination of other circumstances exonerating from international responsibility or of extenuating or aggravating circumstances. For this reason, instead of an analysis, a mere enumeration will be given here of the circumstances which legal opinion or practice have shown to be of most frequent occurrence. In this way it will be possible to see how far the distinction which the rules of municipal law draw as between the various circumstances affecting standards of liability is also applicable in international law.

184. The Preparatory Committee of The Hague Conference mentioned self-defence as one of the "circumstances in which a State is entitled to disclaim responsibility".<sup>175</sup> An analogous case in that of *force majeure* and necessity—though these have their own peculiar features—as factors to be taken into account in measuring the degree of responsibility to be imputed to the State which pleads one of these defences.

185. In the "Basis of Discussion" which it prepared at a later stage, the Committee said that a State was not responsible if the act concerned was occasioned by "immediate necessity of self-defence", but added:

"Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined."<sup>176</sup> Owing to their analogy with the case of self-defence, it may be considered that the extent of responsibility may also vary in cases of *force majeure* and necessity.

186. Perhaps the most important case of all those referred to in this section, as well as the most complex and the most controversial, is the case of injury caused to a foreign State or its nationals during internal disturbances in the State concerning which the problem of imputation of responsibility arises. In the first place, it has much in common with the cases referred to in the foregoing paragraph, especially that of *force majeure*. In the second place, as in the cases of State responsibility for the acts of private individuals, it is only the conduct of the State with regard to the original act (failure to exert due diligence, connivance, etc.) which can be imputed to it. There can thus be no doubt that the presence of this additional factor is necessary in order to involve the State in international responsibility, and that the mere occurrence of the event is not enough. The problem may take yet another form when the insurgent or revolutionary forces which have caused the injury succeed in taking over authority and become the Government of the State. The different problems and the various cases mentioned, as well as others which may occur in connexion with internal disturbances, show clearly that there can be no single uniform criterion for determining the extent of responsibility imputable to the State in these contingencies.

187. In the questionnaire of the Preparatory Committee of The Hague Conference reference was also made to reprisals, as follows:

"What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?"<sup>177</sup>

The Committee itself, although it recognized the difficulties involved, formulated a Basis of Discussion in the following terms:

"A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs."<sup>178</sup>

It will be seen how difficult it would be to accept today this view that reprisals may constitute grounds for exoneration from responsibility. Reprisals, as the term is generally understood in theory and in practice, imply a State conduct contrary to the rules of contemporary international law, and, more specifically, contrary to some of the provisions of the Charter of the United Nations and of certain regional agreements. It would be difficult to find in the present international order "circumstances justifying the exercise of reprisals", whereas it would be easy to point to existing rules and principles which condemn all reprisal measures.

<sup>174</sup> See annex 2, Basis of Discussion No. 24.

<sup>177</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 128.

<sup>178</sup> See annex 2, *Basis of Discussion No. 25*.

<sup>174</sup> Annex 9, article 2.

<sup>175</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 125.

188. The "project" of the American Institute of International Law concerning diplomatic protection deals with yet another case:

"The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility towards itself."<sup>179</sup>

This case comes under the general heading of "serious faults on the part of the injured person" to which Bustamante refers. According to Bustamante, it follows from the fundamental principles of justice that real responsibility in this case lies with the person who, through his culpable act, brought about the injury.<sup>180</sup>

189. Extinctive prescription has also been considered as grounds for exoneration from responsibility, both by learned jurists and in the case-law. In 1925, the Institute of International Law said in one of its resolutions that practical considerations of order, of stability and of peace, long accepted in the case-law of arbitral tribunals, favoured the acceptance of the principle of limitation of actions in international law.<sup>181</sup> In the *Sarropoulos v. Bulgaria case* (1927), the Bulgarian-Greek Mixed Arbitral Tribunal held that "prescription, being an essential and necessary part of every legal system, deserves to be admitted in international law."<sup>182</sup> If prescription in general is to be admitted as part of international law, there can be no doubt that extinctive prescription, for its part, can perform in international relations a function as important as that which it fulfils in municipal law. Just as private individuals cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time, so the State likewise cannot be held responsible for an indefinite duration of time, or remain under the threat of an international claim which is subject to no limitation.

190. Finally, the non-recognition of a State or of a Government, and, by analogy, the severance or the suspension of diplomatic relations, have also been mentioned as possible grounds of exoneration from responsibility.<sup>183</sup> Generally speaking, in all these cases, the political factor is predominant. It follows that any answer which may be given on legal grounds to the problem would run the risk of being ineffective in practice. In any case, from a purely objective point of view, it does not seem correct to exonerate a State from its international responsibility simply because it or its Government has not been recognized by the claimant State, or because diplomatic relations with it are broken or suspended. As recognition has a declaratory effect, it is not possible to plead absence

of international personality as a defence to responsibility, on the theory that the State concerned lacks the capacity to be a subject of those obligations which international law imposes upon the State or the Government. For obvious reasons, the severance or interruption of diplomatic relations does not even raise this issue. Naturally, it may be difficult in practice to assert the international responsibility successfully, for recognition may be a condition that has to be fulfilled before a claim can be pursued; indeed, recognition may actually be the consequence of the claim. These are, however, purely procedural matters; they do not affect the principle of responsibility, if the act or omission itself constitutes the breach or non-observance of an international obligation.

191. From all the foregoing, it will be gathered that international law draws a distinction between exonerating grounds properly so called, and other grounds which may be considered as extenuating or aggravating circumstances. The case-law or arbitral tribunals affords abundant evidence that the distinction can be drawn. The mere fact that in certain cases of responsibility imputability depends on a State's failure to exercise due diligence, its connivance in the wrongful acts, or on other voluntary actions on its part, necessarily implies that the presence or absence of fault or culpability is a factor to be taken into consideration. Consequently, one could only speak of "objective responsibility" in the cases in which such factors are not present, so that the distinction just referred to would not apply: these would be the cases in which the alternative is clear-cut—either responsibility exists, in which event it is absolute, or else it is wholly absent. But even in these latter cases, the position is not absolutely clear. Let us suppose, for example, that the conduct of one of the organs of the State, which involves the latter in alleged responsibility, was the consequence of external pressure, and that this pressure was the deciding factor of the conduct. Could it be said in such a case that the responsibility would be the same as if the State concerned had been completely free to act?

## CHAPTER VIII

### Character, function and measure of reparation

192. In chapter III, which deals with the legal content of international responsibility, it was noted that international doctrine and practice equated this responsibility with the "duty to make reparation" for the injury sustained, this duty being the consequence of the breach or non-performance of an international obligation. Now as one inquires into the content of that duty, or the nature and extent of reparation, problems and difficulties of an exceptional complexity are disclosed. In no other aspect of the law of international responsibility is there a greater number of uncertain points; this is due to the variety of cases which have occurred in practice, to the lack of uniformity in the decisions rendered and to the varying interpretations placed upon the latter.

193. In the first place, reparation takes two different forms: reparation properly so called and "satisfaction". Reparation, in its turn, may take the form of restitution pure and simple, or else of damages, or yet again partly

<sup>179</sup> Annex 7, article VI.

<sup>180</sup> Bustamante, *Derecho internacional público*, Vol. III, p. 504.

<sup>181</sup> See *Annuaire de l'Institut de droit international*, Vol. 32, pp. 559-560.

<sup>182</sup> Schwarzenberger, *op. cit.*, pp. 246-247. See also article 9 of the draft approved in first reading by the Third Committee of The Hague Conference, in annex 3 below.

<sup>183</sup> See Bustamante, *Derecho internacional público*, Vol. III, pp. 503-504.

of restitution and partly of damages. Satisfaction, on the other hand, may be clearly distinguishable from reparation *stricto sensu*, but it may also have points of affinity with reparation or take the form of either restitution or damages. Moreover, irrespective of the specific form that reparation takes, a problem of substance is always involved, i.e. the purpose or object of reparation, either in general or in a particular case of responsibility. It will therefore be necessary to examine not only the form of reparation, but also the function which it performs in international law.

194. It will finally be necessary to consider, in connexion with the foregoing, what criteria are to be applied for the purpose of determining the character and the measure of reparation. In this respect, existing problems and difficulties are chiefly due to the traditional principles and rules from which the prevailing criteria are derived. From the point of view of pure legal theory, the character and the measure of reparation should depend on the extent of the injury caused and on the gravity of the act which involves the State in responsibility, as well as upon the purpose or object of reparation. The quantum of the reparation claim should be determined by the real owner of the right or interest which has been injured, or at least should be assessed in accordance with the damage sustained by the victim or his successors in interest. It will be seen that traditional doctrine and practice have adopted other criteria.

## 26. THE FORM OF REPARATION

195. One of the points of the questionnaire drawn up by the Preparatory Committee of The Hague Conference was the "Reparation for the damage caused".<sup>184</sup> Since the replies from Governments on this point were very divergent, the Committee felt that the best way of reconciling the various opinions was that of simply stating certain general principles. Accordingly, the Committee drafted its Basis of Discussion No. 29 as follows:

"Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

"Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

"Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

"...

<sup>184</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 146.

"In principle, any indemnity to be accorded is to be put at the disposal of the injured State."<sup>185</sup>

196. It will be noted that the Preparatory Committee's Basis of Discussion mentions both the forms of reparation to which reference has been made: the "obligation to make good the damage suffered", i.e., *reparation* properly so called; and *satisfaction*, that is, "the obligation to afford satisfaction to the State which has been injured..." Both diplomatic practice and decisions of international courts also provide clearly distinguishable examples of these two forms of reparation.

197. With respect to reparation *stricto sensu*, international practice has drawn a sub-distinction between "restitution" (*restitutio in integrum*) on the one hand, and "pecuniary damages" (*dommages et intérêts*) on the other. Both are primarily concerned with the material wrong sustained, so that the extent to which each of them applies will necessarily depend on different factors and considerations. Generally speaking, restitution means the restoration of the state of affairs as it existed at the time of the occurrence of the act which caused the injury. Likewise, pecuniary damages are payable when restitution is no longer possible or when restitution would be insufficient to make adequate reparation for the injury.

198. International case-law has endorsed this distinction between the two types of reparation *stricto sensu*. The Permanent Court of International Justice, in its judgement on the *Chorzów Factory Case*, said:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which would serve to determine the amount of compensation due for an act contrary to international law."<sup>186</sup>

On occasions, the agreements setting up claims commissions and tribunals make specific reference to these various forms of reparation; an example is article IX of the Convention concluded on 8 September 1923 which set up the General Claims Commission between the United States and Mexico.<sup>187</sup>

199. Satisfaction, on the other hand, is concerned

<sup>185</sup> See annex 2. The text is substantially a reproduction of the relevant part of the draft of the Institute of International Law. See annex 8, resolutions X and XI.

<sup>186</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17, p. 47. In the case of the *Norwegian Shipping Claims* (1922) the Permanent Court of Arbitration held that "just compensation implies a complete restitution of the *status quo ante*." See Schwarzenberger, *op. cit.*, p. 248.

<sup>187</sup> "In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution."

with moral or non-material wrongs, or with the moral or non-material consequences of the act which involves the State in international responsibility. For this reason, some of the common forms of satisfaction are: apology or amends of a diplomatic character; dismissal or punishment of the guilty official; abrogation of the measure which caused the injury. At times, however, a pecuniary compensation is paid, not as reparation for a material wrong, but rather as an additional apology or amends for the wrongful act which has been committed. Accordingly, satisfaction may be a special form of, though distinguishable from, reparation *stricto sensu*, but may also bear resemblances to and take some of the other forms of reparation. International practice, particularly diplomatic usage, affords many examples of these various kinds of satisfaction.<sup>188</sup>

200. Having described the forms of reparation, we shall now consider its purpose or object. In the case of reparation *stricto sensu*, whether restitution or pecuniary damages, there is not really any serious doubt: the purpose of reparation is purely and simply to restore pre-existing conditions or to compensate for the material injury which has been caused. In the case of satisfaction, on the other hand, whatever may be its specific form, the problem is not so simple. For where reparation takes the form of "satisfaction" and in consequence the State must offer a diplomatic apology, or else dismiss or punish an official, or pay pecuniary damages, then the object is not—not even in this last case—to make good the material damage, or at least that is not the only object. As indicated above, the basis of reparation in these cases is rather a moral or non-material wrong, or the moral consequence of the act which involves the State in responsibility. The reparation measures imposed upon Greece by the Conference of Ambassadors in the Janina-Corfu affair and upon the United States by the Commission which decided the *I'm Alone* case, and, in general, all the other examples of which the foregoing paragraph speaks, clearly indicate a purpose or object different from that of reparation properly so called.

#### 27. FUNCTION OF REPARATION MEASURES: PUNITIVE DAMAGES

201. Because reparation may not be concerned strictly with restoring the *status quo ante* or making compensation for the damage caused, it has been said that international practice has recognized the notion of "punitive", "vindictive" or "exemplary" damages. In this connexion, it is interesting to note that Anzilotti himself says that in every redress for a wrong "there is invariably an element of satisfaction and an element of reparation, the idea of punishing the wrongful act and that of making good the damage sustained; what varies, is, rather, the relative proportion of the two elements".<sup>189</sup> Some more recent writers, however, have understood punitive damages, i.e., reparation having a penal character, as something distinct

<sup>188</sup> See Jean Personnaz, *La réparation du préjudice en droit international public* (Paris, Librairie de Recueil Sirey, 1939), pp. 293 and 306; and Reitzer, *op. cit.*, pp. 210 ff.

<sup>189</sup> Anzilotti, *op. cit.*, p. 464.

from and independent of reparation in its broad sense. Thus Eagleton states:

"While it is true that few arbitral tribunals have avowedly awarded punitive damages, it is to be observed that, on the other hand, none of them go so far as to deny the right, under international law, to award such damages. Where they have explicitly rejected damages of this type it has been for reasons other than their illegality, as, for example, that the commission was limited by the treaty under which it operated."<sup>190</sup>

202. A trend of opinion along these lines has recently gained ground. Personnaz, agreeing in this respect with an opinion expressed by Basdevant, stresses the punitive character of satisfaction in certain instances, and the fact that in certain awards reparation takes the form of an actual pecuniary fine. Reitzer points out that, in diplomatic relations, reparations of this kind are very frequent and that, from time to time, there have been international judicial decisions along the same lines in which punitive damages have been awarded. Briggs, too, says that it is undeniable that many awards contain a strong punitive element, this being particularly true in cases of failure to apprehend, prosecute or punish adequately an individual who has injured an alien.<sup>191</sup>

203. There can be no doubt, however, that this trend of opinion is at variance with certain explicit rulings of arbitral tribunals and commissions. One of the best known is that of the Mixed Claims Commission in the *Lusitania Case*. Concerning this specific question of punitive damages, Umpire Parker stated that none of the precedents which had been cited pointed to any "money award by an international arbitral tribunal where exemplary, punitive or vindictive damages have been assessed against one sovereign nation in favour of another presenting a claim in behalf of its nationals".<sup>192</sup> The Commission held: "In our opinion the words 'exemplary', 'vindictive', or 'punitive' as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained *compensation* for wrong."<sup>193</sup>

204. Whiteman's interpretation of the case-law of arbitral decisions agrees with this view:

"... it is plain that international tribunals have hesitated, *eo nomine*, to pass judgement upon the actions of States in the form of punishment. Where a State is held responsible in damages by an international tribunal or through diplomatic channels, the wrong is not denominated a crime, but merely an international

<sup>190</sup> Eagleton, "Measure of damages in international law", *Yale Law Journal*, Vol. XXXIX (1929-1930), pp. 61-62.

<sup>191</sup> See Personnaz, *op. cit.*, pp. 312 and 327-329; Reitzer, *op. cit.*, pp. 210-212; Briggs, *op. cit.*, p. 745; see also, by the same author, "The Punitive Nature of Damages in International Law and State Responsibility for Failure to Apprehend, Prosecute or Punish", in *Essays in Political Science in Honor of W. W. Willoughby* (1937), pp. 339-353.

<sup>192</sup> Mixed Claims Commission, United States and Germany, *Consolidated Edition of Decisions and Opinions to June 30, 1925* (Washington, U.S. Government Printing Office, 1925), p. 27.

<sup>193</sup> *Ibid.*, p. 25.

delinquency which gives rise to the payment of compensatory damages."<sup>194</sup>

205. It is certainly a complex question how reparation in the cases mentioned above should be viewed in law; the traditional view of responsibility, and in particular of the function performed by reparation measures, is of little help in the quest for an answer. For it is not enough to inquire simply whether international diplomatic or judicial practice, or both, have admitted the idea of "punitive damages", that is, the idea of reparation as a penalty and intended as a punishment. This is only part—and not even the most difficult part—of the question, since practice seems to offer sufficient concrete evidence of the existence of a form of reparation that is intended to be, and hence is, in fact, punitive. The really crucial question now is whether or not this type of reparation should continue to be considered as a penalty directly or indirectly applicable to the State.

206. This is indeed the aspect of the problem which truly concerns us in the present stage of development of international law. When discussing the legal content of international responsibility, we found that criminal responsibility is now so well defined that it can be differentiated from civil responsibility which only implies a duty to make reparation pure and simple (chapter III). When dealing with the problem of imputation, we saw that imputability depended on the subject of the international obligation, the breach or non-observance of which gave rise to international responsibility (chapter IV). The next section will deal with the question of the passive subjects of responsibility, which may nowadays affect the nature and function of reparation. For the moment, however, we shall consider the penalties directly applicable to the individual in accordance with the prevailing doctrine concerning the imputation of international responsibility.

207. The trend of opinion referred to above interprets existing precedents as holding that punitive damages can be imposed on the State as such; this has indeed happened in practice, although sometimes the penalty consisted rather in the punishment of the individual who had caused the injury. Now, this has been precisely the reason why serious doubts have been expressed in the past concerning the punitive purpose of a reparation imposed directly upon the State. Maúrtua, for example, says that "State practice shows that a State has often claimed satisfaction or punitive damages from other States, which have been obliged to submit to them". He adds that "there are also cases in which arbitral tribunals have imposed indemnities so disproportionate to the material wrong that they contain, inherently, the idea of punishment." He concludes: "The truth is that it is not possible in international law to inflict punishment or penalties as understood in municipal criminal law."<sup>195</sup> Whiteman expresses the same opinion in more explicit terms: "where the original wrong is committed by an officer of the respondent Government, those charged with the set-

ting of the claim may feel that the people of the State as a whole should not be charged with additional damages for a wrong on the part of one or more officers, of which they had neither knowledge nor wrongful intent."<sup>196</sup>

208. The situation would, however, not be open to the doubts which have been expressed in the past, if, on the basis of the international *criminal* responsibility of the individual, punitive damages were thought of as a penalty or punishment directly imposed upon the guilty person. In this connexion Lauterpacht points out that, in cases where—so far as the State is concerned—there is a mere tortious responsibility, responsibility may well assume in the person or organ concerned a complexion of an international criminal liability. He adds:

"A corrupt or criminally minded judge who has inflicted upon an alien, through a deliberate or negligent miscarriage of justice, an unjust sentence of death or imprisonment; an official who has permitted the murderer of an alien to escape; a military officer who, when called in to shield an alien from the fury of a mob, joins in the murderous attack—all these persons could, consistently with principle, be held to have transgressed not only the law of their country but also a rule of international law directly binding upon them."<sup>197</sup>

These remarks are naturally without prejudice to the general question whether the State as such may be the object of penalties.<sup>198</sup>

209. This new approach would, in the cases of international responsibility dealt with in this codification, meet the objections which have been very properly expressed to the idea of making punitive measures appear as applying to a whole national community which is in no way a party to the wrongful act. Moreover, the punishment of the guilty individual would in itself be neither contrary to, nor inconsistent with, the traditional view which considered such punishment as one of the elements of "satisfaction". The innovation would be one of form rather than substance. It would moreover conform perfectly with the practice under international agreements that define and regulate the punishment of the so-called *delicta juris gentium*, under which the State undertakes to punish its own nationals; it would also be in conformity with the Convention on the Prevention and Punishment of the Crime of Genocide, in so far as it relates to "crimes against the peace and security of mankind". Consequently, Lauterpacht's suggestion would only be open to the single objection that it would imply an intrusion into matters which are exclusively within the domestic jurisdiction of the State. This objection is just as valid as that encountered by the idea of applying penal measures to the State; one way of meeting the "domestic jurisdiction" objection might be to make it a condition that the "punishable" act must also be treated as punishable by international law. In reality, once the possibility of the international *criminal* responsibility of the individual is admitted, there can be no objection to

<sup>194</sup> Marjorie M. Whiteman, *Damages in International Law* (Washington, U.S. Government Printing Office, 1937), Vol. I, p. 717.

<sup>195</sup> See Maúrtua, *loc. cit.*, p. 574.

<sup>196</sup> Whiteman, *op. cit.*, p. 717.

<sup>197</sup> Lauterpacht, *International Law and Human Rights*, p. 42.

<sup>198</sup> See chap. IV, section 12.

the punishment of persons guilty of wrongful acts involving the State in *civil* responsibility, if the acts in question constitute genuine international offences.

## 28. CRITERIA FOR DETERMINING THE CHARACTER AND MEASURE OF REPARATION

210. In the two previous sections we examined the different forms which reparation takes in international practice, as well as the function which it performs in the various cases of responsibility. We shall now examine the criteria to be applied for the purpose of determining the character and the measure of the reparation payable when international responsibility is imputable.

211. In the first place, what is the general method of determining the form or type of reparation to be claimed from or imposed on a State, when responsibility can be imputed to it? In logic, the reparation should correspond to the character of the obligation concerned; in other words, it should depend on the seriousness of the wrongful act, and, as the case may be, on the extent of the damage caused by the breach or non-observance of the obligation. These criteria, however, have not always guided international practice. In international relations, political and moral considerations are of special importance, generally carrying more weight than economic or other considerations or interests. In fact, economic considerations often play a secondary part, being in a way subordinate to such political and moral considerations as the "honour and dignity of the State" which has been wronged either directly or in the person of one of its nationals. On occasions, this consideration is so weighty that a claim is considered justified even though no material wrong has occurred. Sometimes, as happened in the case of the *I'm Alone*, amends of a pecuniary character are ordered, apart from the damages properly so-called for the wrong inflicted upon the State.<sup>199</sup>

212. So far as wrongs suffered by individuals are concerned, a somewhat peculiar criterion has been advanced. The former Permanent Court of International Justice, giving expression to an opinion predominant in international practice, said:

"...The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient

scale for the calculation of the reparation due to the State."<sup>200</sup>

It will be noted that according to this method of assessment reparation is regarded as "the reparation due to the State" and not to the individual or private person who has really suffered the injury; this is consistent with the idea expressed by the same Court to the effect that, when taking up the case of one of its subjects, "a State is in reality asserting its own rights". It is evident that this criterion is a purely artificial one.

213. Another traditional practice which has been severely criticized by legal writers is the inconsistency of assessing the reparation not in terms of the act which directly caused the damage or of its character and degree of seriousness, but rather by reference to the act or omission imputable to the State, i.e., the wrongful act which directly involves the State in international responsibility. Although in fact this criterion is not generally followed, it would be, strictly speaking, the only one applicable according to the traditional view that only a State's own acts or omissions can be internationally imputed to it. It was on this reasoning that the competent Commission relied in deciding the *Janes Case*, in which it was held that the "international delinquency", in respect of which \$12,000 were ordered to be paid as damages, was not constituted by the culprit's original wrongful act, but rather by the non-observance on the part of the Government of "its duty of diligently prosecuting and properly punishing the offender".<sup>201</sup>

214. Commenting upon this decision, Eagleton has pointed out that, aside from the difficulty of computing damages according to such a measure, it would appear to reduce the damages awarded to the injured alien to a negligible quantity. He points out that, although international responsibility is involved by the act or omission of the State, practice consistently measures the damage by the loss suffered by the alien from the original act (of individual or State agent). Therefore, he suggests that it should be admitted that the State is responsible for injuries to aliens, by whomsoever committed, and from the moment that the injury occurs.<sup>202</sup> Brierly, for his part, while criticizing the inconsistency of the traditional theory, maintains that the real purpose behind those decisions is that of imposing a reparation having an punitive character, and while it may not be at present expedient to make this purpose articulate, it would be neither just nor expedient to deny it.<sup>203</sup> Dunn, however, does not favour "penalizing wrongful conduct" on the part of a State, and prefers to look upon the problem as a matter of risk-allocation. Where a failure to prosecute is such that, if generalized, it would lead to conditions unfavourable to the customary course of intercommunity

<sup>199</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 17 (Case concerning the factory at Chorzów), p. 28.

<sup>201</sup> *Opinions of Commissioners under the Convention concluded on 8 September 1923 between the United States and Mexico (4 February 1926 to 23 July 1927)* (Washington, United States Government Printing Office, 1927), Vol. I, p. 108.

<sup>202</sup> See Eagleton, *The Responsibility of States in International Law*, p. 57.

<sup>203</sup> Brierly, *loc. cit.*, p. 49.

<sup>199</sup> See Joint Final Report on the case of the *I'm Alone*, in Whiteman, *op. cit.*, pp. 150-151; see also Anzilotti, *op. cit.*, p. 457 and Personnaz, *op. cit.*, p. 276.

relationships, then, for the purpose of determining reparation, international responsibility would be engaged.<sup>204</sup>

215. In view of the statements quoted above, there are thus two questions involved: that of the punitive character which may be attributed to the reparation imposed in these or similar circumstances; and the question what criterion is to be applied in measuring the damage sustained by a private foreign individual or his successors in interest, irrespective of the character of the reparation actually imposed. The first question has already been examined in the previous section and it is not necessary to revert to the remarks then made. With regard to the second question, it is true that in practice the criterion which is generally adopted is that of assessing the reparation (*stricto sensu*) by reference to the injury suffered, rather than by reference to the act or omission of the State which directly engages its international responsibility. But it is equally true that this practice is not consistent with the doctrine that only a State's own acts or omissions can be imputed to it. Consequently, it seems to be an inescapable corollary of this doctrine, which is a fundamental one in the law of international responsibility, that the reparation, whatever its form, can only be claimed in respect of damage arising out of the State's own acts or omissions. Naturally, on this basis, it would be very difficult to compute the reparation in cases (like that mentioned above) in which the injury is caused by one act and the responsibility of the State is the consequence of another act, and it is not a necessary implication of the connexion between the two that there has been culpable neglect, connivance or manifest complicity on the part of the organs of the State. And in the absence of such circumstances, how can one think of the State as being under a duty to make reparation for a wrong that arose out of an act which it did not commit? Accordingly, the first point to be settled will be whether the conduct of the State (the act or omission which is really imputable to it) truly implies complicity in the punishable act. Only if the reply is in the affirmative should its conduct be taken into consideration for the purposes of international responsibility. It will be noted that in effect the problem is the same as that which arises in cases of State responsibility for acts of private persons (and of officials acting in the capacity of private persons) rather than a problem of reparation.

216. One other question remains to be considered within the scope of this chapter. As a corollary of the principles and rules discussed above, particularly the principle that reparation relates to an injured interest or right the titular claimant of which is always the State, it is also the traditional view that it is the State which has the right to determine the reparation claim and not the private person who has directly suffered the damage or his successors in interest. As the Permanent Court of International Justice said in the judgement cited above: the damage suffered by an individual "can only afford a convenient scale for the calculation of the reparation due to the State". According to this view, the re-

sponsible State may either pay compensation to the injured individual or do so through the national State, as may be agreed or as may be directed by the international tribunal or body dealing with the claim; in both cases, however, "the individual does not acquire any title to the sum which is awarded, except under the assignment made in his favour".<sup>205</sup>

217. It will be readily seen that individuals are left in a very precarious position under such a system. By analogy with diplomatic protection, which is considered simply as a right vested in the State, this system for assessing reparation has the effect, from the point of view of the real victims of the injury, or the real beneficiaries, of converting reparation into a mere grant. In this respect, the system in question is incompatible with the doctrine that, in cases of "responsibility for damage done to the person or property of foreigners", it is the private individual and not the State (except where there is also an injury to its "general interest") who is the real titular subject of the injured interest or right. This doctrine was our basis for recognizing the individual's capacity to bring an international action in the cases indicated in chapter V; *a fortiori*, therefore, it is a sound basis for admitting his right to determine the reparation claim for the injury he has suffered. Actually, this is a right implicit in the individual's capacity to bring the claim in question in his own name. Besides, it should be noted that this would not mean any radical innovation in international practice, for there is the precedent of the Arbitral Tribunal for Upper Silesia, set up by the German-Polish Convention of 15 May 1922, where private claimants were allowed to specify the character and extent of the reparation which they considered adequate in respect of the injuries allegedly sustained by them.<sup>206</sup>

218. But apart from the inherently artificial character and intrinsic injustice of this system, and its manifest incompatibility with the doctrine that, in the cases indicated, the private person is the real titular claimant of the injured interest or right, the system is inconsistent with itself even within the traditional view. For how can it be reconciled with the rule that an international claim (and, hence, an international reparation) is not admissible so long as local remedies have not been exhausted, when the only possible applicant for these remedies is the private interested party. The answer might be that the local claim and the international claim are not identical, because the right of the individual in the local claim is not the same as that asserted by the State in the international claim. According to this latter view, the international claim is an entirely new claim different from that which may have been made through the recourse to local remedies. The following chapter will show, however, to what extent this is the correct legal view of the nature of international claims.

<sup>205</sup> Anzilotti, *op. cit.*, pp. 468—469. According to the Basis of Discussion of the Preparatory Committee of The Hague Conference quoted in para. 195, "In principle, any indemnity to be accorded is to be put at the disposal of the injured State".

<sup>206</sup> Kaeckenbeeck, *op. cit.*, pp. 55 to 56 and 503-504.

<sup>204</sup> Dunn, *The Protection of Nationals*, p. 187.

## CHAPTER IX

## International claims and modes of settlement

219. International responsibility and the consequent reparation for the damage caused by the wrongful act or omission are made effective by means of "international claims". Under the traditional doctrine, even where an international claim has its origin in an earlier claim under municipal law, and is in reality a mere continuation of the latter, it is considered as an entirely new and distinct claim. This artificial approach has of necessity given rise to both technical and political difficulties, which any future codification of this important branch of the law of responsibility should remove.

220. The most serious difficulties are those connected with the direct exercise of diplomatic protection. Claims presented through the diplomatic channel have frequently led to interventions of various kinds in the internal or external affairs of the respondent State. In order to counteract the risks inherent in the direct exercise of diplomatic protection, two fundamental principles of contemporary international law have been evolved: the principle that any threat or use of force in international relations is to be condemned; and the principle that States have a duty to submit any disputes arising between them to settlement by peaceful means. The present chapter will therefore deal chiefly with these means of settlement in so far as they have been used or can be used to settle disputes concerning cases of international responsibility. It is, however, necessary to examine first the legal character of international claims as well as the two principles just referred to, in so far as they have been applied or may be applicable.

## 29. THE "PUBLIC CHARACTER" OF INTERNATIONAL CLAIMS

221. According to traditional doctrine and practice, an international claim, whatever its initial cause or its object, always has a "public character", i.e., it involves a legal relationship between sovereign political entities. The fact that the original claimant was a foreign private individual and the respondent was the State of residence, and the fact that the reparation of the injury caused to the person or property of such alien continued to be the subject of the (now international) claim, were considered immaterial. The Permanent Court of International Justice, in a judgement cited before in this report, held as follows:

"... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights..."

"The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

It will be recalled that the *Mavrommatis Palestine Concessions* case was at first a claim by a private person against Great Britain, but when Greece, the national

State of the private person in question, took up the case, "the dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States".<sup>207</sup> In *Administrative Decision No. II* of the German-American Mixed Claims Commission, Umpire Parker observed that "though conducted in behalf of their respective citizens, Governments are the real parties to international arbitrations".<sup>208</sup>

222. Viewed in this light, international claims have a peculiar legal character. An international claim, even though it may have its origin in a claim under municipal law and have as its purpose the reparation of the same damage, is regarded as constituting an entirely new claim, distinct from the original one under municipal law. Since, strictly speaking, the State does not act in the name or on behalf of its injured national, but rather substitutes itself for him for the purposes of the claim, the State becomes logically the sole true claimant. Actually, we do not have to go outside the traditional view to show that this legal reasoning is somewhat inconsistent. If the international claim were indeed an entirely new claim, distinct from the one under municipal law which may have, or may have had, the same content or object, then the plea of *lis pendens* should not be admissible. Yet, as will be shown below, the converse is true.

223. In conformity with the local remedies rule, an international claim does not lie unless and until local remedies have been exhausted (chapter VIII, section 23). Accordingly, the right of the State to bring an international claim, that is, its right to "take up the case of one of its subjects", is contingent on the fulfilment of this condition. The international claim may therefore not only be identical in content and purpose with the original claim, but is actually so closely bound up with the latter that it cannot be proceeded with unless the original claim has been disposed of, that is, unless local remedies have been exhausted. It follows that if the original claim is *sub judice* the alien's national State is debarred from "resorting to diplomatic action or international judicial proceedings on his behalf", and in effect this is what happens under the local remedies rule. Too sum up, if an international claim really constituted an entirely new claim, distinct from the original claim under municipal law, it ought to be logically and technically possible to dispense with the condition postulated by the local remedies rule.

224. But apart from this technical inconsistency, there is another and in a way much more important point: the traditional view concerning international claims reflects the dominant part played by political factors, particularly on the procedural side of the law of international responsibility. In spite of the strictly legal character of these claims, and of the fact that in general they have no extra-legal implications, the appearance of the claimant State has given them a political tinge, a circumstance the consequences of which are plainly visible. In the comment

<sup>207</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 2, p. 12.

<sup>208</sup> Mixed Claims Commission, United States and Germany, *Consolidated Edition of Decisions and Opinions to June 30, 1925* (Washington, U.S. Government Printing Office, 1925), p. 8.

to article 18 of the Harvard Research draft, the following remarks are made in this connexion:

"The greatest difficulty in the matter of State responsibility has been not the inability to agree on general substantive rules governing the subject, but the fact that claiming States are not bound to resort to the judicial process and have on occasion constituted themselves plaintiff, judge, and sheriff in their own causes. This is one of the principal and justifiable grievances of certain States. The major objection to the present practice, notably from this point of view, is the absence of an obligatory legal method of determining issues of law. The present system contemplates the frequent use of political coercion of all types to enforce claims essentially legal in character. The whole field of pecuniary claims, more strictly legal in its nature than many of the other departments of international law, should not only on its substantive, but on its procedural side, be if possible divorced from politics and brought within a legal framework. No pecuniary claim, not involving an immediate threat to human life, should become the source of coercive political action. Every claim should, if not easily settled diplomatically, be submitted by convention, as automatically as possible, to an international court. International law would thus extend its beneficent regulatory power to a field in which politics now unfortunately often controls... The defendant nation should not be in the position of having to yield a legal case to political arguments or of availing itself of political strength to resist a legal claim. The cause of peace and normal international relations should not be impaired and hampered by the present easy conversion of a legal into a political issue. An agreement to submit legal pecuniary claims to a legal, i.e., judicial, method of settlement would be one of the greatest boons imaginable not only to the parties and peoples in interest but to the cause of peace. Here, in the field of State responsibility for injuries to aliens, lies a practical opportunity to counteract the elements of force and coercion by removing a most important field of international relations from the arena of politics to the realm of law."<sup>209</sup>

The foregoing remarks deal with the question essentially from the point of view both of the State and of the general interests of peace and the development of international relations, and mentions the effect which the traditional view has had on them. This subject will be discussed in the following section.

225. At this stage, however, we would like to stress the consequences or repercussions of the traditional view upon the alien's own interest, as well as upon that of his national State. With reference to this point, the Harvard Research comment says:

"...A claimant, having a perfect legal claim, is often dependent for relief largely upon the political strength or influence of his nation, on its political relations with the country complained against, and on the disposition and willingness of the Foreign Office to exert diplomatic efforts in his behalf. His claim

becomes subject to the exigencies of politics. The State of the injured alien is subjected to political pressure to espouse what may be a poor claim, often acts on insufficient evidence, and in prosecuting a claim is led to invoke the support of a whole people on behalf of a single citizen or corporation—a primitive form of collective action which survives in practically no other branch of public law. A people should not be involved in political entanglements arising out of an alleged legal injury to a citizen, if it can possibly be avoided."<sup>210</sup>

226. In chapter V, we pointed out the drawbacks of the theory that the State is always the sole titular claimant of the injured interest or right, even though the injury which gives rise to international responsibility was caused to the person or property of a private individual, and, in chapter VIII, we drew attention to the disadvantages of this theory in the matter of defining the character and measuring the extent of the reparation for such injury. Those are the disadvantages, from the point of view of the foreign private individual, which flow from the theory that an international claim is a new claim, distinct from the claim made by the alien by means of local remedies. But the drawbacks are equally serious from the point of the alien's national State. This "primitive form of collective action" which an international claim takes because of the public character attributed to it, implies the imposition upon a whole people of an unnecessary and unjustified burden.

### 30. THE DIRECT EXERCISE OF THE RIGHT OF DIPLOMATIC PROTECTION; THE DRAGO DOCTRINE; AND OTHER FORMULATIONS OF THE PRINCIPLE OF NON-INTERVENTION

227. So long as international law had not proclaimed the principle that disputes between States have to be resolved by peaceful means and methods of settlement, or the principle condemning all threat or use of force in international relations, international claims, and the character attributed to them, constituted the principal cause of abuse of the direct exercise of diplomatic protection. The experience of history, particularly in the Americas, illustrates that this abusive exercise of diplomatic protection may lead to a threat or even to the actual use of force against the respondent State, and so affect the general interests of peace and the normal development of international relations. While, therefore, the legitimate right of the claimant State to exercise diplomatic protection directly has not been denied, legal opinion has been progressively turning strongly against the various abusive forms of the exercise of that right.

228. The action taken in 1902 by three European Powers against Venezuela, for the purpose of recovering certain contractual debts, was the incident which led to one of the earliest formal protests against the abuse of the right of diplomatic protection. In a Note to the Argentine Minister in Washington who transmitted it to the United States Department of State, the then Minister of Foreign Affairs of the Argentine Republic, Luis M. Drago, pointed out that the capitalist who lends his money to a foreign State always takes into account the resources of

<sup>209</sup> Harvard Law School, *op. cit.*, pp. 217-218.

<sup>210</sup> *Ibid.*, p. 218.

the country and the probability, greater or less, that the obligations contracted will be fulfilled without delay. He added that all Governments hence enjoy different credit according to their degree of civilization and culture and their conduct in business transactions; and these conditions are measured and weighed before making any loan, the terms being made more or less onerous in accordance with the precise data concerning them which bankers always have on record. Moreover, the lender knows that he is entering into a contract with a sovereign entity, and it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgement may be instituted or carried out against it, since this manner of collection would compromise its very existence and cause the independence and freedom of action of the respective Government to disappear. On the basis of these considerations, Drago went on to say in his Note:

“Among the fundamental principles of public international law which humanity has consecrated, one of the most precious is that which decrees that all States, whatever be the force at their disposal, are entities in law, perfectly equal to one another, and mutually entitled by virtue thereof to the same consideration and respect.

“The acknowledgement of the debt, the payment of it in its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments, together with all the functions inherent in them, by the mighty of the earth . . .

“ . . . We in no wise pretend that the South American nations are, from any point of view, exempt from the responsibilities of all sorts which violations of international law impose on civilized peoples. We do not nor can we pretend that these countries occupy an exceptional position in their relations with European Powers, which have the indubitable right to protect their subjects as completely as in any other part of the world against the persecutions and injustices of which they may be the victims. The only principle which the Argentine Republic maintains and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial situation may compel some one of them to postpone the fulfilment of its promises. In a word, the principle which she would like to see recognized is: that the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.”<sup>211</sup>

<sup>211</sup> See *Papers relating to the Foreign Relations of the United States, 1903* (Washington, Government Printing Office, 1904), pp. 1-5.

229. As was mentioned earlier in this report, the Third International Conference of American States (Rio de Janeiro, 1906) recommended to the Governments represented at the Conference “that they consider the point of inviting the Second Peace Conference, at The Hague, to examine the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.”<sup>212</sup>

230. Convention II signed at the Peace Conference, The Hague (1907), “Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts” adopted the *Drago Doctrine* in part only. Article 1 of the *Porter Convention*, as Convention II is usually called, while giving expression to the obligation of the contracting parties “not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”, provides for an important exception to this obligation. According to the second paragraph of that article, “this undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.”<sup>213</sup> This exception in effect authorized the use of armed force in certain given circumstances, some of which—such as the agreement on a *compromis*—were subject to the discretion of the claimant country.

231. The subsequent development of international law, however, has affirmed in an absolute manner this obligation not to resort to the threat or the use of force for the compulsory recovery of public debts or for the purpose of obtaining satisfaction for any other international claim. In the Americas, this development is reflected in other formulations of the principle of non-intervention. This principle was first expressly proclaimed in the Convention on Rights and Duties of States (Montevideo, 1933), article 8 of which provides: “No State has the right to intervene in the internal or external affairs of another.”<sup>214</sup> The Bogotá Conference (1948) was more explicit on this point and included in the Charter of the Organization of American States the following provision:

#### “Article 15

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted

<sup>212</sup> *The International Conferences of American States, 1889-1928*, pp. 135-136.

<sup>213</sup> *The Hague Conventions and Declarations of 1899 and 1907* ed. Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 89.

<sup>214</sup> *The International Conferences of American States, First Supplement, 1933 to 1940*, p. 122. See also the Additional Protocol Relative to Non-Intervention, supplemental to the Convention of Montevideo, signed at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), *ibid.*, p. 191.

threat against the personality of the State or against its political, economic or cultural elements.”<sup>215</sup>

Similarly, the Charter of the United Nations, in its Article 2, paragraph 4, provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

The language of both documents, and the purposes of the relevant provisions, are patently broad enough to include, in the prohibition of force, any action that implies a threat or use of force as a means of enforcing international claims.

### 31. THE DUTY TO RESORT TO PEACEFUL MEANS OF SETTLEMENT

232. The duty to resort to peaceful means for the settlement of international law evolved as a development parallel to the principle condemning the use or threat of force in international relations. In the matter of international claims, this duty supplements and is an advance upon that principle, and so mitigates the risk of abuse inherent in the direct exercise of diplomatic protection. In addition to the basic international treaties existing at present, both general and regional, which lay down that duty in respect of all international disputes, and to the bilateral and multilateral agreements containing analogous provisions, there are numerous treaties which specifically stipulate the peaceful settlement of international claims.

233. The foundations of the system of pacific settlement were laid, in the Americas, at the beginning of the twentieth century. By the terms of article 1 of the Treaty of Arbitration for Pecuniary Claims, signed at the Second International Conference of American States (Mexico City, 1902):

“The High Contracting Parties agree to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens, and which cannot be amicably adjusted through diplomatic channels and when said claims are of sufficient importance to warrant the expenses of arbitration.”<sup>216</sup>

234. Two further Conventions, signed at the Third (Rio de Janeiro)<sup>217</sup> and Fourth (Buenos Aires)<sup>218</sup> International Conferences of American States, respectively, contain provisions to the same effect. Article 1 of the General Treaty of Inter-American Arbitration, signed in Washington in 1929, contains more elaborate provisions:

“The High Contracting Parties bind themselves to submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right . . . which it has not been possible to adjust by diplomacy and which are juridical

in their nature by reason of being susceptible of decision by the application of the principles of law.

“There shall be considered as included among the questions of juridical character:

“ . . .

“(d) The nature and extent of the reparation to be made for the breach of an international obligation.

“The provisions of this treaty shall not preclude any of the Parties, before resorting to arbitration, from having recourse to procedures of investigation and conciliation established in conventions then in force between them.”<sup>219</sup>

235. The many other international instruments which require international claims to be submitted to arbitration or to some other pacific mode of settlement are evidence of the extent to which the system has received general recognition.<sup>220</sup> In a sense, of course, the system receives its most important expression in the acceptance of the compulsory jurisdiction of the former Permanent Court of International Justice and, since 1946, that of the International Court of Justice, the jurisdiction of which comprises international disputes concerning “the nature or extent of the reparation to be made for the breach of an international obligation” (Article 36, paragraph 2 of the Statute of the Court). This acceptance can take the form either of a special convention signed by the parties or of a provision in a treaty, or of a unilateral declaration recognizing the jurisdiction of the Court as *ipso facto* compulsory.

236. But what is even more interesting is to note the frequent and successful operation of the system in practice. The following examples will suffice as illustrations. The majority of the nineteen cases decided by the Permanent Court of Arbitration relate to international claims. The same is true of the disputes which were submitted to the former Permanent Court of International Justice. Mixed claims tribunals and commissions have been very numerous. Apart from those set up under the Treaties of Peace of 1919-1920, sixty such tribunals functioned before the Second World War. Some, such as the various Claims Commissions between the United States and Mexico, and particularly the German-Polish Tribunal set up by the 1922 Convention, have dealt with thousands of claims.<sup>221</sup>

237. An analysis of the abundant precedents afforded by international practice discloses certain fundamental problems. Firstly, what mode of settlement should be employed or what body should be designated to deal with

<sup>219</sup> *Ibid.*, p. 458. See also Resolution XXXV on “Pecuniary Claims” adopted at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) in *The International Conferences of American States, First Supplement, 1933 to 1940*, p. 165.

<sup>220</sup> See, in particular, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations Publications, Sales No. 1949.V.3) and an earlier study by the Secretariat of the League of Nations, *Arbitration and Security—Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations* (League of Nations publication, V. Legal, 1927.V.29 (document C.653.M. 216.1927.V) ).

<sup>221</sup> Hudson, *op. cit.*, chap. XVI.

<sup>215</sup> *Annals of the Organization of American States*, Vol. I, No. 1 (1949), p. 77.

<sup>216</sup> *The International Conferences of American States, 1889-1928*, p. 104.

<sup>217</sup> *Ibid.*, p. 132.

<sup>218</sup> *Ibid.*, p. 183.

the dispute? As the system does not exclude the direct exercise of diplomatic protection, it should be noted that negotiations between the interested parties are not only proper but are in fact the first step to be taken with a view to settling the claim. But when it is not possible to settle the claim by negotiation, the method which has proved the most appropriate in practice is that of arbitration. The particular kind of arbitral body to be used will depend upon the type of claim involved or perhaps even on other circumstances, but what is important is that disputes which are essentially juridical in character are to be submitted to a commission or tribunal for adjudication according to law. For obvious reasons, recourse to this mode of settlement includes the submission of the dispute to the International Court of Justice, if the dispute is so important or significant as to justify that course.

238. Another fundamental question is that of jurisdiction or competence. The bare duty to arbitrate may be nugatory if compulsory jurisdiction is not conferred upon a specified body. In other words, compulsory arbitration, by itself, only carries with it the undertaking to submit the dispute to this mode or settlement. It is a mere *pactum de contrahendo* and, for that reason, depends for its efficacy on the agreement by the parties concerning the arbitral body and the conditions governing its operation. The problem naturally does not arise if the agreement to arbitrate makes reference to a pre-existing tribunal, such as the International Court of Justice. Nor does it arise if the basic agreement which provides for arbitration specifies how the arbitral body is to be set up and function, as is the case under the system provided for in the General Act for the Pacific Settlement of International Disputes (1928) and the American Treaty on Pacific Settlement ("Pact of Bogotá"). The draft on "Arbitral Procedure" prepared by the International Law Commission at its fifth session (1953) also offers a set of provisions which satisfy an indispensable requirement for the improvement of the traditional system of compulsory arbitration.

239. Thirdly, there is the problem of the "law to be applied": By reference to what rules and principles should disputes concerning international claims be decided? Clearly, the rules and principles of international law are applicable, in so far as the parties have not agreed otherwise; they will be applicable even if the instrument governing the arbitral body does not explicitly so provide. Apart from these cases, practice has been most diverse. The relevant instruments sometimes refer to international law as applicable, in so far as the parties have not agreed *bono*, to the "general principles of justice and equity", to the "free judgement" of the tribunal, to judicial precedents, etc.; on occasion, two or more of these sets of rules or principles are prescribed as the "law to be applied". The factor which decisively determines what rules or principles should apply is undoubtedly the character or other material circumstance of the claim. Still, though this consideration should not be left out of account, the best system appears to be that under which claims are decided in conformity with Article 38 of the Statute of the International Court of Justice, i.e., in con-

formity with the rules and principles which emanate from the sources of international law, except where the parties agree that the case should be decided *ex aequo et bono*.

240. There are other problems and questions of equal importance, but this is not the context for discussing them. Perhaps the most topical is the question of the right of access to, or appearance before, the body responsible for deciding the claim; but this question has been dealt with earlier in this report, at least so far as its substance is concerned, in the chapter relating to the international capacity to bring a claim (chapter V, section 18).

## CHAPTER X

### Bases of discussion

241. As indicated in the introduction, in view of the character and purpose of this report the Rapporteur decided not to follow the usual practice of submitting a draft convention, but instead to present a summary of his researches and some of the conclusions reached in the form of "Bases of Discussion" (see chapter I, section No. 2). For this reason, the Bases do not cover all aspects of the questions dealt with in the report, nor do they constitute proposals in the strict sense of the term. Their purpose is rather to summarize general concepts and ideas, the Commission's function being to express an opinion on these with a view to settling the fundamental criteria and principles which are to govern the actual work of codification.

#### BASIS OF DISCUSSION No. I

##### *Legal content and function of international responsibility*

(1) Since, in contemporary international law, the acts and omissions which give rise to responsibility may either be simply unlawful, or else constitute punishable acts, the breach or non-observance of an international obligation may give rise either to *civil* responsibility, or to *criminal* responsibility, or to both.

(2) Acts or omissions which are merely unlawful only comport the duty to make reparation *stricto sensu*, whereas the responsibility for a punishable act implies a sanction, namely the punishment of the guilty party, without prejudice to the reparation of the injury, where applicable.

(3) Since, moreover, the soundness of the rules of international law depends upon the degree of protection they afford to the interests and rights recognized by that law, it follows that the principles governing the law of international responsibility should be so formulated that they protect the interests and rights recognized by international law in its present stage of development.

#### BASIS OF DISCUSSION No. II

##### *The active subjects of international responsibility*

(1) International responsibility being the consequence of the breach or non-observance of an international obligation, its imputability depends on who is the direct subject of the obligation.

(2) Accordingly, the following may be active subjects of international responsibility:

(a) States, in respect of acts or omissions of State organs, so far as the duty to make reparation for the injury caused is concerned; and, where applicable, *political subdivisions of States* and *semi-sovereign entities*, in so far as they have the capacity to contract international obligations directly;

(b) *Individuals*, including rulers, officials and private persons, in so far as an act or omission considered as a punishable act under international law can give rise to *criminal* responsibility;

(c) *International organizations*, in respect of acts or omissions of their organs so far as the duty to make reparation for the injury caused is concerned.

(3) A *State* may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

#### BASIS OF DISCUSSION No. III

##### *The passive subjects of international responsibility*

(1) Since the breach or non-performance of an international obligation may result in injury to some interest or right which is internationally recognized, it is the titular claimant of the injured interest or right who is the passive subject of responsibility.

(2) Accordingly, the following may be passive subjects of international responsibility:

(a) *Foreign private individuals*, if the injury affects their person or property;

(b) *States*, both in cases in which a State, as a legal entity, is the direct object of the injury and in cases in which it has a "general interest" in the injury caused to the person or property of its nationals;

(c) *International organizations*, if the damage affects the interests of the organization itself, or its administrative machine, or its property and assets, or the interests of which it is the guardian.

(3) The real owner of the injured interest or right should therefore be recognized, in principle, as having the capacity to bring an international claim for the damage sustained. In cases of responsibility for damage caused to the person or property of aliens, the national State's "general interests" in the damage caused should receive special consideration.

#### BASIS OF DISCUSSION No. IV

##### *Responsibility in respect of violations of the fundamental rights of man*

(1) The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees, as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental rights of man" recognized and defined in contemporary international instruments.

(2) In consequence, in cases of violation of civil

rights, or disregard of individual guarantees with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

#### BASIS OF DISCUSSION No. V

##### *Exoneration from responsibility; extenuating and aggravating circumstances*

(1) As in municipal law, so in international law one should recognize the existence of grounds and circumstances which exonerate from, or attenuate or aggravate, responsibility. As a general rule, the distinction depends on the diversity of the various factors which may attend the act giving rise to international responsibility.

(2) The following, among others, may be considered as exonerating circumstances:

(a) *Failure to resort to local remedies*, in the sense that, so long as these remedies have not been exhausted, an international claim will not lie and the duty to make reparation will not be enforceable;

(b) *Renunciation of diplomatic protection*, either by the State or by foreign private individuals. Renunciation of diplomatic protection by a private person constitutes an exonerating circumstance in so far as the *Calvo clause* does not refer to rights which, by their nature, are not capable of being renounced, or to questions in which the private person is not the only interested party.

(3) The admissibility of other exonerating, extenuating or aggravating circumstances will depend on the conduct which the State observed, or could or should have observed, with respect to the act which caused the damage.

#### BASIS OF DISCUSSION No. VI

##### *Character, function and measure of reparation*

(1) Reparation may take the form of restitution (*restitutio in integrum*), or, if restitution is not possible or would not constitute adequate reparation for the injury, of pecuniary damages.

(2) The purpose of reparation is not necessarily solely restitution or compensation for material damage. "Reparation" measures may also have a punitive function. In such cases the measures in question should be regarded as a penalty, applicable to the party guilty of the act giving rise to responsibility.

(3) The character and measure of reparation should be determined by reference to the extent of the damage caused and to the seriousness of the act giving rise to responsibility, and also by reference to the purpose which the reparation is to serve; it should be determined by the real owner of the injured interest or right, or at least assessed on the basis of the damage caused to the victim or to his successors in interest.

#### BASIS OF DISCUSSION No. VII

##### *International claims and modes of settlement*

(1) In the cases of responsibility for damage caused

to the person or property of foreign private individuals, the "international claim" should not be considered as a new claim, distinct from that brought before the local authorities, except where the national State makes a claim asserting its "general interest" in the reparation of the injury.

(2) Where an interstate claim is involved, such a claim shall, when diplomatic negotiations between the parties have been exhausted without result, be submitted to arbitration for final settlement, unless the parties agree on some other mode or procedure of settlement more appropriate to the specific character of the claim.

(3) In no event shall the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or

any other form of intervention in the domestic or external affairs of the respondent State.

#### *Plan of work*

The topic of international responsibility is so broad, and involves such diverse factors, that it is not possible to proceed immediately with the codification of the entire topic. The Commission, as it has done in the case of other topics, should adopt a gradual approach, codifying first that part of the topic which is most ripe for codification and which, at the same time, should receive priority in conformity with the terms of resolution 799 (VIII) of the General Assembly. The "responsibility of States for damage caused to the person or property of aliens" would appear to fulfil these two conditions.

### ANNEXES

#### A. Codification under the auspices of the League of Nations

##### *Annex 1*

QUESTIONNAIRE NO. 4 ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>222</sup> ADOPTED BY THE LEAGUE OF NATIONS COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW (GENEVA, 1926)

The Committee is acting under the following terms of reference:

(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following subject:

"Whether and, if so, in what cases a State may be held responsible for damage done in its territory to the person or property of foreigners."

On this subject the Committee has the honour to communicate to the Governments a report presented to it by a Sub-Committee<sup>223</sup> consisting of M. GUERRERO, Rapporteur, and Mr. WANG CHUNG-HUI.<sup>224</sup>

The nature of the general question and of the particular questions involved in it appears from this report. The report contains a statement of one theory as to the principles governing State responsibility in the matters considered and of the particular solutions derived from these principles. The Committee considers that this statement indicates the questions to be resolved for the

<sup>222</sup> League of Nations publication, *V. Legal*, 1926.V.3 (document C.46.M.23.1926.V).

<sup>223</sup> M. De Visscher was also appointed on this Sub-Committee but he was unfortunately prevented from taking any part in the preparation of the report.

<sup>224</sup> Mr. Wang Chung-Hui signed the original text of the Sub-Committee's report. Having unfortunately not been able to attend the session of the Committee of Experts, he is not responsible for the actual text as annexed to the present document, this text containing amendments made by the Rapporteur in consequence of the discussion in the Committee.

purpose of regulating the matter by international agreement. All these questions are subordinate to the larger question, namely:

"Whether and in what cases a State is responsible for damage suffered by foreigners within the territories under its jurisdiction and to what extent the conclusions of the Sub-Committee should be accepted and embodied in a convention between States."

It is understood that, in submitting the present subject to the Governments, the Committee does not pronounce either for or against the general principles of responsibility set out in the report or the solutions for particular problems which are suggested on the basis of these principles. At the present stage of its work it is not for the Committee to put forward conclusions of this nature. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realizable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in the conclusions of M. Guerrero's report.

In the same spirit, the Committee begs to refer to M. Guerrero's report for the details when it submits to the Governments the following question, which is closely related to the main question brought to their attention above.

"Whether and, if so, in what terms it would be possible to frame an international convention whereby facts which might involve the responsibility of States could be established, and prohibiting in such cases recourse to measures of coercion until all possible means of pacific settlement have been exhausted".

In order to be able to continue its work without delay, the Committee will be grateful to be put in possession of the replies of the Governments before October 15th, 1926.

The Sub-Committee's report is annexed.

Geneva, January 29th, 1926.

(Signed) Hj. L. HAMMARSKJÖLD  
Chairman of the Committee of Experts  
VAN HAMMEL

Director of the Legal Section of the Secretariat

ANNEX TO QUESTIONNAIRE No. 4

Report of the Sub-Committee

M. GUERRERO  
Rapporteur  
Mr. WANG Chung-Hui

...

## VI

Conclusions <sup>225</sup>

The conclusions we are about to draw are the logical outcome of the principles by which we have consistently been guided in preparing this report—and which we hold to be the only possible basis for the elaboration of rules likely to secure the approval of all States.

Were we to depart from these guiding rules, were we to seek to codify principles regarding which the collective will is uncertain or actually divided, our endeavours would be useless; indeed, we should be encouraging the establishment of a series of continental systems and codifications of law—which already exist in outline—the sole result being to create unending sources of disagreement.

We should not lose sight of the fact that the object of our task is to establish rules which may be embodied in international conventions, and that these conventions, to be effective, require the consent of all, or nearly all, the countries of the world.

These are our conclusions:

1. Since international responsibility can only arise out of a wrongful act, contrary to international law, committed by one State against another State, damage caused to a foreigner cannot involve international responsibility unless the State in which he resides has itself violated a duty contracted by treaty with the State of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form.

2. The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.

3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:

(a) If the right which has been infringed and which is recognized as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;

(b) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;

The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.

4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:

(a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;

(b) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;

<sup>225</sup> As reproduced here, the conclusions of the report contain amendments made by M. Guerrero as a result of the discussion in the Committee of Experts.

(c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws.

5. Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State.

6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.

It therefore follows:

(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;

(b) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.

7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice*.

*Denial of justice* consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice*.

8. Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.

9. The category of damage referred to in the preceding paragraph does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.

The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation.

10. All that has been said in regard to centralized States applies equally to federal States. Consequently, any international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous.

11. Any dispute which may arise between two States regarding damage suffered by foreigners within the territory of one of the States must be submitted to an international commission of inquiry appointed to examine the facts.

If the report of the commissioners adopted by a majority vote does not result in the incident being closed, the parties concerned must submit the dispute to decision by arbitration or some other means of pacific settlement.

12. States must formally undertake not to resort in the future to any measure of coercion until all the above-mentioned means have been exhausted.

(Signed) Gustavo GUERRERO

Rapporteur

*Annex 2*

BASES OF DISCUSSION DRAWN UP IN 1929 BY THE PREPARATORY COMMITTEE OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (THE HAGUE, 1930)<sup>220</sup> (ARRANGED IN THE ORDER THAT THE COMMITTEE CONSIDERED WOULD BE MOST CONVENIENT FOR DISCUSSION AT THE CONFERENCE)

## GENERAL PRINCIPLES

*Basis of discussion No. 2*

A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations.

*Basis of discussion No. 7*

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power incompatible with the treaty obligations or other international obligations of the State.

*Basis of discussion No. 12*

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

*Basis of discussion No. 13*

A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State.

*Basis of discussion No. 14*

Acts performed in a foreign country by officials of a State (such as diplomatic agents or consuls) acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.

*Basis of discussion No. 15*

If by a special legislative or administrative measure a State puts an end to the right to reparation enjoyed by a foreigner against one of its officials who has caused damage to the foreigner, or if it does not permit the right to be enforced, the State thereby renders itself responsible for the damage to the extent to which the official was responsible.

*Basis of discussion No. 16*

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.

*Basis of discussion No. 23*

Where a State is entrusted with the conduct of the foreign relations of another political unit, the responsibility for damage suffered by foreigners on the territory of the latter belongs to such State.

Where one Government is entrusted with the conduct of the foreign relations of several States, the responsibility for damage

suffered by foreigners on the territories of such States belongs to such common or central Government.

*Basis of discussion No. 5*

A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights;
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;
3. There has been unconscionable delay on the part of the courts;
4. The substance of judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

*Basis of discussion No. 6*

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice.

## APPLICATION TO SPECIAL QUESTIONS

## A. Concessions or contracts

*Basis of discussion No. 3*

A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

*Basis of discussion No. 8*

A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

## B. Debts

*Basis of discussion No. 4*

A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

*Basis of discussion No. 9*

A State incurs responsibility if the executive power repudiates or purports to cancel debts for which the State is liable.

A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity.

<sup>220</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 19-159.

## C. Deprivation of Liberty

*Basis of discussion No. 11*

A State is responsible for damage suffered by a foreigner as the result of the executive power unwarrantably depriving a foreigner of his liberty. The following acts in particular are to be considered unwarrantable: maintenance of an illegal arrest; preventive detention, if it is manifestly unnecessary or unduly prolonged; imprisonment without adequate reason, or in conditions causing unnecessary suffering.

## D. Insufficient protection afforded to foreigners

*Basis of discussion No. 10*

A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.

*Basis of discussion No. 17*

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.

*Basis of discussion No. 18*

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.

*Basis of discussion No. 19*

The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.

*Basis of discussion No. 20*

If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the extent to which the author of the damage was responsible.

## E. Damages resulting from insurrections, riots or other disturbances

*Basis of discussion No. 21*

A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

The State must, however:

(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;

(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;

(3) Make good damage caused to foreigners by acts of its

armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States;

(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances.

*Basis of discussion No. 22*

A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.

*Basis of discussion No. 22 (a)*

Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

*Basis of discussion No. 22 (b)*

A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

*Basis of discussion No. 22 (c)*

A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.

*Basis of discussion No. 22 (d)*

A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials.

## CIRCUMSTANCES UNDER WHICH STATES CAN DECLINE THEIR RESPONSIBILITY

*Basis of discussion No. 1*

A State cannot escape its responsibility under international law by invoking the provisions of its municipal law.

*Basis of discussion No. 24*

A State is not responsible for damage caused to a foreigner if it proves that its act was occasioned by the immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons.

Should the circumstances not fully justify the acts which caused the damage, the State may be responsible to an extent to be determined.

*Basis of discussion No. 25*

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.

*Basis of discussion No. 26*

An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in bases of discussion Nos. 5 and 6.

*Basis of discussion No. 27*

Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in bases of discussion Nos. 5 and 6.

### NATIONAL CHARACTER OF CLAIMS

*Basis of discussion No. 28*

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.

### COMPENSATION FOR DAMAGES

*Basis of discussion No. 29*

Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons.

Reparation may, if there is occasion, include an indemnity to the injured persons in respect of moral suffering caused to them.

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures.

A State which is responsible for the action of other States is bound to see that they execute the measures which responsibility entails, so far as it rests with them to do so; if it is unable to do so, it is bound to furnish an equivalent compensation.

In principle, any indemnity to be accorded is to be put at the disposal of the injured State.

### CHARACTER OF THE AGREEMENT TO BE CONCLUDED

*Basis of discussion No. 31*

The high contracting parties recognize that the provisions set out below are in accordance with the principles of international law as at present in force; they acknowledge their obligatory character and declare their intention to comply therewith.

### JURISDICTION

*Basis of discussion No. 30*

*Special protocol*

A claim made by a State in respect of damage suffered by one of its nationals and based on the provisions of the convention to which the present protocol is attached shall, failing amicable settlement and without prejudice to any other method of settlement in force between the States concerned, be submitted for decision to the Permanent Court of International Justice.

### Annex 3

TEXT OF ARTICLES ADOPTED IN FIRST READING BY THE THIRD COMMITTEE OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (THE HAGUE, 1930)<sup>227</sup>

*Article 1*

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.

*Article 2*

The expression "international obligations" in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

[The Drafting Committee proposed to replace the words in parentheses by the following words:

" . . . obligations which result from treaties as well as those which are based upon custom or the general principles of law . . . " ]

*Article 3*

The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.

*Article 4*

1. The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State.

2. This rule does not apply in the cases mentioned in paragraph 2 of Article 9.

*Article 5*

A State cannot avoid international responsibility by invoking (the state of) its municipal law.

[The Drafting Committee proposes to suppress the words in parentheses.]

*Article 6*

International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations.

*Article 7*

International responsibility is incurred by a State if damage is

<sup>227</sup> League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c)M.145(c).1930.V).

sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State.

#### Article 8

1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.

International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage.

#### Article 9

International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:

(1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;

(2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice.

The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period.

#### Article 10

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage.

### B. Codification by inter-American bodies

#### Annex 4

RECOMMENDATION CONCERNING "CLAIMS AND DIPLOMATIC INTERVENTION" ADOPTED AT THE FIRST INTERNATIONAL AMERICAN CONFERENCE (WASHINGTON, 1889-1890) <sup>228</sup>

The International American Conference recommends to the Governments of the countries therein represented the adoption, as principles of American international law, of the following:

(1) Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be accorded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

(2) A nation has not, nor recognizes in favor of foreigners, any other obligations or responsibilities than those which in favor of the natives are established, in like cases, by the constitution and the laws.

<sup>228</sup> *The International Conferences of American States, 1889-1928*, p. 45.

#### Annex 5

CONVENTION RELATIVE TO THE RIGHTS OF ALIENS <sup>229</sup>  
SIGNED AT THE SECOND INTERNATIONAL CONFERENCE  
OF AMERICAN STATES (MEXICO CITY, 1902)

First: Aliens shall enjoy all civil rights pertaining to citizens, and make use thereof in the substance, form or procedure, and in the recourses which result therefrom, under exactly the same terms as the said citizens, except as may be otherwise provided by the Constitution of each country.

Second: The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.

Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.

Third: Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law.

#### Annex 6

RESOLUTION ON "INTERNATIONAL RESPONSIBILITY OF THE STATE" ADOPTED AT THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES (MONTEVIDEO, 1933) <sup>230</sup>

The Seventh International Conference of American States, RESOLVES:

1. To recommend that the study of the entire problem relating to the international responsibility of the state, with special reference to responsibility for manifest denial or unmotivated delay of justice be handed over to the agencies of codification instituted by the International Conferences of American States and that their studies be co-ordinated with the work of codification being done under the auspices of the League of Nations.

2. That, notwithstanding this, it reaffirms once more, as a principle of international law, the civil equality of the foreigner with the national as the maximum limit of protection to which he may aspire in the positive legislations of the states.

3. Reaffirms equally that diplomatic protection cannot be initiated in favor of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.

4. The Conference recognizes, at the same time, that these general principles may be the subject of definition or limitations and that the agencies charged with planning the codification shall

<sup>229</sup> *The International Conferences of American States, 1889-1928*, p. 91.

<sup>230</sup> *The International Conferences of American States, First Supplement, 1933-1940*, pp. 91 and 92.

take into account the necessity of definition and limitations in formulating the rules applicable to the various cases which may be provided for.

### C. Codification by private bodies

#### *Annex 7*

PROJECTS ON "RESPONSIBILITY OF GOVERNMENTS" AND "DIPLOMATIC PROTECTION" PREPARED BY THE AMERICAN INSTITUTE OF INTERNATIONAL LAW (1925)  
PROJECT NO. 15: RESPONSIBILITY OF GOVERNMENTS

Whereas it is expedient to determine the responsibility of American Republics with regard to foreigners for damages which they may suffer on the territory of those republics.

The latter have agreed to conclude the following convention:

##### *Article I*

The Government of each American Republic is obliged to maintain on its own territory the internal order and governmental stability indispensable to the fulfillment of international duties.

##### *Article II*

As a consequence of the rule formulated in the preceding article, the Governments of the American Republics are not responsible for damages suffered by foreigners, in their persons or in their property for any reason whatsoever, except when the said Governments have not maintained order in the interior, have been negligent in the suppression of acts disturbing this order, or, finally, have not taken precautions so far as they were able to prevent the occurrence of such damages or injuries.

#### PROJECT NO. 16: DIPLOMATIC PROTECTION

Whereas the cases in which diplomatic claims may be made are matters interesting them in a special manner,

The American Republics have concluded the following Convention:

##### *Article I*

The American Republics do not recognize in favor of foreigners other obligations or responsibilities than those established for their own nationals in their constitutions, their respective laws, and the treaties in force.

##### *Article II*

In accordance with the present convention, every American Republic has the right to accord diplomatic protection to its native or naturalized citizens.

The conditions under which an American Republic may grant diplomatic protection depend entirely on its internal legislation.

##### *Article III*

Every nation has the right to accord diplomatic protection to its nationals in an American Republic in cases in which they do not have legal recourse to the authorities of the country, or if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law.

##### *Article IV*

Denial of justice exists:

(a) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

(b) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of law;

(c) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible.

##### *Article V*

Every American Republic has the power to protect not only its own nationals but those of other countries when the latter have entrusted it with diplomatic representation or the supervision of their interests in the country where the claim is made.

##### *Article VI*

The American republic to which the diplomatic claim is presented may decline to receive this claim when the person in whose behalf it is made has interfered in internal or foreign political affairs against the Government to which the claim is made. The republic may also decline if the claimant has committed acts of hostility towards itself.

##### *Article VII*

A diplomatic claim is not admissible when the individual in whose behalf it is presented is at the same time considered a national by the law of the country to which the claim is made, in virtue of circumstances other than those of mere residence in the territory.

##### *Article VIII*

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.

##### *Article IX*

Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who, according to its laws, are of the nationality of the country.

##### *Article X*

American Republics are expressly forbidden to protect their nationals through diplomatic channels when the rights involved have been acquired by means of a voluntary or forced cession made subsequent to the act giving rise to the claim.

##### *Article XI*

All controversies arising between American Republics regarding the admissibility of a diplomatic claim under the present convention shall be determined by arbitration or by the decision of an international court when not settled by direct negotiation.

#### *Annex 8*

DRAFT ON "INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES ON THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>231</sup> PREPARED BY THE INSTITUTE OF INTERNATIONAL LAW (1927)

The Institute of International Law expresses the hope of seeing sanctioned in the practice of the law of nations the whole of the following rules concerning the international responsibility of States by reason of injuries caused upon their territory, in time of peace, to the persons or property of foreigners.

##### I

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations,

<sup>231</sup> Harvard Law School, *op. cit.*, pp. 228-230.

whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative, or judicial.

This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.<sup>232</sup>

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.

This responsibility of the State does not exist if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault.

## II

The State is responsible for the act of corporate bodies exercising public functions on its territory.

## III

The State is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions.

## IV

Aside from cases where international law would call for a treatment of a foreigner preferable to that of a national, the State should apply to foreigners against injurious acts emanating from individuals, the same measures of protection as to its nationals. Foreigners should in consequence have at least the same right as the latter to obtain indemnity.

## V

The State is responsible on the score of denial of justice:

- (1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.
- (2) When the tribunals are not accessible to foreigners.
- (3) When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice.

## VI

The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State.

## VII

The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes or other persons. The responsibility of the State by reason of acts committed by insurgents ceases when it recognizes the latter as a belligerent party, and in all cases in regard to States which have recognized them as such.

The question of the degree to which a State is responsible for acts of insurgents, even when recognized as a belligerent party, in case they have become the government of the country, is reserved.

<sup>232</sup> The text of the second paragraph should be understood in the sense that the responsibility of the State exists whether its organs have acted in conformity with or contrary to the law or even the order of a superior authority. (Extract from the *procès-verbal* of 1 September 1927).

## VIII

The principles stated in articles 3 and 4 govern also the international obligation resting upon the State to guarantee the rights foreigners have with regard to it by virtue of its internal law.

## IX

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is contrary to the international obligations incumbent upon those States. It cannot escape this responsibility by invoking the fact that its constitution does not give it the right to control the particular States nor the right to require them to discharge their obligations.

Likewise a protecting State is responsible for the conduct of a protected State so far as the latter is bound to execute the international obligations of the protecting State, or so far as the latter represents the protected State towards third States wronged by it and employing the right to press their claims.

## X

The responsibility of the State includes reparation for injuries suffered in so far as they are the consequences of a failure to observe an international obligation. It includes moreover, when need be, according to the circumstances and the general principles of the law of nations, a satisfaction to be given to the State which has been wronged in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise.

## XI

The damages include, when applicable, an indemnity for the injured persons as reparation for the moral suffering they have experienced.

When the responsibility of the State results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission of these measures.

A State responsible for the conduct of other States is bound to see to the execution by them of the payments entailed by this responsibility and chargeable to them; if it is not possible for it to do so, it is bound to grant an equivalent compensation.

In principle the indemnity to be granted should be placed at the disposal of the wronged State.

The questions relating to the calculation of damages and to the relations of injured persons to their State and to the State against which the claim is brought are reserved.

## XII

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.

## FINAL VOEU

The Institute expresses the hope that by international conventions, where they do not already exist, the States will bind themselves in advance to submit all disputes concerning international responsibility of the State resulting from injuries caused on their territory to the persons and property of foreigners, first, to an international commission of inquiry, if that is necessary for an examination of the facts; next, to a process of conciliation; finally, if that does not succeed, to a judicial procedure before the Permanent Court

of Arbitration, the Permanent Court of International Justice, or any other international court of justice, for a definitive solution.

The Institute also expresses the hope that States will abstain from every coercive measure before having had recourse to the preceding measures.

### Annex 9

DRAFT CONVENTION ON "RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS"<sup>233</sup> PREPARED BY HARVARD LAW SCHOOL (1929)

#### Article 1

A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.

#### Article 2

The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

#### Article 3

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

#### Article 4

A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

#### Article 5

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

#### Article 6

A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

#### Article 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

#### Article 8

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

#### Article 9

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

#### Article 10

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

#### Article 11

A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

#### Article 12

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

#### Article 13

(a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

#### Article 14

A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

#### Article 15

(a) A state is responsible to another state which claims in behalf of one of its nationals only in so far as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another state which claims in behalf of one who is not its national only if

(1) The beneficiary has lost its nationality by operation of law, or

<sup>233</sup> Harvard Law School, *op. cit.*, pp. 140 ff.

(2) The interest in the claim has passed from a national to the beneficiary by operation of law.

*Article 16*

(a) A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.

(b) A state is not relieved of responsibility if injury is sustained by a foreign corporation, or if a claim is made on behalf of a foreign corporation, because one or more of the shareholders of such corporation possessed or possesses its nationality.

(c) A state is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose.

*Article 17*

A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the State of which he is a national.

*Article 18*

Any dispute between states parties to this convention, with respect to the interpretation or application of the provisions of this convention, which is not settled by negotiation and which is not referred to arbitration under a general or special arbitration treaty, shall be referred to the Permanent Court of International Justice, and may be brought before the Permanent Court of International Justice by either party to the dispute.

*Annex 10*

DECLARATION ON THE FOUNDATIONS AND LEADING PRINCIPLES OF MODERN INTERNATIONAL LAW<sup>234</sup>

Approved by the International Law Association, the Académie diplomatique internationale, and the Union juridique internationale

SECTION V

*Duties of States*

*Article 25.* The State is under a duty to: .....

(b) Maintain a political and legal organization which enables all persons residing in its territory to exercise the rights and to enjoy the benefits which, in accordance with the sentiment of international justice, are at present a necessity for all civilized peoples.

<sup>234</sup> Alejandro Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne*, 2nd ed. (Paris, Les Editions Internationales, 1938), pp. 49 ff.

SECTION VI

*International rights of the individual*

*Article 28.* Every State shall afford to every individual in its territory full and complete protection of the right to life, freedom and property, without any discrimination based on nationality, sex, race, language, or religion.

*Article 29.* Every State shall in addition recognize the right of every individual in its territory to practise freely, both in public and in private, any faith, religion or belief the practice of which is not repugnant to public order and decency.

SECTION VII

*Rights and duties of aliens: the responsibility of States: diplomatic intervention*

*Article 30.* Aliens are entitled to the same treatment as nationals in so far as private rights and the safeguards of criminal law are concerned.

Aliens may in no case claim rights greater than those of nationals, except if the country in which they reside does not afford to its inhabitants, in a permanent manner, the minimum rights referred to in article 25 (b) and in articles 28 and 29.

*Article 31.* Every alien is governed by the laws, and subject to the authorities, of the country in the territory of which he resides.

*Article 32.* Every State shall be responsible for whatever damage its authorities cause, whether by some act or by failure to act, to nationals of another State.

This responsibility shall, however, be neither less nor greater than that owed to its own nationals, an exception being made in the cases contemplated by article 25 (b) and by articles 28 and 29, or in any case in which the rights of an alien under international law have been violated or ignored.

*Article 33.* States may, by convention, extend or restrict, as between them, the responsibility laid down in the foregoing articles.

*Article 34.* If an alien suffers some damage attributable to the authorities or to private persons in the country in which he finds himself, and considers that the said damage involves that country in responsibility, then his remedy is to apply to the authorities of that country. The State of which he is a national may only make a diplomatic intervention on his behalf if there is denial of justice.

Any dispute which may arise concerning the existence or otherwise of denial of justice shall be settled by an international jurisdiction.

*Article 35.* Any State which unjustly causes a prejudice to another State is under duty to make reparation for the same.

The question whether the prejudice was caused unjustly shall come within the competence of international jurisdiction.

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## ARBITRAL PROCEDURE

### DOCUMENT A/CN.4/L.64

#### Note by the Secretariat

[Original text: English]

[30 March 1956]

1. The International Law Commission, in the report on its fifth session,<sup>1</sup> submitted to the General Assembly at its eighth session a draft Convention on Arbitral Procedure, and proposed that the Assembly should recommend the draft to the Members of the United Nations with a view to the conclusion of a convention.

2. After the matter had been discussed in its Sixth Committee,<sup>2</sup> the General Assembly by resolution 797 (VIII) of 7 December 1953 decided to transmit to the Member States the draft convention and the observations made thereon in the Sixth Committee, to request the Members to submit their comments on the draft, and to include the question in the agenda of its tenth session.

3. In the light of the comments received from Governments<sup>3</sup> the matter was again discussed in the Sixth Committee at the tenth session of the General Assembly. The various opinions expressed are set forth in the summary records of the 461st-464th and 466th-472nd meetings of the Committee and in the Committee's report on the subject to the General Assembly.<sup>4</sup>

4. On the recommendation of the Sixth Committee, the General Assembly on 14 December 1955 adopted the following resolution 989 (X):

*"The General Assembly,*

*"Having considered the draft on arbitral procedure*

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

<sup>2</sup> *Ibid., Sixth Committee, 382nd-389th Meetings, and Annexes, agenda item 53.*

<sup>3</sup> *Ibid., Tenth Session, Annexes, agenda item 52, document A/2899 and Add.1 and 2.*

<sup>4</sup> *Ibid., Sixth Committee, 461st-464th and 466th-472nd meetings, and Annexes, agenda item 52, document A/3083.*

prepared by the International Law Commission at its fifth session and the comments thereon submitted by Governments,

*"Recalling* General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

*"Noting that* a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

*"Believing* that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

*"1. Expresses* its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

*"2. Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session;

*"3. Decides* to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

# QUESTION OF AMENDING ARTICLE 11 OF THE STATUTE OF THE INTERNATIONAL LAW COMMISSION

DOCUMENT A/CN.4/L.65

Note by the Secretariat

[Original text: English]  
[30 March 1956]

1. At its tenth session the General Assembly, by resolution 985 (X) of 3 December 1955, decided to extend, as from 1 January 1957, the term of office of the members of the International Law Commission from three to five years. In view of this increase in the length of the term of office the representative of the United States of America proposed in the Sixth Committee that article 11 of the Commission's Statute should be amended so that casual vacancies would be filled by the General Assembly instead of by the Commission itself. The sponsor of the proposal later replaced it by a proposal to postpone the matter until the eleventh session of the General Assembly. The representatives of Costa Rica and India submitted an amendment to the latter proposal, inviting the International Law Commission to express its opinion on the matter.<sup>1</sup>

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Sixth Committee, 452nd-454th meetings, and Annexes, agenda item 50.*

2. The Sixth Committee recommended and the General Assembly, on 3 December 1955, adopted the following resolution 986 (X):

*"The General Assembly,*

*"Having regard to the fact that article 10 of the Statute of the International Law Commission has been amended to increase the term of office of the members of the Commission from three to five years,*

*"1. Invites the International Law Commission to communicate its opinion concerning the amendment of article 11 of the Statute of the Commission relating to the filling of casual vacancies in its membership;*

*"2. Decides to include in the provisional agenda of the eleventh session of the General Assembly the question of amending article 11 of the Statute of the International Law Commission."*

# PUBLICATION OF THE DOCUMENTS OF THE INTERNATIONAL LAW COMMISSION

## DOCUMENT A/CN.4/L.67

### Note by the Secretariat

[Original text: French]

[26 April 1956]

1. In resolution 987 (X) of 3 December 1955, adopted on the report of the Sixth Committee,<sup>1</sup> the General Assembly requested the Secretary-General to arrange as soon as possible for the printing of the following documents of the first seven sessions of the International Law Commission:

(a) The studies, special reports, principal draft resolutions and amendments presented to the Commission, in their original languages;

(b) The summary records of the Commission, initially in English.

2. The General Assembly also requested the Secretary-General to arrange for the printing each year, in English, French and Spanish, of the documents mentioned in the preceding paragraph relating to future sessions of the Commission.

3. Finally, it invited the Commission to express its views for the guidance of the Secretary-General with respect to the selection and editing of the documents to be printed and, if necessary in its opinion, to resubmit to the General Assembly the question of the printing of the documents of the Commission.

4. There is a considerable backlog of documents to be published, amounting to about 12,000 mimeographed pages for the first seven sessions of the Commission; the number is divided almost equally between the summary records, to be printed in English, and the studies, special reports, principal draft resolutions and amendments presented to the Commission, which are to be published in their original languages.<sup>2</sup> However the number of pages for the different sessions varies appreciably.<sup>3</sup>

5. The Fifth Committee, in its report to the Assembly, asked that the work of editing the documents of previous sessions should be spread over a period of three years (A/3052, para. 11).

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 50, document A/3028. The Committee discussed this question at its 445th to 452nd meetings (see *Official Records of the General Assembly, Tenth Session, Sixth Committee*, 445th-452nd meetings).

<sup>2</sup> About 3,400 pages in English, 1,800 in French, and 200 in Spanish.

<sup>3</sup> (a) Summary records: first session 679 pp.; second session 1,033 pp.; third session 1,372 pp.; fourth session 648 pp.; fifth session 1,022 pp.; sixth session 491 pp.; seventh session 840 pp. (b) Other documents: first session 186 pp.; second session 1,457 pp.; third session 595 pp.; fourth session 749 pp.; fifth session 1,289 pp.; sixth session 615 pp.; seventh session 420 pp.

6. The only problems arising are discussed in the two following sections and relate (a) to the selection and editing of the documents and (b) to the form of publication.

#### SECTION I. SELECTION AND EDITING OF THE DOCUMENTS

7. During the discussions in the Sixth Committee two opposite opinions were expressed. Some representatives thought that "all the Commission's documents should be printed, as there was no sound criterion for classifying them with respect to their importance". Others considered that "some selection was necessary and that this task could best be entrusted to the Commission itself, which should give the necessary instructions on the subject to the Secretary-General".<sup>4</sup> The resolution adopted by the Assembly represents the latter view. In any case the problem presents a different aspect according to the category of documents to be published, but in selecting and editing the documents two guiding principles should be followed: (a) the texts should be reproduced as faithfully as possible; (b) the repeated reproduction of the same text should be avoided.

#### *Summary records*

8. The publication of summary records does not seem to present any major problems. The existing texts are final ones which members of the Commission have had the opportunity of correcting. The work of editing will consist simply in ensuring uniform presentation, correcting material errors, incorporating the corrigenda in the text and deleting paragraphs dealing with administrative questions of minor importance. There can be no question of changing the substance and still less of not reproducing some summary records. On the other hand certain additions mentioned in the next paragraph will be made.

#### *Working documents*

9. Most of these documents can be incorporated in the summary records, either in the body of the text or as footnotes. Parts of the Commission's draft report amended in the final report can be treated in the same way. However a problem arises when these documents are in a language other than English, the language in which the summary records of the first seven sessions are to be reproduced. It would be advisable in this case to waive

<sup>4</sup> *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 50, document A/3028, para. 31.

the principle of reproduction in the original language and to insert in the summary record the English translation of the text, the original text being given in a footnote, if necessary.

10. Some documents (such as working papers), the only purpose of which was to facilitate discussion, can quite well be ignored.

*Reports of special rapporteurs and comments by Governments*

11. The publication of these documents seems to present no problem. They should be reproduced in full and as faithfully as possible.

*Studies and memoranda by the Secretariat*

12. These documents should also be published. However it is for the Commission to make a selection.

*Reports on the work of the session*

13. During each session the Commission draws up a draft report on its work, which first appears in mimeographed form in the "LIMITED" series of its documents (A/CN.4/L...). After discussion this draft appears as a final report, also in mimeographed form, but in the "GENERAL" series (A/CN.4/...). After some changes

of language and form the report is then printed in the series of Supplements to the Official Records of the General Assembly.

14. In order to preserve the homogeneous character of the series of publications planned, the final report must be included together with the other documents of the Commission. The text reproduced will be identical with that in the series of Supplements to the Official Records of the Assembly.

SECTION 2. FORM OF PUBLICATION

15. It is proposed to edit the documents by session rather than by subject; the latter solution would be impracticable since it could only be used for subjects discussion of which had been finally completed.

16. The publication could therefore take the form of a year-book, in one or two volumes.

17. With regard to presentation, it is proposed to adopt a chronological division in three parts:

(a) Reports of special rapporteurs, communications for Governments and memoranda and studies by the Secretariat;

(b) Summary records and working documents;

(c) Report on the work of the session.

# CO-OPERATION WITH INTER-AMERICAN BODIES

## DOCUMENT A/CN.4/102

### Report by the Secretary of the Commission on the proceedings of the Third Meeting of the Inter-American Council of Jurists

[Original text: Spanish]

[12 April 1956]

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### Introduction

1. At its seventh session the International Law Commission unanimously adopted on 29 June 1955 a draft resolution proposed by Mr. F. V. García-Amador, one of its members, in which it decided:

“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 that the Council may be able, for a similar purpose, to request its Secretary to attend the next session of the Commission.”<sup>1</sup>

2. On 5 August 1955, Dr. Yuen-li Liang, Secretary of the Commission, informed Dr. Charles G. Fenwick, Executive Secretary of the Inter-American Council of Jurists, of the Commission's decision, and requested him to communicate the terms thereof to the Inter-American Council of Jurists.

3. In a letter dated 22 November 1955, addressed to the Secretary-General of the United Nations, Mr. William Manger, Acting Secretary General of the Organization of American States, expressed the hope that the Secretary of the International Law Commission would attend the third meeting of the Inter-American Council of Jurists. In his reply, dated 20 December 1955, the Secretary-General of the United Nations said that the Secretary of the International Law Commission would be authorized to attend the meeting.

4. Accordingly, the Secretary of the Commission attended the sessions of the third meeting of the Inter-American Council of Jurists, held at Mexico City from 17 January to 4 February 1956, in the capacity of observer.

5. This report covers the proceedings of the third meeting in so far as they relate to topics which are also on the agenda of the International Law Commission, namely:

- (a) System of territorial waters and related questions; and
- (b) Reservations to multilateral treaties.

#### A. BRIEF HISTORY OF THE INTER-AMERICAN COUNCIL OF JURISTS

6. The Inter-American Council of Jurists was established by the Ninth International Conference of American States, held at Bogotá in the spring of 1948, to serve as an advisory body on juridical matters; to promote the development and codification of public and private international law; and to study the possibility of

attaining uniformity in the legislation of the various American countries, in so far as it might appear desirable.<sup>2</sup>

7. The Charter of the Organization of American States contains the rules governing the Inter-American Council of Jurists. Article 57 describes the Council of Jurists as an organ of the Council of the Organization. Like the other two organs of the Council (the Inter-American Economic and Social Council and the Inter-American Cultural Council), it possesses technical autonomy within the limits of the Charter, that is, in the performance of its functions under the Charter, but its decisions must not encroach upon the sphere of action of the Council of the Organization (article 58).

8. Pursuant to the general provisions of article 60 of the Charter of the Organization of American States, it is the function of the Inter-American Council of Jurists, as far as possible, to render to the Governments such technical services as the latter may request, and to advise the Council of the Organization on matters within its jurisdiction.

9. The Inter-American Council of Jurists is composed of representatives of all the Member States of the Organization (article 59). The Charter provides that the Inter-American Juridical Committee of Rio de Janeiro shall be the permanent committee of the Inter-American Council of Jurists (article 68). This Committee is composed of jurists of nine countries selected by the Inter-American Conference, the jurists in their turn being selected by the Inter-American Council of Jurists from a panel submitted by each country chosen by the Conference. The Council of the Organization is empowered to fill any vacancies that occur during the intervals between Inter-American Conferences and between meetings of the Inter-American Council of Jurists (article 69).<sup>3</sup> Article 69 provides that the members of the Juridical Committee represent all member States of the Organization.

10. The Juridical Committee undertakes such studies and preparatory work as are assigned to it by the Inter-American Council of Jurists, the Inter-American Conference, the Meeting of Consultation of Ministers of Foreign Affairs, or the Council of the Organization. It may also undertake those studies and projects which, on its own initiative, it considers advisable (article 70).

11. Under article 71 of the Charter, the Inter-American Council of Jurists and the Juridical Committee are to seek the co-operation of national committees for the codification of international law, of institutes of international and comparative law, and of other specialized agencies. In addition, the Council of Jurists, in agreement with the Council of the Organization, is authorized to establish co-operative relations with the corresponding organs of the United Nations and with the national or international agencies that function within its sphere of action

<sup>2</sup> Article 67 of the Charter of the Organization of American States, signed at that Conference.

<sup>3</sup> Under resolution II of the Bogotá Conference, the Juridical Committee is to “continue, as now organized, to perform its duties until such time as the provisions of the Charter of the Organization of American States pertaining thereto are carried out”.

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, para. 36.*

(article 61). It is the function of the Council of the Organization, with the advice of the appropriate bodies and after consultation with the Governments, to formulate the statutes of its organs in accordance with and in the execution of the provisions of the Charter. But the organs make their own regulations (article 62). The Inter-American Council of Jurists meets when convened by the Council of the Organization, at the place determined by the Council of Jurists at its previous meeting.

12. The Council has held three meetings. The first was held at Rio de Janeiro from 22 May to 15 June 1950; the second at Buenos Aires from 20 April to 9 May 1953; and the third at Mexico City, from 17 January to 4 February 1956.

#### B. ORGANIZATION AND AGENDA OF THE THIRD MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS

13. Twenty-one countries were represented at the meeting:<sup>4</sup> Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States of America, Uruguay and Venezuela.

14. The agenda of the third meeting was prepared by a committee of the Council of the Organization and approved by that Council at its meeting of 22 June 1955. The topics included in the agenda were distributed among the three committees as follows:

##### *Committee I*

Topic I (a) System of territorial waters and related questions:

Preparatory study for the Specialized Inter-American Conference provided for in resolution LXXXIV of the Caracas Conference.

Topic I (b) Reservations to multilateral treaties.

##### *Committee II*

Topic I (c) Draft uniform law on international commercial arbitration.

Topic I (d) Draft convention on Extradition

Topic I (e) International co-operation in judicial procedures.

##### *Committee III*

Topic II (a) Election of the members of the Permanent Committee.

Topic II (b) Consideration of amendments to the Statutes of the Inter-American Council of Jurists.

Topic II (c) Amendments to the Regulations of the Inter-American Juridical Committee.

<sup>4</sup> Dr. Charles G. Fenwick, Director of the Department of International Law and Organizations of the Pan American Union, and Dr. Manuel S. Canyes, Chief of the Division of Legal Affairs of that Department, attended as Executive Secretary and Assistant Executive Secretary respectively of the Inter-American Council of Jurists. Dr. Mauro Bellegarde Marcondes, Secretary of the Inter-American Juridical Committee, was also present. Dr. Oscar Rabasa acted as Secretary-General and Dr. Francisco Cuevas Cancino as Committee Secretary.

Topic II (d) Determination of the matters that should be studied by the Permanent Committee during its new period of meetings:

(1) Possibility of revising resolution VII of the First Meeting of the Inter-American Council of Jurists with respect to the procedure recommended in article 3 (1).

(2) Principles of international law governing the responsibility of the State.

(3) Other matters.

Topic III. Selection of the seat of the Fourth Meeting of the Inter-American Council of Jurists.

15. The remainder of this report is an account of the proceedings of the third meeting of the Council of Jurists so far as they relate to topics which also are on the agenda of the International Law Commission of the United Nations.

#### CHAPTER I

#### Matters which were discussed at the Third Meeting of the Inter-American Council of Jurists and which are also on the agenda of the International Law Commission

16. Of the topics discussed at the meeting, two are also on the agenda of the International Law Commission. For the purposes of the Council's proceedings, these topics were referred to Committee I (Chairman: Dr. Lineu Albuquerque Mello, representative of Brazil). The Committee discussed the topics in the following order: (1) Topic I (a). System of territorial waters and related questions.<sup>5</sup> (2) Topic I (b). Reservations to multilateral treaties.<sup>6</sup>

##### A. SYSTEM OF TERRITORIAL WATERS AND RELATED QUESTIONS

###### 1. Past treatment of the subject

17. As an introduction to the discussion of the problem, a brief description of past treatment is given in the paragraphs which follow:

(a) Under resolution VII of the first meeting of the Council of Jurists, held at Rio de Janeiro, the Inter-American Juridical Committee was entrusted with the study, in conformity with the plan for the development and codification of public and private international law, of the topic "system of territorial waters and related questions".

(b) The Committee then prepared a draft convention relating to the continental shelf, entitled "Draft Convention on Territorial Waters and Related Questions".

(c) Three<sup>7</sup> of the seven members of the Committee expressed dissenting opinions. The Committee submitted the draft convention, with an account of its preparation and the dissenting opinions attached, to the second

<sup>5</sup> Inter-American Council of Jurists document CIJ-25 (Washington, D.C., Pan American Union).

<sup>6</sup> I-ACJ document CIJ-23 (Washington, D.C., Pan American Union, 1955).

<sup>7</sup> Brazil, Colombia and the United States of America.

meeting of the Council of Jurists, held at Buenos Aires in 1953.

(d) In view of certain legislation enacted and declarations made by a number of American countries asserting rights in the continental shelf of their mainland and insular territories, it was realized that much more thorough research was needed into the nature of those rights and into the question of the maximum limits of claims relating to the continental shelf and the contiguous zone, in the light of the diverse characteristics of the different regions of the continent. Accordingly, the second meeting of the Council resolved to refer the topic back to the Juridical Committee, for the continuation of its study, in conformity with the procedure outlined in the general scheme of codification.

(e) The outcome of the discussions was the Council's resolution XIX, which asked the Secretary-General of the Organization of American States to invite the Member States which had adopted, or in the future might adopt, special laws on the subject of the "system of territorial waters and related questions", to transmit the texts thereof, together with the corresponding geographical charts, to the Inter-American Juridical Committee, in order that it might make an analytical study thereof and prepare a report for the third meeting of the Council of Jurists.

(f) In view of the importance of the topic and of the interest shown by the American States, which were anxious to enact legislation on the preservation of the continent's natural resources, the Caracas Conference included the question of the continental shelf among the economic topics. The Conference reaffirmed that the American States had a vital interest in the adoption of legal, administrative and technical measures for the conservation and prudent utilization of the natural resources existing in maritime areas, and adopted resolution LXXXIV, recommending that a specialized conference should be convoked.

(g) In consequence of that resolution, the Juridical Committee decided to suspend its study of the subject. But the Council of the Organization of American States, at its meeting of 5 January 1955, resolved, in order to facilitate the work of the specialized conference, to include on the agenda of the third meeting of the Inter-American Council of Jurists the topic "system of territorial waters and related questions". At the same time, the Inter-American Juridical Committee was requested to prepare a preliminary study in the light of the terms of the Caracas resolution.

(h) The Committee considered this request at its meetings held from 29 August to 2 September 1955 and, on the latter date, adopted a resolution to the effect that the study of territorial waters and related questions would remain in suspense.

## 2. *The law now in effect in the countries of the Americas*

18. The law relating to the sea is embodied in a number of unilateral declarations, enactments and law-making treaties, the earliest being the Anglo-Venezuelan Treaty of 1942 and the most recent the Cuban Legislative Decree of 25 January 1955.

19. A digest, prepared by the Pan American Union, of these declarations and legislative provisions is reproduced in the *Handbook* of the Third Meeting of the Inter-American Council of Jurists.<sup>8</sup>

### 3. *General debate on the topic in Committee I*

20. The debates at the third meeting touched on the following matters relating to the territorial sea: (a) the breadth of the territorial sea; <sup>9</sup> (b) article 3 of the draft articles on the régime of the territorial sea, prepared by the International Law Commission; <sup>10</sup> and (c) the proclamation of the 200-mile limit.<sup>11</sup>

#### (a) *Breadth of the territorial sea*

21. The different points of view put forward during the meeting are described in the following passages; they reflect the considerations which influenced the thinking of the American States and the debate on the subject of the territorial sea. The debate culminated in the declaration called "Principles of Mexico on the Juridical Régime of the Sea".

22. On the question of the breadth of the territorial sea, the participants were divided into three schools of thought: (i) the first took the view that the breadth should not exceed three miles; (ii) the second, while not upholding a specified breadth, expressed itself disposed to accept whatever the Council of Jurists or the specialized conference might decide; and (iii) the third argued that the breadth of the territorial sea should exceed three miles.

23. The first school of thought was represented by the United States of America,<sup>12</sup> whose representative said, in the general debate at the eleventh session, that the United States considered the three-mile limit for the territorial sea consistent with international law and took the view that international law did not require States to recognize a breadth beyond three nautical miles.<sup>13</sup>

24. The second school of thought was represented by Argentina, Brazil, Colombia, Cuba, the Dominican Republic and Venezuela. The representative of Argentina requested that the conference to be held at Ciudad Trujillo should determine the breadth of the territorial sea bearing in mind the wish of the peoples of America that it should be extended.<sup>14</sup>

25. The representative of Colombia said that the three-mile rule was not a rule of international law, and that, at most, what could properly be claimed was that the three-mile limit was universally accepted as a minimum, in the sense that no State specified a smaller extent for its territorial sea.<sup>15</sup>

<sup>8</sup> I-ACJ document CIJ-24 (Washington, D.C., Pan American Union), pp. 15-29 and appendix IV.

<sup>9</sup> Third Meeting of the Inter-American Council of Jurists, Committee I, seventh session, document 39; tenth session, documents 47-48 and 50-51; eleventh session, documents 49 and 30.

<sup>10</sup> *Ibid.*, fifth sessions, document 33; eighth session, document 44.

<sup>11</sup> *Ibid.*, fifth session, document 33.

<sup>12</sup> *Ibid.*, eleventh session, document 30.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, tenth session, document 53.

<sup>15</sup> *Ibid.*, fourteenth session, document 98.

26. The representative of Venezuela said that his delegation would give serious consideration to any proposal which secured general agreement in the Council.<sup>16</sup>

27. The representative of Cuba said that the tone of the debate had been one of negative criticism, and that the critics had been concerned more with destroying a principle than with laying the foundations of a new one to take its place. He added that the three-mile rule had never prevented States from stipulating a greater breadth in case of need or for the protection of a legitimate interest.<sup>17</sup>

28. The representative of the Dominican Republic said that in his country the extent of the maritime area treated as the territorial sea was defined in Act No. 3342 of 13 July 1952, under article 1 of which the breadth of the territorial sea was three nautical miles. The Council should reach a satisfactory decision which could form a basis for the specialized conference to be held at Ciudad Trujillo, and he hoped that the conference would be able to work out the principles of a fair regional settlement of all the questions relating to the problem.<sup>18</sup>

29. The third school of thought was that of the majority of the States represented at the meeting. These took the view that the three-mile rule should be abolished, and that it should be replaced by a rule more in keeping with the aspirations of the American States. This majority group consisted of Peru, Chile, Ecuador, Costa Rica, Honduras, Mexico, El Salvador, Haiti, Uruguay, Guatemala and Panama.

30. The Mexican representative said that of the world's seventy-one coastal States only twenty recognized the three-mile rule, and two of these stipulated a contiguous zone precisely for the protection of fisheries. In other words only eighteen out of seventy-one States recognized the three-mile rule. Surely it was inadmissible that such a minority should impose its views on the majority. The three-mile rule could not be said to be a rule of international law binding on the American States.<sup>19</sup> The representative of El Salvador said that if the participants declared, as they were qualified to do, that the three-mile rule had never been a binding rule of international law, then such a declaration, representing the consensus of opinion which had materialized at the meeting, might be referred to the conference of Ciudad Trujillo in the form of a resolution or advisory opinion.<sup>20</sup> The representative of Haiti said that for reasons of defence, coastal control and economic interest his Government had stipulated a distance of six nautical miles as the breadth of the territorial sea of Haiti.<sup>21</sup>

31. The representatives of Uruguay, Guatemala and Panama also agreed that the three-mile rule should be abolished.<sup>22</sup>

32. It may be said, broadly, that the participants endorsed the thesis upheld by Dr. Alejandro Alvarez in his individual opinion in the Anglo-Norwegian fisheries case:

"Having regard to the great variety of geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea; . . . similarly, for the great bays and straits, there can be no uniform rules" . . . "Each State may therefore determine the extent of its territorial sea . . . provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an *abus de droit*." . . . "States may alter the extent of the territorial sea which they have fixed, provided that they furnish adequate grounds to justify the change."<sup>23</sup>

(b) *Article 3 of the draft articles on the régime of the territorial sea prepared by the International Law Commission*

33. In the course of the general debate, the representatives of Ecuador, Mexico, El Salvador and Cuba spoke on article 3 of the draft articles on the régime of the territorial sea reproduced in the report of the International Law Commission covering the work of its seventh session.<sup>24</sup>

34. The Mexican representative said that what had happened at the last session of the International Law Commission had been truly surprising. He analysed article 3, paragraph 1, in which the Commission recognizes that international practice is not uniform as regards the three-mile limit, and paragraph 2, in which the Commission expresses the view that international law does not justify an extension of the territorial sea beyond twelve miles. He said that both paragraphs had been proposed by Dr. Amado of Brazil and had at first been approved without paragraph 3, which had been proposed later by Professor François of the Netherlands. Paragraph 3, which says that international law does not require States to recognize a breadth beyond three miles, had been approved by 7 votes to 6. The Mexican representative drew attention to the contradiction between paragraph 3 and paragraphs 1 and 2, remarking that the situation was now more confused than ever.<sup>25</sup>

35. The Cuban representative agreed that there was, indeed, a manifest inconsistency in article 3, but added that one could hardly blame the Commission which had had the question of the breadth of the territorial sea on its agenda for five years. During that time the Commission had received comments from Governments from which it had gathered that the breadths stipulated varied

<sup>16</sup> *Ibid.*, eleventh session, document 54.

<sup>17</sup> *Ibid.*, eighth session, document 43.

<sup>18</sup> *Ibid.*, tenth session, document 47.

<sup>19</sup> *Ibid.*, seventh session, document 39.

<sup>20</sup> *Ibid.*, eighth session, document 44.

<sup>21</sup> *Ibid.*, tenth session, document 46.

<sup>22</sup> *Ibid.*, tenth session, documents 48 and 50; twelfth session, document 63.

<sup>23</sup> *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 150 ff.

<sup>24</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9*, chap. III.

<sup>25</sup> Third Meeting of the Inter-American Council of Jurists, Committee I, seventh session, document 39, p. 10.

from three miles at one extreme to 200 miles at the other. The Commission had accordingly taken the view that Governments ought to take the other rights conferred on coastal States into account and to consider whether the rights so conceded did not go some way towards satisfying their needs and whether any adjustment in the breadth of the territorial sea was really necessary.<sup>26</sup>

36. In the course of his comments on article 3 the representative of Ecuador said that while paragraph 1 recognized that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles, paragraph 2 read: "The Commission considers that international law *does not justify* an extension of the territorial sea *beyond twelve miles*". Having admitted the right of States to claim a maximum breadth of twelve miles, the Commission ought to have declared that there was a corresponding duty on the part of States to recognize claims up to that limit. That demand was perfectly proper, inasmuch as it was a maxim of the law that every right presupposed a duty to recognize the right. In defiance of that maxim, article 3, paragraph 3, stated that the Commission, "without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not *require* States to recognize a breadth *beyond three miles*".<sup>27</sup>

37. The Mexican representative drew attention to the views expressed by some members of the Commission, and quoted from the comment on article 3 in the report of the International Law Commission on its seventh session:

"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".<sup>28</sup>

That comment, he said, showed how necessary it was that an international body should express a definite opinion, one way or the other, on the reality of the three-mile rule.

38. The representative of El Salvador said that if those were the considerations which guided some of the members of the International Law Commission then the implication was quite clearly that, as far as they were concerned, the law of the sea was governed not by the principle of the equality of all States but by the views and practices of the maritime States concerned. Admittedly, the phrase "important maritime States" was not synonymous with "great Powers"; nevertheless, it was inadmissible that the interests of a group of States, however important, should prevail over the interests of other members of the international community, and still less was such a contention acceptable in the American family of nations the distinctive characteristic of which was the use of democratic processes.<sup>29</sup>

<sup>26</sup> *Ibid.*, eighth session, document 43.

<sup>27</sup> *Ibid.*, fifth session, document 33.

<sup>28</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9, chap. III.*

<sup>29</sup> Third Meeting of the Inter-American Council of Jurists, Committee I, eighth session, document 44.

(c) *Motives of States in proclaiming the 200-mile limit*

39. On 18 August 1952, the Governments of Chile, Ecuador and Peru, motivated by economic considerations, signed a "Declaration on the Maritime Zone" in which they proclaimed as a principle of their international maritime policy "sole sovereignty and jurisdiction over the area of sea adjacent to the coast [of their respective countries] and extending not less than 200 nautical miles from the said coast". This declaration has come to be known as the Declaration of Santiago.<sup>30</sup> During the discussion in the Council, the representatives of these States explained the reasons underlying their declaration of sovereignty over that expanse of sea. The Peruvian representative said that the object of the Declaration of Santiago as an international instrument was defensive; there was no intention of aggression or of violating the rights of others. The origins of the Declaration could be traced back, not to the arbitrary will of the States parties to it, but to the wrongful practices carried on off the Pacific coast by fishing expeditions from distant countries.<sup>31</sup>

40. The representative of Chile stated categorically that in his Government's opinion the tripartite Declaration did not violate any provision of international law or any acquired rights. Nor did it affect the freedom of the seas or the freedom of fishing.<sup>32</sup>

41. The representative of Ecuador said that it was by reason of compelling geological and biological factors affecting the life, conservation and development of the fauna and flora in the ocean and in coastal waters that the extent of the maritime zone of Chile, Ecuador and Peru had been specified as 200 miles. Questions relating to the breadth of the territorial sea ought to be judged strictly according to principles of relativity; whereas, for example, the three countries' maritime zone of 200 miles represented only approximately 3 per cent of the width of the Pacific Ocean, by contrast, the application of the classic three-mile rule at the narrowest point of the English Channel meant that the territorial waters of the coastal States, the United Kingdom and France, each

<sup>30</sup> On the same date they signed:

1. An Agreement organizing a Standing Committee of the Conference, composed of representatives of the three countries;

2. A joint declaration on fishery problems in the South Pacific; and

3. Regulations governing the form of maritime hunting in the waters of the South Pacific.

A Second Conference was held at Lima from 1 to 4 December 1954 and the following agreements were signed:

1. Agreement relating to penalties;

2. Agreement supplementary to the declaration of sovereignty over the maritime zone of 200 miles;

3. Agreement relating to measures of supervision and control in the maritime zones of the signatory countries;

4. Agreement relating to the issue of permits for the exploitation of the maritime resources of the South Pacific;

5. Agreement relating to the regular annual meeting of the Standing Committee;

6. Agreement relating to a special maritime frontier zone.

<sup>31</sup> Third Meeting of the Inter-American Council of Jurists, Committee I, fifth session, document 31.

<sup>32</sup> *Ibid.*, document 32.

accounted for approximately 20 per cent of the width of the Channel. He added that States made such proclamations because, as the guardians of the right to life and security of the peoples protected by their sovereignty, they had to safeguard the natural maritime resources necessary for the satisfaction of their vital needs.<sup>33</sup>

42. The representative of Mexico, referring to the tripartite Declaration, said that his country naturally observed with the utmost interest any initiative having as its object the utilization of the resources of the sea off a State's coast for the direct benefit, first and foremost, of that State's population and intended to ensure that the exploitation of those resources was governed by the rules prescribed by science and economics for their conservation.<sup>34</sup>

43. Two States, the United States and Cuba, opposed the extension of the maritime zone to 200 miles. The United States representative drew attention to the difference between President Truman's proclamation of 1945 on the continental shelf and the Declaration of Santiago of 1952, pointing out that in the latter the States not only proclaimed "sovereignty and jurisdiction" over the sea but proclaimed them over an area of "not less than" 200 nautical miles. Whereas the principle of the freedom of the seas had been widely recognized in international law at the time of the Declaration of Santiago, the status of the continental shelf had been undetermined.<sup>35</sup> The Cuban representative said it was the generally accepted view that the waters covering the continental shelf formed part of the high seas, though the implication was not, of course, that the coastal State was debarred from exercising certain specific powers vested in it for the protection of its interests.<sup>36</sup>

4. *Consideration in Committee I of the draft proposed by the delegations of Argentina, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Peru and Uruguay*

44. Committee I closed the general debate after twelve sessions, so that representatives could study the nine-Power draft. The text of the draft as finally approved is reproduced in annex I of this report.

45. The representative of Mexico, speaking on behalf of the sponsors, explained the scope and meaning of the principles set out in the draft. It was the result of close co-operation among the sponsors who had not only made suggestions on how the document could be improved, but had also made major concessions in token of their desire to produce an agreed, compromise text. The draft had been carefully prepared and represented a harmonious balance of frequently extreme and divergent opinions and arguments.

46. With regard to the rights of the coastal State in

the sea-bed and subsoil of its continental shelf, the Mexican representative stated that in keeping with the aspirations of the American States and with numerous precedents, the natural resources of the shelf had been taken to include not only mineral substances, hydrocarbons and petroleum, but also all the maritime fauna that lived in a constant physical and biological relationship with the shelf.

47. Part C of the draft gave expression to two distinct ideas. Firstly, it provided, in paragraph 1, that the coastal State had the right to adopt adequate unilateral measures of conservation for the protection of the resources of the sea in the proximity of their coasts beyond territorial waters. That provision gave the State the right of conservation and supervision only. That might be the general rule. The language of paragraph 1 closely followed the text of a resolution submitted at the Rome Conference and supported by almost all the Latin American countries.

48. Secondly, paragraph 2 of part C made provision for certain special cases in which the coastal States had, in addition, the right of exclusive exploitation of species closely related to the coast or the needs of the coastal population.

49. The provisions concerning straight base lines and bays represented an attempt to define and establish, for the American continent, certain new rules which the International Court of Justice in its famous decision in the Anglo-Norwegian fisheries case had declared to be in conformity with international law. The intention was to apply new principles which might help to extend the area of territorial waters subject to the coastal State.<sup>37</sup>

50. In commenting on the draft, the representative of Cuba said that it was not only political in nature but also patently inconsistent in its legal implications. What, he asked, could be the value of force in law of a declaration of principles, issued by a non-political body of lawyers like the Council, that expressly stipulated that the acceptance of the principles in question would not affect the position maintained by the parties to it? The sponsors of the draft had been concerned solely and exclusively with the interests of the coastal State. The purport of the draft, he concluded, exceeded the Council's terms of reference and, moreover, the draft encroached on matters which the Conference of Caracas had referred to the specialized conference to be held at Ciudad Trujillo.<sup>38</sup>

51. The representative of the United States said that the draft contained statements of a political nature and should be plainly labelled as political. Part A, paragraph 2, was clearly contrary to international law. Part C, paragraph 2, was based on economic and scientific assumptions for which no support had been offered and which could not properly be made by a group of jurists.<sup>39</sup> He read a draft summarizing what his

<sup>33</sup> *Ibid.*, document 33.

<sup>34</sup> *Ibid.*, seventh session, document 35.

<sup>35</sup> *Ibid.*, eleventh session, document 30/Add.1.

<sup>36</sup> *Ibid.*, eighth session, document 43.

<sup>37</sup> *Ibid.*, thirteenth session, document 74.

<sup>38</sup> *Ibid.*, document 80.

<sup>39</sup> *Ibid.*, document 76.

delegation considered the third meeting might have done on the question of the territorial sea.<sup>40</sup>

52. The representative of Venezuela proposed the following amendments which were approved and incorporated in the draft:

“1. Insert the following preamble:

“WHEREAS:

“The topic ‘System of territorial waters and related questions: preparatory study for the Specialized Inter-American Conference provided for in resolution LXXXIV of the Caracas Conference’ was included by the Council of the Organization of American States on the agenda of this Third Meeting of the Inter-American Council of Jurists; and

“Its conclusions on the subject are to be transmitted to the Specialized Conference soon to be held,

“The Inter-American Council of Jurists,

“2. Delete the phrase ‘shoals or banks whether drying or submerged’ in part D, paragraph 2.

“3. Delete paragraph 5 in part E.”

53. Certain other States<sup>41</sup> expressed the view that the circumstances in which the draft would be put to the vote made it unlikely that any practical results would be achieved, as the Council’s objectives would not be attained by majority votes in favour of declarations of the type embodied in the proposal under consideration.

54. At the fourteenth session of Committee I, the draft as a whole was approved by 15 votes to 1, with 5 abstentions.<sup>42</sup>

#### 5. *Consideration of the draft at the fourth plenary session of the Council*

55. At the fourth plenary session of the Council at which the draft was discussed the representative of El Salvador proposed certain drafting amendments; these were accepted by the sponsors and eventually approved. On being put to the vote, the draft as a whole was approved by 15 votes to 1, with 5 abstentions.<sup>43</sup>

#### 6. *Reservations and declarations*

56. The representative of Bolivia made the following declaration:

“As a country which has had no sea coast for the last seventy-seven years, in consequence of resolutions by earlier international meetings and in particular by the Tenth Inter-American Conference at Caracas,

<sup>40</sup> In the United States draft it was proposed that the Council should: (a) recommend the specialized conference to consider the problems of the territorial sea in the light of certain principles relating to the freedom of fishing; (b) transmit to the specialized conference the records of the Council’s proceedings concerning territorial waters; (c) recommend the Pan American Union to prepare a systematic bibliography of the documents and background material relating to the problems discussed at the third meeting under the topic “territorial waters”.

<sup>41</sup> Dominican Republic, Venezuela, Colombia.

<sup>42</sup> Against: United States of America. Abstentions: Dominican Republic, Cuba, Colombia, Bolivia, Nicaragua.

<sup>43</sup> Against: United States of America. Abstentions: Dominican Republic, Cuba, Bolivia, Nicaragua.

Bolivia abstains from voting on questions relating to the régime of the territorial sea until such time as some solution in keeping with the requirements of international equity and inter-American understanding and co-existence ends its position as a land-locked State.”

57. The representative of the Dominican Republic explained that he had abstained because he considered that the Council had undertaken to examine questions which had been explicitly referred to the specialized conference.<sup>44</sup>

58. The representative of Guatemala made the following declaration:

“The delegation of Guatemala requests that the following declaration should appear in the records: The delegation of Guatemala considers that part D, paragraph 2, part E concerning bays, and the régime to be applied require fuller and closer study; accordingly, this delegation abstains from approving the provisions in question and also expresses its reservations with regard to the principles, inasmuch as they cannot affect the status of the historical bay of AMATIQUÉ.”

59. Although Honduras voted in favour of the draft as a whole, its delegation stressed that it “gave that approval in so far as the draft did not contain anything inconsistent with the statement made at this third meeting by the Honduran delegation on 28 January”.

60. The Nicaraguan representative explained that he had voted in favour of part A, paragraph 2, on the understanding that the said paragraph did not give a State absolute latitude to extend the width of the territorial sea arbitrarily and to excess, for such an excessive use of prerogatives would constitute a wrongful act, and any other State that considered its interests prejudiced would be free to bring the case before the competent international tribunal.<sup>45</sup>

61. Other countries<sup>46</sup> made declarations which, like the foregoing, were incorporated into the Final Act. The United States representative stated that, after having listened to the arguments put forward, he still opposed the proposed provisions; he made the following declaration and reservation, requesting that the text thereof should be reproduced in the Final Act:

“For the reasons stated by the United States representative during the sessions of Committee I, the United States voted against and records its opposition to the resolution on territorial waters and related questions. Among the reasons indicated were the following:

“That the Inter-American Council of Jurists has not had the benefit of the necessary preparatory studies on the part of its Permanent Committee which it has consistently recognized as indispensable to the formulation of sound conclusions on the subject;

“That at this meeting of the Council of Jurists, apart from a series of general statements by representatives

<sup>44</sup> The specialized conference was convoked by the Tenth Inter-American Conference held at Caracas; it met at Ciudad Trujillo, Dominican Republic, in March 1956.

<sup>45</sup> Nicaraguan Delegation, Third Meeting of the I-ACJ, fourteenth session of Committee I.

<sup>46</sup> Brazil, Colombia, Venezuela, Peru.

of various countries, there has been virtually no study, analysis or discussion of the substantive aspects of the resolution;

“That the resolution contains pronouncements based on economic and scientific assumptions for which no support has been offered and which are debatable, and which, in any event, cover matters within the competence of the specialized conference called for under resolution LXXXIV of the Tenth Inter-American Conference;

“That much of the resolution is contrary to international law;

“That the resolution is completely oblivious to the interests and rights of States other than the adjacent coastal States in the conservation and utilization of marine resources and of the recognized need for international co-operation for the effective accomplishment of that common objective; and

“That the resolution is clearly designed to serve political purposes and therefore exceeds the competence of the Council of Jurists as a technical-judicial body.

“In addition, the United States delegation wishes to record the fact that when the resolution, in the drafting of which the United States had no part, was submitted to Committee I, despite fundamental considerations raised by the United States and other delegations against the resolution, there was no discussion of those considerations at the one and only session of the Committee held to debate the document.”

#### 7. *Proposal by Cuba and amendment proposed by El Salvador*

62. At its fourteenth session Committee I took a roll-call vote, requested by the sponsor, on the following draft proposed by Cuba:

“The Inter-American Council of Jurists transmits to specialized conference convoked under resolution LXXXIV of the Tenth Inter-American Conference, the records of its sessions, together with the conclusions approved at those sessions, to serve as preparatory work for the said specialized conference, in conformity with the terms of the said resolution LXXXIV.”

63. The proposal was adopted by the Committee by 11 votes to 9, with 1 abstention.<sup>47</sup> At the fourth plenary session, the representative of El Salvador proposed that the draft should be amended to read as follows:

“The Inter-American Council of Jurists recommends to the Council of the Organization of American States that it should transmit to the specialized conference provided for by resolution LXXXIV of the Tenth Inter-American Conference the Principles of Mexico City Governing the Régime of the Sea, adopted by this Council, together with the records of those sessions at which the subject was discussed during the Third Meeting.”

<sup>47</sup> In favour: Panama, Dominican Republic, Cuba, Paraguay, Colombia, Brazil, Venezuela, Guatemala, United States, Haiti, Nicaragua. Against: Uruguay, Honduras, Chile, Argentina, Mexico, Costa Rica, Ecuador, El Salvador, Peru.

The proposed amendment was adopted by 14 votes to 6, with 1 abstention.<sup>48</sup>

63a. The fourth plenary meeting thereafter voted on an amendment previously submitted by the representative of the United States to the above-mentioned proposal of El Salvador whereby the following words were to be added:

“as the preparatory study called for in Topic I-a of its Agenda, ‘System of Territorial Waters and Related Questions’.”

The United States amendment was adopted by 11 votes to 7, with 3 abstentions.

63b. The full text of the resolution adopted by the fourth plenary meeting reads as follows:

“The Inter-American Council of Jurists

“Suggests to the Council of the Organization of American States that it transmit to the Specialized Conference provided for in Resolution LXXXIV of the Caracas Conference the Resolution entitled ‘Principles of Mexico on the Juridical Régime of the Seas’ approved by this Council, together with the minutes of the meetings at which this subject has been considered during the Third Meeting, as the preparatory study called for in Topic I-a of its Agenda, ‘System of Territorial Waters and Related Questions’.”

#### 8. *Proposal by Ecuador*

64. As a tribute to the Mexican people, the representative of Ecuador proposed that the title of the declaration on the territorial sea should be “Principles of Mexico on the juridical régime of the sea”. Despite the objection that the adoption of such a title would conflict with the terms of reference laid down by the Council of American States, the proposal was adopted by 14 votes to none, with 6 abstentions.

#### B. RESERVATIONS TO MULTILATERAL TREATIES

65. The topic “Reservations to multilateral treaties” was also referred to Committee I. As an introduction to the proceedings at the third meeting of the Inter-American Council of Jurists relating to that topic, a brief account of past treatment of the subject is given below.

##### 1. *Past treatment of the subject*

66. At the Sixth International Conference of American States, held at Havana in 1928, the earlier work culminated in a Convention on Treaties under which the Pan American Union was designated depositary of instruments of ratification of treaties signed by American States. Accordingly, the Governing Board of the Pan American Union appointed a Special Committee to study the procedure to be observed with regard to the deposit of ratifications. The Committee’s report, containing the provisional rules governing the procedure of deposit, was submitted and approved at the Board’s session of 4 May 1932.<sup>49</sup>

<sup>48</sup> Against: Dominican Republic, Cuba, Colombia, United States, Haiti, Nicaragua. Abstention: Bolivia.

<sup>49</sup> See annex II.

67. The topic was considered again at the Seventh International Conference of American States, and in consequence the Governing Board, at its session of 2 May 1934, approved the so-called "five rules"<sup>50</sup> to which resolution XXIX of the Eighth International Conference of American States refers. This resolution, which laid down the so-called "Pan American rules", states as follows:

["The Conference decides:]

"1. With the purpose of unifying and perfecting the methods of preparation of multilateral treaties, the form of the instruments, and the adherence, accession and deposit of ratifications thereof, to approve the six rules of procedure adopted by the Governing Board of the Pan American Union in its resolution of May 4, 1932, relative to the deposit of ratifications, the five rules on the ratification of treaties or conventions approved on May 2, 1934, and the two recommendations<sup>51</sup> of February 5, 1936, on the ratification of multilateral treaties.

"2. In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the Treaty may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.

"3. To adopt the system of depositing treaties in the Pan American Union, as provided in the project presented by the Delegation of Chile, published on page 245 of the *Diario* of the Conference.

"4. To refer for study to the Permanent Committee of Rio de Janeiro the project presented by the Delegation of Venezuela and published on page 610 of the *Diario* of the Conference."

68. The Inter-American Economic and Social Council, by its resolution of 10 April 1950, had requested that the topic be studied by the Inter-American Juridical Committee. That Council resolved:

"1. To request the Council of the Organization of the American States to submit to the Inter-American Juridical Committee for study, in accordance with article 70 of the Charter of the Organization, the

<sup>50</sup> See annex III.

<sup>51</sup> The first of the two recommendations of 5 February 1936, on the ratification of multilateral treaties requests the Pan American Union to continue the publication of the charts on the status of Inter-American treaties and conventions and authorizes the Director-General, when sending this record to the Governments, to inquire regarding the status of the agreements and the progress that is being made toward their ratification.

The second of these recommendations refers to resolution LVI of the Seventh International Conference of American States, which proposes the designation in each country of a representative *ad honorem* of the Pan American Union whose duty would be to expedite the study, approval and ratification of Inter-American treaties and conventions.

question as to the juridical scope of reservations to international multilateral pacts; and

"2. To send to the Inter-American Juridical Committee, as working documents for their information, the memorandum presented by the Delegation of Brazil, dated March 22, 1950, and also the existing antecedents relative thereto."

69. Acting on that request, the Council of the Organization of American States resolved, at its meeting of 17 May 1950:

"To entrust to the Inter-American Juridical Committee the immediate study of the legal effect of reservations made to multilateral pacts at any stage, whether at the time of signature, of ratification or adherence. The Juridical Committee shall communicate the results of such study to the Council of the Organization.

"2. To send to the Inter-American Juridical Committee, as informative working documents, the memorandum of March 22, 1950, presented by the Delegation of Brazil on the subject, as well as pertinent existing background material."

70. The Juridical Committee prepared a *Report on the Juridical Effect of Reservations to Multilateral Treaties*<sup>52</sup> which briefly sketches the past treatment of the subject and adds some remarks that served as a basis for the discussions at the meeting at Mexico City.

## 2. Consideration of the topic by the Third Meeting of the Inter-American Council of Jurists

### (a) Preliminary debate in Committee I

71. The representatives of Brazil, Colombia and Nicaragua each presented working documents containing fundamental points for discussion. At the proposal of the representative of Panama, Committee I decided to form a Working Group composed of the representatives of Colombia, Brazil and Nicaragua to work out an agreed draft dealing with the legal effects of reservations to multilateral treaties.<sup>53</sup>

72. For their part, the representatives of Honduras, Chile, Venezuela, the United States and Mexico presented a draft resolution to the effect that the Inter-American Juridical Committee should continue the study of the legal effects of reservations to multilateral treaties, in the light of the drafts submitted and the other material produced.<sup>54</sup>

73. Speaking on a point of order, the Argentine delegation said that the five-Power draft should not be discussed at that stage; the Committee should first discuss the fundamental points presented by the Working Group. The Argentine motion to that effect was adopted by 19 votes to 1. As a consequence, the five-Power draft was not put to the vote and the Committee decided that it

<sup>52</sup> I-ACJ document CIJ-23 (Washington, D.C., Pan American Union, 1955).

<sup>53</sup> Third Meeting of the Inter-American Council of Jurists, Committee I, records of second session held on 29 January 1956, document 20.

<sup>54</sup> *Ibid.*, fourth session, document 24.

should first discuss and vote on the fundamental points presented by the Working Group.

(b) *Fundamental points presented by the Working Group (Colombia, Brazil and Nicaragua) for consideration by Committee I*

74. The text of the working document containing the fundamental points follows:

"A. RESERVATIONS MADE AT THE TIME OF SIGNING

"1. A State that desires to make reservations to a multilateral treaty at the time of collective signature shall communicate the text thereof to all States that are going to sign it, such communication to be at least forty-eight hours in advance unless some other period has been agreed upon in the course of the negotiations.

"2. The States receiving the communication referred to in the foregoing paragraph shall, at least twenty-four hours before the collective signing, inform the other States and the State making the reservations whether they accept the said reservations.

"3. Reservations that have been expressly considered unacceptable, even though only in part, by the majority of the States present at the signing, shall not be admitted, and if they are made they shall be of no effect whatever.

"4. When reservations are admitted, a State that has considered them unacceptable may declare at the time of signing that such reservations shall not enter into force between it and the State making them.

"5. A State that has been unable to present its reservations before the deadline agreed upon, for consideration by the other States, may do so up to the time of the collective signing, but in this case the rules will apply that are applicable in the case of reservations made at the time of ratification or adherence.

"B. RESERVATIONS MADE AT THE TIME OF RATIFICATION OR ADHERENCE

"1. At the time of ratification or adherence, reservations may be made in the manner and under the conditions stipulated in the treaty itself or agreed to by the signatories.

"2. In the absence of any stipulation in the treaty itself or of an agreement between the signatories with respect to the making of reservations at the time of ratification or adherence, such reservations may be made if within six months after their official notification none of the signatory States objects to them as being incompatible with the purpose or object of the treaty. The reservations shall be considered to have been accepted by a signatory State which does not, within the said period of six months, make objection thereto on any other ground.

"3. If there is an allegation of incompatibility, the General Secretariat of the Organization of American States on its own initiative and in accordance with its prevailing rules of procedure shall consult the signatory States, and the reservations shall not be admitted if

within six months they are deemed to be incompatible by at least one-third of such States.

"4. In the case of treaties opened for signature for a fixed or indefinite time, the applicable rules shall be those governing reservations made at the time of ratification or adherence.

"C. GENERAL RULES

"1. It is advisable to include in future multilateral treaties precise stipulations regarding the admissibility or inadmissibility of reservations, as well as the legal effects attributed to these, should their terms be accepted.

"2. The legal effects of reservations are the following:

"(a) The treaty shall be in force as signed, as between countries that have ratified it without reservations.

"(b) The treaty shall be in force as modified by the reservations, as between States that have ratified with reservations and States that have ratified it and accepted such reservations.

"(c) The treaty shall not be in force between a State that has ratified it with reservations and a State that has ratified it and not accepted such reservations.

"3. Any State may withdraw its reservations at any time, either before or after they have been accepted by other States.

"4. The prevailing rules of procedure referred to in paragraph B 3 are the rules approved in resolution XXIX of the Eighth International Conference of American States and those rules that may be approved by proper authority in the future."<sup>55</sup>

(c) *Consideration of the fundamental points by Committee I*

75. Nearly all the representatives spoke in the general discussion. The great majority considered that the Council should take a definitive decision concerning the rules which would in future govern the legal effects of reservations to multilateral treaties.

76. The Cuban representative suggested the following procedure: the Council of Jurists would adopt a preliminary draft, or fundamental points, of a treaty, which would be transmitted to Governments for their comments; the draft, together with the comments by Governments, would then be submitted to the Juridical Committee for further discussion, whereupon it would be included in the agenda of the fourth meeting of the Council of Jurists; after discussion at that meeting, a complete draft, in a form suitable for a convention, would be submitted by resolution of the Council to the Eleventh Inter-American Conference.<sup>56</sup>

77. When the Working Group's draft was discussed as a whole, the representatives of Cuba, Panama, El

<sup>55</sup> Third Meeting of the Inter-American Council of Jurists, session of 21 January 1956, document 21.

<sup>56</sup> *Ibid.*, Committee I, records of fourth session, document 27.

Salvador and Mexico offered some comments and expressed reservations in general terms.<sup>57</sup>

78. The representatives of Chile, El Salvador, Uruguay, Mexico, Colombia and the United States commented on the proposed division of the draft into three parts; they were not convinced of the wisdom of the division or of the idea of making special rules governing reservations made at the time of signature.

79. After a number of amendments to various paragraphs had been discussed, the document as a whole was put to the vote and approved by 12 votes to 2, with 4 abstentions.

80. Lastly, the Committee adopted unanimously a Cuban draft resolution to the effect that the draft rules would be transmitted to the Council of the Organization of American States, which would then invite Governments to comment thereon, and that the Juridical Committee should take into consideration both the draft rules and the comments by Governments when preparing revised rules for submission to the fourth meeting of the Council of Jurists.

(d) *Consideration of the draft at the plenary session of the Council*

81. At the fourth plenary session, the draft rules were further amended. The Honduran representative proposed that the following passage should be added in part C, after paragraph 2 (c): "In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them. The amendment was adopted by 15 votes to 1, with 4 abstentions.

82. Some States declared that they would abstain from voting in favour of the draft general rules but would vote in favour of the draft resolution.<sup>58</sup>

83. Lastly, the Council adopted by 17 votes to none, with 3 abstentions, a Mexican proposal<sup>59</sup> that the third paragraph of the preamble of the draft resolution should be amended to read: "Having considered that report, including the dissenting opinions annexed thereto, as well as draft proposals submitted by various delegations, the Council has prepared a series of draft rules to serve as the basis for further studies by inter-American organizations and the Governments".

84. The draft rules and the draft resolution, amended as mentioned above, were put to the vote separately; the former were approved by 14 votes to none, with 5 abstentions, and the latter was approved unanimously.<sup>60</sup>

<sup>57</sup> *Ibid.*, p. 7.

<sup>58</sup> United States, Chile. Third Meeting of the Inter-American Council of Jurists, records of fourth plenary session, document 113, p. 30 ff.

<sup>59</sup> *Ibid.*, p. 33.

<sup>60</sup> The draft resolution presented to the Council by Committee I and approved by the Council is reproduced in its final form in annex IV.

CHAPTER II

Co-operation between the Inter-American Council of Jurists and the International Law Commission

1. *Past references to co-operation*

85. Article 61 of the Charter of the Organization of American States provides that "The organs of the Council of the Organization shall, in agreement with the Council, establish co-operative relations with the corresponding organs of the United Nations and with the national or international agencies that function within their respective spheres of action".

86. The United Nations General Assembly for its part, in establishing the International Law Commission in 1947, included in article 26, paragraph 4, of the Commission's Statute a provision recognizing "the advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan-American Union".

87. The subject of "Collaboration with the International Law Commission of the United Nations" first appeared on the agenda of the Inter-American Council of Jurists at its first meeting, held at Rio de Janeiro in 1950. In the *Handbook* for that meeting, the Executive Secretary of the Pan-American Union said:

"It is to be hoped, however, that in due time contact may be established between the International Law Commission and the Inter-American Council of Jurists so as to avoid, as far as possible, duplication of effort, and to work, whenever the subject matter so requires, on common bases."<sup>61</sup>

88. At the same meeting, the Council of Jurists, considering it desirable to establish co-operation in the interests of the work of both bodies, adopted a resolution requesting the Executive Secretary of the Pan American Union:

"1. To serve as the channel of communication with the International Law Commission on behalf of the Inter-American Council of Jurists and of its Permanent Committee, the Inter-American Juridical Committee;

"2. To respond, in so far as possible, to any request from the International Law Commission for documents, and to provide other information at his disposal;

"3. To request, at his discretion and in conformity with whatever agreement may be entered into with the International Law Commission, the documents or other information considered advisable in order to facilitate the work of the Council of Jurists;

"4. To establish and maintain co-operative relations with the International Law Commission, in consultation with the Permanent Committee and the Council of the Organization of American States, it being understood that any arrangement tending to have permanent force and effect should be regarded as provisional until approved by the Council of Jurists in agreement with the Council of the Organization;

<sup>61</sup> *Handbook: First Meeting of the Inter-American Council of Jurists* (Washington, D.C., Pan American Union, 1950).

"5. To include the Permanent Committee, to such extent as is considered appropriate after consultation with the Committee, in all arrangements entered into with the International Law Commission pursuant to the foregoing paragraph."

89. When at its sixth session, held in 1954, the International Law Commission again considered the subject of co-operation with international bodies, it adopted the following resolution which had been proposed by Mr. F. V. Garcia Amador:

"Resolves to ask the Secretary-General to take such steps as he may deem appropriate in order to establish a closer co-operation between the International Law Commission and the Inter-American bodies whose task is the development and codification of international law."<sup>62</sup>

90. Most recently, at its seventh session, the Commission adopted a resolution<sup>63</sup> in which it referred to the resolution adopted at the preceding session, noted the oral report of the representative of the Secretary-General of the United Nations concerning the steps taken to carry out the terms of that resolution, and, considering that further contact should be established between the Commission and the Inter-American Council of Jurists through the participation of their respective secretaries in these bodies, decided to request the Secretary-General to authorize the Secretary of the Commission to attend the third meeting of the Inter-American Council of Jurists.<sup>64</sup>

## 2. *Statement by the Secretary of the International Law Commission before the first plenary session of the Council's Third Meeting*

91. At the first plenary session of the Council's third meeting, the Secretary of the International Law Commission said that the resolution adopted by the Commission, and his own presence in the Council as the Commission's Secretary, marked the culmination of a prolonged endeavour to co-ordinate the efforts made, both in Inter-American bodies and in the United Nations, to promote the development and codification of international law.

92. The objects of the two bodies were very similar, he said; while the object of the Commission was "the promotion of the progressive development of international law and its codification", one of the purposes of the Council was "to promote the development and the codification of public and private international law".

93. Furthermore, they employed broadly similar methods; whereas, however, the Inter-American Council's drafts on the development of international law could take the form of opinions or reports, the decisions of the Commission had to be in the form of articles of draft conventions.

94. After referring to past contracts between the two bodies, he said that in view of their common objects the

relationship between them should be closer. A pooling of efforts would not only facilitate the task but would also tend to produce more fruitful results.<sup>65</sup>

## 3. *Joint draft resolution proposed by the delegations of Colombia, Cuba and Peru*

95. A draft resolution concerning co-operation with the International Law Commission was first proposed at this meeting of the Council by the representative of Cuba. It suggested that the Secretary-General of the Organization of American States should authorize a representative of the Executive Secretariat of the Inter-American Council of Jurists to attend, as an observer, the meetings of the International Law Commission of the United Nations.<sup>66</sup>

96. Under amendments proposed by the representative of Colombia, it was suggested that, firstly, the Secretary-General of the Organization of American States should authorize the Executive Secretary of the Council of Jurists and, secondly, the Inter-American Juridical Committee should authorize one of its members, to attend the meetings of the International Law Commission as observers.<sup>67</sup>

97. A number of representatives having commented on the draft and on the procedure to be followed, it was decided, in the light of these comments, to defer consideration of the draft until the fourth plenary session.<sup>68</sup>

98. At that session, the representatives of Cuba, Colombia and Peru proposed the following draft resolution which was approved unanimously:

"Whereas:

"At its first meeting the Inter-American Council of Jurists approved a resolution to establish co-operative relations with the International Law Commission of the United Nations;

"That Commission, during its seventh period of sessions, decided to request the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend this third meeting as an observer, and in accordance with that request the Secretary of the Commission has been present in that capacity during the deliberations; and

"Article 4 of the Statutes of the Inter-American Council of Jurists provides that when the co-operation of specialized agencies implies the establishment of permanent relations with the corresponding organs of the United Nations, the Inter-American Council of Jurists may act only in agreement with the Council of the Organization of American States;

"The Inter-American Council of Jurists resolves:

"1. To express its opinion that it would be desirable for the Organization of American States to study the

<sup>62</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9*, para. 77.

<sup>63</sup> *Ibid.*, Tenth Session, Supplement No. 9, para. 36.

<sup>64</sup> See paragraphs 1 to 4 above.

<sup>65</sup> From the statement made by Dr. Yuen-li Liang, Secretary of the International Law Commission, at the Third Meeting of the Inter-American Council of Jurists, Mexico City, 18 January 1956.

<sup>66</sup> Third Meeting of the Inter-American Council of Jurists, document 57.

<sup>67</sup> *Ibid.*, document 73.

<sup>68</sup> *Ibid.*, second and third plenary sessions, 1 and 2 February 1956, documents 91 and 104.

possibility of having its juridical agencies represented as observers at the sessions of the International Law Commission of the United Nations;

"2. To record its satisfaction at nothing the presence of the Secretary of the International Law Commission of the United Nations at this Third Meeting of

the Council, which it considers as the beginning of direct recognition by both agencies of their respective work, to the advantage of the development of international law."<sup>69</sup>

<sup>69</sup> *Ibid.*, fourth plenary session, 3 February 1956, document 106.

## ANNEXES

### Annex I

#### RESOLUTION XIII OF THE THIRD MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS APPROVED AT THE FOURTH PLENARY SESSION, 3 FEBRUARY 1956 PRINCIPLES OF MEXICO ON THE JURIDICAL REGIME OF THE SEA

Whereas:

The topic "System of Territorial Waters and Related Questions: Preparatory Study for the Specialized Inter-American Conference Provided for in resolution LXXXIV of the Caracas Conference" was included by the Council of the Organization of American States on the agenda of this Third Meeting of the Inter-American Council of Jurists; and

Its conclusions on the subject are to be transmitted to the Specialized Conference soon to be held.

*The Inter-American Council of Jurists*

*Recognizes* as the expression of the juridical conscience of the Continent, and as applicable between the American States, the following rules, among others; and

*Declares* that the acceptance of these principles does not imply and shall not have the effect of renouncing or prejudicing the position maintained by the various countries of America on the question of how far territorial waters should extend.

#### A

##### *Territorial waters*

1. The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law. Therefore, the enlargement of the zone of the sea traditionally called "territorial waters" is justifiable.

2. Each State is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defense.

#### B

##### *Continental shelf*

The rights of the coastal State with respect to the sea-bed and subsoil of its continental shelf extend also to the natural resources found there, such as petroleum, hydrocarbons, mineral substances, and all marine, animal, and vegetable species that live in a constant physical and biological relationship with the shelf, not excluding the benthonic species.

#### C

##### *Conservation of living resources of the high seas*

1. Coastal States have the right to adopt, in accordance with scientific and technical principles, measures of conservation and supervision necessary for the protection of the living resources of the sea contiguous to their coasts, beyond territorial waters. Measures taken by a coastal State in such case shall not prejudice

rights derived from international agreements to which it is a party, nor shall they discriminate against foreign fishermen.

2. Coastal States have, in addition, the right of exclusive exploitation of species closely related to the coast, the life of the country, or the needs of the coastal population, as in the case of species that develop in territorial waters and subsequently migrate to the high seas, or when the existence of certain species has an important relation to an industry or activity essential to the coastal country, or when the latter is carrying out important works that will result in the conservation or increase of the species.

#### D

##### *Base lines*

1. The breadth of territorial waters shall be measured, in principle, from the low-water line along the coast, as marked on large-scale marine charts officially recognized by the coastal State.

2. Coastal States may draw straight base lines that do not follow the low-water line when circumstances require this method because the coast is deeply indented or cut into, or because there are islands in its immediate vicinity, or when such a method is justified by the existence of economic interests peculiar to a region of the coastal State. In any of these cases the method may be employed of drawing a straight line connecting the outermost points of the coast, islands, islets, keys, or reefs. 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 linked to the land domain.

3. Waters located within the base line shall be subject to the régime of internal waters.

4. The coastal State shall give due publicity to the straight base lines.

#### E

##### *Bays*

1. A bay is a well-marked indentation whose penetration inland in proportion to the width of its mouth is such that its waters are *inter fauces terrae*, constituting something more than a mere curvature of the coast.

2. The line that encloses a bay shall be drawn between its natural geographical entrance points where the indentation begins to have the configuration of a bay.

3. Waters comprised within a bay shall be subject to the juridical régime of internal waters if the surface thereof is equal to or greater than that of a semicircle drawn by using the mouth of the bay as a diameter.

4. If a bay has more than one entrance, this semicircle shall be drawn on a line as long as the sum total of the length of the different entrances. The area of the islands located within a bay shall be included in the total area of the bay.

5. So-called "historical" bays shall be subject to the régime of internal waters of the coastal State or States.

## Annex II

## REPORT OF THE SPECIAL COMMITTEE APPOINTED BY THE GOVERNING BODY OF THE PAN AMERICAN UNION TO STUDY THE PROCEDURE TO BE FOLLOWED IN THE DEPOSIT OF RATIFICATIONS

The undersigned, members of the Committee appointed by the Board to study the procedure to be followed by the Pan American Union in the deposit of instruments of ratification of treaties and conventions, have the honour to submit for the consideration of the Board the following report:

The procedure to be followed by the Pan American Union with respect to the deposit of ratifications, pursuant to article 7 of the Convention on the Pan American Union, signed at the Sixth International Conference of American States, shall be the following, unless provisions of a particular treaty provide otherwise:

1. To assume the custody of the original instrument.
2. To furnish copies thereof to all the signatory Governments.
3. To receive the instruments of ratification of the Signatory States, including the reservations.
4. To communicate the deposit of ratifications to the other Signatory States, and, in the case of reservation, to inform them thereof.
5. To receive the replies of the other signatory States as to whether or not they accept the reservations.
6. To inform all the States signatory to the treaty, if the reservations have or have not been accepted.

With respect to the legal states of treaties to which reservations are made but not accepted, the Governing Board of the Union understands that:

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed;
2. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations;
3. It shall not be in force between a Government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.

The procedure suggested by the Committee is purely provisional, inasmuch as, strictly speaking, the function of depository of the instruments of ratification to be performed by the Pan American Union for the first time by virtue of the treaties signed at Havana is also provisional, as long as those treaties have not been unanimously ratified.

In other respects, the points involved in this procedure are very complex, and touch on a problem of international law still much debated, which the Committee believes should be solved in a final manner by the Seventh International Conference of American States and not be a simple interpretative provision of the Governing Board of the Pan American Union.

The Committee consequently considers it advisable, without prejudice to these provisional rules, that this matter should be submitted to the Seventh International Conference of American States and also brought to the attention of the American Institute of International Law.

Felipe A. ESPIL  
*Ambassador of Argentina*  
Miguel CRUCHAGA  
*Ambassador of Chile*  
Fabio LOZANO  
*Minister of Colombia*

## Annex III

## RULES ON THE RATIFICATION OF TREATIES APPROVED BY THE GOVERNING BODY OF THE PAN AMERICAN UNION ON 2 MAY 1934

The following measures would be conducive to giving practical effect to the desire repeatedly expressed by the International Conferences of American States, as set forth in the above-mentioned resolutions:

1. Once treaties or conventions have been signed, the Government of the country in which the conference is held should remit to each of the signatory States, as soon as possible after the adjournment of the conference, a certified copy of each of the treaties and conventions signed at the conference.
2. The signatory Governments should be urged, in so far as constitutional provisions may permit, to submit the treaties and conventions to their respective Congresses at the first opportunity following the receipt of the certified copies mentioned in the preceding paragraph.

3. The Pan American Union shall transmit, every six months, through the members of the Governing Board, a chart showing the status of the ratifications, reservations, adherences, accessions and denunciations of treaties and conventions signed at conferences held by countries members of the Union.

4. The Pan American Union shall address a communication to each of the American Governments requesting that, in accordance with resolution LVII of 23 December 1933 of the Seventh International Conference of American States, and with the sole purpose of studying the possibility of finding a formula acceptable to the majority of the countries members of the Union, the respective Government make known the objections which it may have to the conventions open to its signature or awaiting ratification by its national Congress.

The communication, while recognizing the right of each State to decide in accordance with its interests the question of the ratification of treaties and conventions signed at the international conferences of American States, shall furthermore request each Government to communicate to the Pan American Union the modifications which in its judgement will make ratification possible.

5. The communication addressed to the American Governments in accordance with the preceding paragraphs shall be sent once a year, an endeavour being made to send it at the time of the regular session of the respective Congress.

## Annex IV

RESOLUTION XV OF THE THIRD MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS  
RESERVATIONS TO MULTILATERAL TREATIES

*Whereas:*

The Council of the Organization of American States entrusted to the Inter-American Juridical Committee the study of the legal effect of reservations made to multilateral pacts at any stage, whether at the time of signature, of ratification, or of adherence;

In response to that request, the Juridical Committee prepared a report that has been submitted to the Inter-American Council of Jurists for consideration at its Third Meeting;

Having considered that report, including the dissenting opinions annexed thereto, as well as draft proposals submitted by various delegations, the Council has prepared a series of draft rules to serve as the basis for further studies by inter-American organizations and the Governments; and

The draft rules prepared by the Council of Jurists, as indicated in the request of the Council of the Organization of American States, should be transmitted to that body,

*The Inter-American Council of Jurists**Resolves:*

1. To request the Council of the Organization of American States to forward the draft prepared by the Inter-American Council of Jurists on the effects of reservations to multilateral treaties to the Member Governments in order that they may make any observations thereon that they consider advisable;

2. To ask the Inter-American Juridical Committee to take into account the above-mentioned draft and the observations of the Member Governments and to prepare a second draft of rules to be presented to the Fourth Meeting of the Inter-American Council of Jurists.

**DRAFT RULES APPLICABLE TO RESERVATIONS TO  
MULTILATERAL TREATIES SUBMITTED BY THE INTER-  
AMERICAN COUNCIL OF JURISTS**

**A***Reservations made at the time of signing*

1. A State that desires to make reservations to a multilateral treaty at the time of collective signature shall transmit the text thereof to all States that have taken part in the negotiations, at least forty-eight hours in advance, unless some other period has been agreed upon in the course of the deliberations.

2. The States to which the aforementioned communication has been made shall notify the other States and the State that is making the reservations, before the collective signing, as to whether they accept the said reservations or not.

3. Reservations that have been expressly rejected, even though in part, by the majority of the States present at the signing, shall not be admitted.

**B***Reservations made at the time of ratification or adherence*

1. At the time of ratification or adherence, reservations may be made in the manner and under the conditions stipulated in the treaty itself or agreed to by the signatories.

2. In the absence of any stipulation in the treaty itself or of agreement between the signatories with respect to the making of reservations at the time of ratification or adherence, such reservations may be made if within six months after the official notification thereof none of the signatory States objects to them as

being incompatible with the purpose or object of the treaty. The reservations shall be considered accepted by a signatory State that does not object to them on any other ground within the six-month period.

3. If there is an allegation of incompatibility, the General Secretariat of the Organization of American States shall, on its own initiative and in accordance with its prevailing rules of procedure, consult the signatory States, and the reservations shall not be admitted if within six months they are deemed to be incompatible by at least one-third of such States.

4. In the case of treaties opened for signature for a fixed or an indefinite time, the applicable rules shall be those governing reservations made at the time of ratification or adherence.

5. A reservation that is not repeated in the instrument of ratification shall be deemed to have been abandoned.

**C***General rules*

1. It is advisable to include in multilateral treaties precise stipulations regarding the admissibility or inadmissibility of reservations, as well as the legal effects attributable to them, should they be accepted.

2. The legal effects of reservations are in general the following:

(a) As between countries that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

(c) As between a State that has ratified with reservations and another State that has ratified and not accepted such reservations, the treaty shall not be in force.

(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

3. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States.

4. The prevailing rules of procedure referred to in paragraph B-3 are the six rules approved in resolution XXIX of the Eighth International Conference of American States and those rules that may be approved by the competent organ in the future.

**DOCUMENT A/CN.4/102/Add.1**

**Addendum to the report by the Secretary of the Commission on the proceedings of the Third Meeting  
of the Inter-American Council of Jurists**

[*Original text: Spanish*]

[7 May 1956]

The present document contains the "Ciudad Trujillo Resolution" adopted by the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", held at Ciudad Trujillo in 1956. The Conference was referred to in resolution XIII of the Third Meeting of the Inter-American Council of Jurists, reproduced in annex I to document A/CN.4/102.

**RESOLUTION OF CIUDAD TRUJILLO<sup>1</sup>**

The Inter-American Specialized Conference on "Con-

servation of Natural Resources: The Continental Shelf and Marine Waters",

*Considering:*

That the Council of the Organization of American States, in fulfilment of Resolution LXXXIV of the Tenth Inter-American Conference held in Caracas in March

<sup>1</sup> *Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", Ciudad Trujillo, March 15-28, 1956, Final Act* (Washington, D.C., Pan American Union, 1956), p. 13.

1954, convoked this Inter-American Specialized Conference "for the purpose of studying as a whole the different aspects of the juridical and economic system governing the submarine shelf, oceanic waters, and their natural resources in the light of present-day scientific knowledge"; and

That the Conference has carried out the comprehensive study that was assigned to it,

## I

### *Revolves:*

To submit for consideration by the American States the following conclusions:

1. The sea-bed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal State, outside the area of the territorial sea, and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil, appertain exclusively to that State and are subject to its jurisdiction and control.

2. Agreement does not exist among the States here represented with respect to the juridical régime of the waters which cover the said submarine areas, nor with respect to the problem of whether certain living resources belong to the sea-bed or to the superjacent waters.

3. Co-operation among States is of the utmost desirability to achieve the optimum sustainable yield of the living resources of the high seas, bearing in mind the continued productivity of all species.

4. Co-operation in the conservation of the living resources of the high seas may be achieved most effectively through agreements among the States directly interested in such resources.

5. In any event, the coastal State has a special interest in the continued productivity of the living resources of the high seas adjacent to its territorial sea.

6. Agreement does not exist among the States represented at this Conference either with respect to the nature and scope of the special interest of the coastal State, or as to how the economic and social factors which such State or other interested States may invoke should be taken into account in evaluating the purposes of conservation programmes.

7. There exists a diversity of positions among the States represented at this Conference with respect to the breadth of the territorial sea.

## II

Therefore, this Conference does not express an opinion concerning the positions of the various participating States on the matters on which agreement has not been reached and

### *Recommends:*

That the American States continue diligently with the consideration of the matters referred to in paragraphs 2, 6, and 7 of this resolution with a view to reaching adequate solutions.

# REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/3159\*

### Report of the International Law Commission covering the work of its eighth session, 23 April—4 July 1956

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#### CHAPTER I

#### ORGANIZATION OF THE SESSION

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 eighth session at the European Office of the United Nations, Geneva, Switzerland, from 23 April to 4 July 1956. The work of the Commission during the session is related in the present report. Chapter II of the report contains the Commission's final report on the law of the sea, as requested in General Assembly resolution 899 (IX), chapter III consists of progress reports on the work on the subjects of Law of treaties, State responsibility and Consular intercourse and immunities, while chapter IV deals with questions relating to the statute of the Commission and with administrative matters.

##### I. Membership and attendance

2. The Commission consists of the following members, which were all present at the session:

<i>Name</i>	<i>Nationality</i>
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-Khourri	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 Zourek	Czechoslovakia

#### II. Officers

3. At its meetings on 24 and 25 April 1956, the Commission elected the following officers:

*Chairman:* Mr. F. V. García Amador;

*First Vice-chairman:* Mr. Jaroslav Zourek;

*Second Vice-chairman:* Mr. Douglas L. Edmonds;

*Rapporteur:* Mr. J. P. A. François.

4. 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

5. The Commission adopted an agenda for the eighth session consisting of the following items:

1. Régime of the high seas.
2. Régime of the territorial sea.
3. Law of treaties.
4. Diplomatic intercourse and immunities.
5. Consular intercourse and immunities.
6. State responsibility.
7. Arbitral procedure: General Assembly resolution 989 (X).
8. Question of amending article 11 of the statute of the Commission: General Assembly resolution 986 (X).
9. Publication of the documents of the Commission: General Assembly resolution 987 (X).
10. Co-operation with inter-American bodies.
11. Date and place of the ninth session.
12. Planning of future work of the Commission.
13. Other business.

6. In the course of the session, the Commission held fifty-one meetings. It considered all the items on the above

\* Also issued as *Official Records of the General Assembly, Eleventh Session, Supplement No. 9.*

agenda with the exception of Diplomatic intercourse and immunities (item 4) and Arbitral procedure (item 7), these latter subjects being postponed until its next session.

## CHAPTER II

### LAW OF THE SEA

#### I. Introduction

7. At its first session (1949), the International Law Commission drew up a provisional list of topics whose codification it considered necessary and feasible. Among the items in this list were the régime of the high seas and the régime of the territorial sea. The Commission included the régime of the high seas among the topics to be given priority and appointed Mr. J. P. A. François special rapporteur for it. Subsequently, at its third session (1951), in pursuance of a recommendation contained in General Assembly resolution 374 (IV), the Commission decided to initiate work on the régime of the territorial sea and appointed Mr. François special rapporteur for that topic as well.

##### (a) RÉGIME OF THE HIGH SEAS

8. At its second session (1950), the Commission considered the question of the high seas, taking as a basis of discussion the report of the special rapporteur (A/CN.4/17). The Commission was of the opinion that it could not undertake the codification of the law of the high seas in all its aspects, and that it would have to select the subjects which it could take up in the first phase of its work on the topic. The Commission thought it could for the time being leave aside all those subjects which were being studied by other United Nations organs or by specialized agencies. The Commission also left out subjects which, because of their technical nature, were not suitable for study by it. Lastly, it set aside a number of other subjects the importance of which did not appear to justify consideration at that stage of the work.

9. At the third session (1951), the special rapporteur submitted his second report on the high seas (A/CN.4/42). The Commission first examined the chapters of the report dealing with the continental shelf and various related subjects, namely, conservation of the resources of the sea, sedentary fisheries and the contiguous zone. The Commission decided to publish its draft on these questions<sup>1</sup> in accordance with its statute, and to invite the Governments to submit their comments on it. The Commission also considered various other subjects part of the régime of the high seas, and requested the special rapporteur to submit a further report at its fourth session.

10. At its fourth session (1952), the Commission had before it the third report of the special rapporteur (A/CN.4/51). In addition, the Commission received comments on its draft articles on the continental shelf

and related subjects from a number of Governments.<sup>2</sup> Owing to lack of time the Commission was obliged to defer consideration of these questions until its fifth session.

11. At its fifth session (1953), in the light of the comments from Governments and on the basis of a new report by the special rapporteur (A/CN.4/60), the Commission re-examined the following questions: (1) continental shelf; (2) fishery resources of the seas; (3) contiguous zone. In its work on the subject the Commission derived considerable assistance from a collection, in two volumes, published in 1951 and 1952 by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat and entitled "Laws and Regulations on the Régime of the High Seas".<sup>3</sup> The Commission prepared revised drafts on the three questions mentioned above.<sup>4</sup> 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 certain subjects concerning the high seas not dealt with in the earlier reports. While reverting to the idea of codifying the law of the sea, the Commission decided not to include any provisions on technical matters or to encroach on ground already covered in special studies by other United Nations organs or specialized agencies.

12. At the sixth session (1954), shortage of time prevented the Commission from dealing with the question of the high seas and from examining the special rapporteur's fifth report (A/CN.4/69), which was specially devoted to penal jurisdiction in matters of collision.

13. At its seventh session (1955), the Commission adopted, on the basis of the special rapporteur's sixth report (A/CN.4/79), a provisional draft on the régime of the high seas,<sup>5</sup> with commentaries, which was submitted to Governments for observation. The Commission also decided to communicate the chapter on the conservation of the living resources of the sea to the organizations 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. In preparing the articles dealing with the conservation of the living resources of the sea, the Commission took account of the report<sup>6</sup> of that Conference.

14. At its eighth session (1956), the Commission examined replies from twenty-five Governments (A/CN.4/99 and Add.1 to 9) and from the International Commission for the Northwest Atlantic Fisheries (A/CN.4/100), together with a new report by the special rapporteur (A/CN.4/97 and Add.1 and 3). After careful

<sup>2</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), annex II.*

<sup>3</sup> ST/LEG/SER.B/1 and 2.

<sup>4</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), chapter III.*

<sup>5</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), chapter II.*

<sup>6</sup> *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April-10 May 1955, Rome. (A/Conf.10/6.)*

<sup>1</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), annex.*

study of these replies, it drew up a final report in which it incorporated some of the points made.

(b) REGIME OF THE TERRITORIAL SEA

15. At its fourth session (1952), the Commission considered certain aspects of the régime of the territorial sea on the basis of a report by the special rapporteur (A/CN.4/53). It dealt in particular with the questions of baselines and bays. With regard to the delimitation of the territorial sea of two adjacent States, the Commission decided to ask Governments for particulars concerning their practice and for any observations they might consider useful. The Commission also decided that the special rapporteur should be free to consult with experts with a view to elucidating certain technical aspects of the problem.

16. The special rapporteur was asked to submit to the Commission at its fifth session (1953) a further report containing a draft regulation and comments revised in the light of opinions expressed at the fourth session. In compliance with this request, the special rapporteur on 19 February 1953 submitted a second report on the régime of the territorial sea (A/CN.4/61).

17. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the special rapporteur. Its members were: Professor L. E. G. Asplund (Geographic Survey Department, Stockholm); Mr. S. Whittemore Boggs (Special Adviser on Geography, Department of State, Washington, D. C.); Mr. P. R. V. Couillault, Ingénieur en chef du Service central hydrographique, Paris); Commander R. H. Kennedy, O.B.E., R.N. (Retd.), (Hydrographic Department, Admiralty, London) accompanied by Mr. R. C. Shawyer (Administrative Officer, Admiralty, London); Vice-Admiral A. S. Pinke (Retd.), (Royal Netherlands Navy, The Hague). The group of experts submitted a report on technical questions. In the light of their comments, the special rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1 and Corr.1) in which the report of the experts appears as an annex.

18. At its sixth session (1954), the special rapporteur submitted to the Commission a third report on the régime of the territorial sea (A/CN.4/77) in which he incorporated the changes suggested by the observations of the experts. He also took into account the comments received from Governments concerning the delimitation of the territorial sea between two adjacent States (A/CN.4/71 and Add.1 and 2).

19. At the sixth session, the Commission adopted a number of provisional articles concerning the régime of the territorial sea,<sup>7</sup> with a commentary, and invited Governments to furnish their observations on the articles.

20. The Secretary-General received comments from

eighteen Member States of the United Nations.<sup>8</sup> At its seventh session (1955), recognizing the cogency of many of the comments, the Commission amended several of the articles.<sup>9</sup> The Commission also examined certain questions held over in its report of 1954 concerning, *inter alia*, the breadth of the territorial sea, bays and the delimitation of the territorial sea at the mouths of rivers. It submitted these articles to Governments for their comments.

21. At its eighth session (1956) the Commission examined the replies from twenty-five Governments (A/CN.4/99 and Add.1 to 9) on the basis of a report by the special rapporteur (A/CN.4/97 and Add.2). It then drew up its final report on this subject, incorporating a number of changes deriving from the replies from Governments.

(c) LAW OF THE SEA

22. In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission has grouped together systematically all the rules it has adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea. In consequence of this rearrangement the Commission has had to make certain changes in the texts adopted.

23. The final report on the subject is in two parts, the first dealing with the territorial sea and the second with the high seas. The second part is divided into three sections: (1) general régime of the high seas; (2) contiguous zone; (3) continental shelf. Each article is accompanied by a commentary.

24. The Commission wishes to preface the text of the articles adopted, by certain observations as to the way in which it considers that practical effect should be given to these rules.

25. When the International Law Commission was set up, it was thought that the Commission's work might have two different aspects: on the one hand the "codification of international law" or, in the words of article 15 of the Commission's statute, "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine"; and on the other hand, the "progressive development of international law" or "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".

26. In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle

<sup>7</sup> Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), chapter IV.

<sup>8</sup> Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), annex.

<sup>9</sup> *Ibid.*, chapter III.

of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.

27. In these circumstances, in order to give effect to the project as a whole, it will be necessary to have recourse to conventional means.

28. The Commission therefore recommends, in conformity with article 23, paragraph 1 (*d*) of its statute, that the General Assembly should summon an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

29. The Commission is of the opinion that the conference should deal with the various parts of the law of the sea covered by the present report. Judging from its own experience, the Commission considers—and the comments of Governments have confirmed this view—that the various sections of the law of the sea hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside.

30. The Commission considers that such a conference has been adequately prepared for by the work the Commission has done. The fact that there have been fairly substantial differences of opinion on certain points should not be regarded as a reason for putting off such a conference. There has been widespread regret at the attitude of Governments after The Hague Codification Conference of 1930 in allowing the disagreement over the breadth of the territorial sea to dissuade them from any attempt at concluding a convention on the points on which agreement had been reached. The Commission expresses the hope that this mistake will not be repeated.

31. In recommending confirmation of the proposed rules as indicated in paragraph 28, the Commission has not had to concern itself with the question of the relationship between the proposed rules and existing conventions. The answer to that question must be found in the general rules of international law and the provisions drawn up by the proposed international conference.

32. The Commission also wishes to make two other observations, which apply to the whole draft:

1. The draft regulates the law of the sea in time of peace only.
2. The term "mile" means nautical mile (1,852 metres) reckoned at sixty to one degree of latitude.

33. The text of the articles concerning the law of the sea, as adopted<sup>10</sup> by the Commission, and the Com-

mission's commentary to the articles are reproduced below.

## II. Articles concerning the law of the sea

### PART I

#### TERRITORIAL SEA

##### SECTION I. GENERAL

###### *Juridical status of the territorial sea*

###### *Article 1*

1. The sovereignty of a State extends to a belt of sea adjacent to its coast, described as the territorial sea.
2. This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.

###### *Juridical status of the air space over the territorial sea and of its bed and subsoil*

###### *Article 2*

The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil.

##### SECTION II. LIMITS OF THE TERRITORIAL SEA

###### *Breadth of the territorial sea*

###### *Article 3*

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.
4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

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subject to prior notification or authorization. He recorded an abstention on those parts of article 47 (Right of hot pursuit) and the commentary thereto, that related to the question of hot pursuit from within a contiguous zone.

Mr. Krylov was not able to vote for articles 3 (Breadth of the territorial sea), 22 (Government ships operated for commercial purposes), article 39 (Piracy), 57 (Compulsory arbitration) and 73 (Compulsory jurisdiction).

Mr. Zourek, while having voted for the draft articles relating to the law of the sea as a whole, does not accept, for reasons indicated during the discussions, articles 3 (Breadth of the territorial sea), and 22 (Government ships operated for commercial purposes). He also maintained his reservations regarding article 7 (Bays). He remains opposed to articles 57, 59 and 73 relating to compulsory arbitration; he maintains his reservations regarding the definition of piracy in article 39 and does not accept the commentary relating to that article.

<sup>10</sup> Sir Gerald Fitzmaurice expressed his dissent from (1) the final paragraph of the commentary to article 3, in so far as it might suggest that the breadth of the territorial sea was not governed by any existing rule of international law; (2) article 24, in so far as it made the right of innocent passage of warships

*Normal baseline**Article 4*

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 large-scale charts officially recognized by the coastal State.

*Straight baselines**Article 5*

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, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal State shall give due publicity to the straight baselines drawn by it.

3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in article 15, through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic.

*Outer limit of the territorial sea**Article 6*

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

*Bays**Article 7*

1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked 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 mouth of that indentation. If a bay has more than one mouth, this semi-circle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

2. The waters within a bay, the coasts of which be-

long to a single State, shall be considered internal waters if the line drawn across the mouth does not exceed fifteen miles measured from the low-water line.

3. Where the mouth of a bay exceeds fifteen 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.

4. The foregoing provisions shall not apply to so-called "historic" bays or in any cases where the straight baseline system provided for in article 5 is applied.

*Ports**Article 8*

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.

*Roadsteads**Article 9*

Roadsteads which are normally used for the loading, unloading and anchoring of ships, 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.

*Islands**Article 10*

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.

*Drying rocks and drying shoals**Article 11*

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 measuring the extension of the territorial sea.

*Delimitation of the territorial sea in straits and off other opposite coasts**Article 12*

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, shall be fixed by agreement between those States. Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two States are measured.

2. If the distance between the two States exceeds the

extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal State. If, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal State to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.

#### *Delimitation of the territorial sea at the mouth of a river*

##### *Article 13*

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.

#### *Delimitation of the territorial sea of two adjacent States*

##### *Article 14*

1. The boundary of the territorial sea between two adjacent States shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest points on the baseline from which the breadth of the territorial sea of each country is measured.

2. The boundary line shall be marked on the officially recognized large-scale charts.

### SECTION III. RIGHT OF INNOCENT PASSAGE

#### Sub-section A. General rules

##### *Meaning of the right of innocent passage*

##### *Article 15*

1. Subject to the provisions of the present rules, ships 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 ship 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 only in so far as the same are incidental to ordinary navigation

or are rendered necessary by *force majeure* or by distress.

5. Submarines are required to navigate on the surface.

#### *Duties of the coastal State*

##### *Article 16*

1. The coastal State must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other States.

2. The coastal State is required to give due publicity to any dangers to navigation of which it has knowledge.

#### *Rights of protection of the coastal State*

##### *Article 17*

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 and other rules of international law.

2. In the case of ships 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 ships to those waters is subject.

3. The coastal State may suspend temporarily 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 ships through straits normally used for international navigation between two parts of the high seas.

#### *Duties of foreign ships during their passage*

##### *Article 18*

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.

#### Sub-section B. Merchant ships

##### *Charges to be levied upon foreign ships*

##### *Article 19*

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign ship passing through the territorial sea as payment for specific services rendered to the ship.

*Arrest on board a foreign ship**Article 20*

1. A coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the ship during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the ship; 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 ship or by the consul of the country whose flag the ship 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 ship lying in its territorial sea or passing through the territorial sea after leaving 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.

*Arrest of ships for the purpose of exercising civil jurisdiction**Article 21*

1. A coastal State may not arrest or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. A coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph 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 ship lying in the territorial sea or passing through the territorial sea after leaving the internal waters.

## Sub-section C. Government ships other than warships

*Governments ships operated for commercial purposes**Article 22*

The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes.

*Government ships operated for non-commercial purposes**Article 23*

The rules contained in sub-section A shall apply to government ships operated for non-commercial purposes.

## Sub-section D. Warships

*Passage**Article 24*

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 17 and 18.

*Non-observance of the regulations**Article 25*

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea 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.

## PART II

## HIGH SEAS

## SECTION I. GENERAL REGIME

*Definition of the high seas**Article 26*

1. The term "high seas" means all parts of the sea that are not included in the territorial sea, as contemplated by Part I, or in the internal waters of a State.

2. Waters within the baseline of the territorial sea are considered "internal waters".

*Freedom of the high seas**Article 27*

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. 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.

## Sub-section A. Navigation

*The right of navigation**Article 28*

Every State has the right to sail ships under its flag on the high seas.

*Nationality of ships**Article 29*

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships

have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

2. A merchant ship's right to fly the flag of a State is evidenced by documents issued by the authorities of the State of the flag.

#### *Status of ships*

##### *Article 30*

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

#### *Ships sailing under two flags*

##### *Article 31*

A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

#### *Immunity of warships*

##### *Article 32*

1. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

#### *Immunity of other government ships*

##### *Article 33*

For all purposes connected with the exercise of powers on the high seas by States other than the flag State, ships owned or operated by a State and used only on government service, whether commercial or non-commercial, shall be assimilated to and shall have the same immunity as warships.

#### *Safety of navigation*

##### *Article 34*

1. Every State is required to issue for ships under its jurisdiction regulations to ensure safety at sea with regard *inter alia* to:

(a) The use of signals, the maintenance of communications and the prevention of collisions;

(b) The crew which must be adequate to the needs of the ship and enjoy reasonable labour conditions;

(c) The construction, equipment and seaworthiness of the ship.

2. In issuing such regulations, each State is required to observe internationally accepted standards. It shall take the necessary measures to secure observance of the regulations.

#### *Penal jurisdiction in matters of collision*

##### *Article 35*

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which the accused person is a national.

2. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

#### *Duty to render assistance*

##### *Article 36*

Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

#### *Slave trade*

##### *Article 37*

Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its colours, shall *ipso facto* be free.

#### *Piracy*

##### *Article 38*

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

##### *Article 39*

Piracy consists in any of the following acts:

(1) Any illegal acts of violence, detention or any

act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or against persons or property on board such a ship;

(b) Against a ship, persons or property in a place 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 making it a pirate ship or aircraft;

(3) Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

#### *Article 40*

The acts of piracy, as defined in article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

#### *Article 41*

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

#### *Article 42*

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 the national character was originally derived.

#### *Article 43*

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

#### *Article 44*

Where the seizure of a ship or aircraft on suspicion of piracy has been affected 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 loss or damage caused by the seizure.

#### *Article 45*

A seizure on account of piracy may only be carried out by warships or military aircraft.

### *Right of visit*

#### *Article 46*

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade, the ship is engaged in that trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship 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 ship's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

### *Right of hot pursuit*

#### *Article 47*

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing State, and may only be continued outside the territorial sea if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. If the foreign ship is within a contiguous zone, as defined in article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like means, that the ship 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 pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself.

6. The release of a ship 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, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

### *Pollution of the high seas*

#### *Article 48*

1. Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

2. Every State shall draw up regulations to prevent pollution of the seas from the dumping of radioactive waste.

3. All States shall co-operate in drawing up regulations with a view to the prevention of pollution of the seas or air space above, resulting from experiments or activities with radioactive materials or other harmful agents.

### Sub-section B. Fishing

#### *Right to fish*

#### *Article 49*

All States have the right for their nationals 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.

### *Conservation of the living resources of the high seas*

#### *Article 50*

As employed in the present articles, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

#### *Article 51*

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 shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

#### *Article 52*

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

#### *Article 53*

1. If, subsequent to the adoption of the measures referred to in articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States 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 contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

#### *Article 54*

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State 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.

3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

#### *Article 55*

1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect 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 previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an 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 contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

#### *Article 56*

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent 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 contemplated by article 57.

#### *Article 57*

1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the State or States on the one side of the dispute, and two members shall be named by the State or States contending to the contrary, but only one of the members nominated by each side may be a national of a State on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute. Failing agreement they shall, upon the request of any State party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from amongst well qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

#### *Article 58*

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

#### *Article 59*

The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

#### *Fisheries conducted by means of equipment embedded in the floor of the sea*

#### *Article 60*

The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals. Such regulations will not, however, affect the general status of the areas as high seas.

#### Sub-section C. Submarine cables and pipelines

#### *Article 61*

1. All States shall be entitled to lay telegraph, telephone or high-voltage power 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 such cables or pipelines.

#### *Article 62*

Every State shall take the necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine high-voltage power cable or pipeline, 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 ships, after having taken all necessary precautions to avoid such break or injury.

*Article 63*

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.

*Article 64*

Every State shall regulate trawling so as to ensure that all the fishing gear used shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

*Article 65*

Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

SECTION II. CONTIGUOUS ZONE

*Article 66*

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

SECTION III. CONTINENTAL SHELF

*Article 67*

For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

*Article 68*

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

*Article 69*

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

*Article 70*

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 on the continental shelf.

*Article 71*

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

*Article 72*

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each country is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured.

*Article 73*

Any disputes that may arise between States concerning the interpretation or application of articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

### III. Commentary to the articles concerning the law of the sea

#### PART I

#### TERRITORIAL SEA

#### SECTION I. GENERAL

##### *Juridical status of the territorial sea*

#### ARTICLE 1

1. The sovereignty of a State extends to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.

##### *Commentary*

(1) Paragraph 1 brings out the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies from Governments in connexion with The Hague Codification Conference of 1930 and the report of the Conference's Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. It is also the principle underlying a number of multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat the territorial sea in the same way as other parts of State territory.

(2) The Commission preferred the term "territorial sea" to "territorial waters". It was of the opinion that the term "territorial waters" might lead to confusion, since it is used to describe both internal waters only, and internal waters and the territorial sea combined. For the same reason, the Codification Conference also expressed a preference for the term "territorial sea". Although not yet universally accepted, this term is becoming more and more prevalent.

(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.

(4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles.

(5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted

to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.

##### *Juridical status of the air space over the territorial sea and of its bed and subsoil*

#### ARTICLE 2

The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil.

##### *Commentary*

This article is taken, except for purely stylistic changes, from the regulations proposed by the 1930 Codification Conference. Since the present draft deals solely with the sea, the Commission did not study the conditions under which sovereignty over the air space, seabed and subsoil is exercised.

#### SECTION II. LIMITS OF THE TERRITORIAL SEA

##### *Breadth of the territorial sea*

#### ARTICLE 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

##### *Commentary*

(1) At its seventh session the Commission had adopted certain guiding principles concerning the limits of the territorial sea, but before drafting the final text of an article on this subject, it had wished to see the comments of Governments.

(2) First of all, the Commission had recognized that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles. In the opinion of the Commission, that was an incontrovertible fact.

(3) Next the Commission had stated that international law did not justify an extension of the territorial sea beyond twelve miles. In its opinion, such an extension infringed the principle of the freedom of the seas, and was therefore contrary to international law.

(4) Finally the Commission had stated that it took no decision as to the breadth of the territorial sea up to 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 a number of important maritime States, it should, in the absence of any other rule of equal authority, be regarded as recognized by international law and binding on all States. That view was not supported by the majority of the Commission; at its seventh session, however, the Commission did not succeed in reaching agreement on any other limit. The extension by a State of its territorial sea to a breadth of between three and twelve miles was not characterized by the Commission as a breach 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 recognized it tacitly or by treaty, or was a party to a judicial or arbitral decision recognizing the extension. A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes* by any State, if based on historic rights. 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.

(5) At its eighth session, the Commission resumed its study of this problem in the light of the comments by Governments. Those comments showed a wide diversity of opinion, and the same diversity was noted within the Commission. Several proposals were made; they are referred to below in the order in which they were put to the vote. Some members were of the opinion that it was for each coastal State, in the exercise of its sovereign powers, to fix the breadth of its territorial sea. They considered that in all cases where the delimitation of the territorial sea was justified by the real needs of the coastal State, the breadth of the territorial sea was in conformity with international law; this would cover the case of those States which had fixed the breadth at between three and twelve miles. Another opinion was that the Commission should recognize that international practice was not uniform as regards limitation of the territorial sea to three miles, but would not authorize an extension of the territorial sea beyond twelve miles. On the other hand every State would have the right to extend its jurisdiction up to twelve miles. A third opinion was that the Commission should recognize that every coastal State was entitled to a territorial sea of a breadth of at least three, but not exceeding twelve, miles. If, within those limits, the breadth was not determined by long usage, it should not exceed what was necessary for satisfying the justifiable interests of the State, taking into account also the interests of the other States in maintaining the freedom of the high seas and the breadth generally applied in the region. In case of a dispute, the question should, at the request of either of the parties, be referred to the International Court of Justice. A fourth opinion was reflected in a proposal to state that the breadth of the territorial sea could be determined by the coastal State in accordance with its economic and strategic needs within the limits of three and twelve miles, subject to recognition by States maintaining a narrower belt. According to a fifth opinion and proposal, the breadth of the territorial sea would be three miles, but a greater breadth should be recognized if

based on customary law. Furthermore, any State might fix the breadth of its territorial sea at a higher figure than three miles, but such an extension could not be claimed against States which had not recognized it or had not adopted an equal or greater breadth. In no case could the breadth of the territorial sea exceed twelve miles.

(6) None of these proposals managed to secure a majority in the Commission, which, while recognizing that it differs in form from the other articles, finally accepted, by a majority vote, the text included in this draft as article 3.

(7) The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It States that international law does not permit that limit to be extended beyond twelve miles. As regards the right to fix the limit between three and twelve miles, the Commission was obliged to note that international practice was far from uniform. Since several States have established a breadth of between three and twelve miles, while others are not prepared to recognize such extensions, the Commission was unable to take a decision on the subject, and expressed the opinion that the question should be decided by an international conference of plenipotentiaries.

(8) It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas. On the other hand, the Commission did not succeed in fixing the limit between three and twelve miles.

(9) The Commission considered the possibility of adopting a rule that all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of the International Court of Justice. The majority of the Commission, however, were unwilling to ask the Court to undertake the settlement of disputes on a subject regarding which the international community had not yet succeeded in formulating a rule of law. It did not wish to delegate an essentially legislative function to a judicial organ which, moreover, cannot render decisions binding on States other than the parties. For those reasons it considered that the question should be referred to the proposed conference.

#### *Normal baseline*

##### ARTICLE 4

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 large-scale charts officially recognized by the coastal State.

#### *Commentary*

(1) The Commission was of the opinion that, according to the international law in force, the extent of the territorial sea is measured either from the low-water line along the coast, or, in the circumstances envisaged

in article 5, from straight baselines independent of the low-water mark. This is how the Commission interprets the judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway.<sup>11</sup>

(2) The traditional expression "low-water mark" may have different meanings; there is no uniform standard by which States in practice determine this line. The Commission considers that it is permissible to adopt as the base line the low-water mark as indicated on large-scale charts officially recognized by the coastal State. The Commission is of the opinion that the omission of detailed provisions such as were prepared by the 1930 Codification Conference is hardly likely to induce Governments to shift the low-water lines on their charts unreasonably.

### *Straight baselines*

#### ARTICLE 5

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, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals.

2. The coastal State shall give due publicity to the straight baselines drawn by it.

3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in article 15, through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic.

### *Commentary*

(1) The International Court of Justice, in its decision regarding the Fisheries Case between the United Kingdom and Norway, considered that where the coast is deeply indented or cut into, or where it is bordered by an insular formation such as the Skjaergaard in Norway, the baseline becomes independent of the low-water mark and can only be determined by means of a geometric construction. The Court said:

"[In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coastline to be followed in all its sinuosities. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such

a rugged coast; the rule would disappear under the exceptions. Such a coast, viewed as a whole, calls for the application of a different method; that is, the method of base-lines which, within reasonable limits, may depart from the physical line of the coast] . . .

"The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight baselines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters."<sup>12</sup>

(2) The Commission interpreted the Court's judgement, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; it accordingly drafted the article on the basis of this judgement. It felt, however, that certain rules advocated by the group of experts who met at The Hague in 1953 (see introduction to chapter II, paragraph 17 above) might serve to round off the criteria adopted by the Court. Consequently, at its sixth session, it inserted the following supplementary rules in paragraph 2 of the article:

"As a general rule, the maximum permissible length for a straight baseline shall be ten miles. Such baselines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight baselines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Baselines shall not be drawn to and from drying rocks and shoals."<sup>13</sup>

(3) Some Governments raised objections to this paragraph 2, arguing that the maximum length of ten miles for baselines 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 of the Commission pointed out that the Commission had drafted these provisions for application "as a general rule" and that it would always be possible to depart from them if special circumstances justified doing so. In the opinion of those members, the criteria laid down by the Court was not sufficiently precise for

<sup>12</sup> *Ibid.*, pp. 129 and 130. The passage within brackets is a translation, provided by the Registry of the International Court of Justice, for the authoritative French text of the judgement; it is inserted here instead of the corresponding passage reproduced in the I.C.J. Reports 1951, which is somewhat distorted by printing errors.

<sup>13</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*, p. 14.

<sup>11</sup> *International Court of Justice, Reports 1951*, p. 116.

general application. However, at its seventh session in 1955, after further study of the question the Commission decided, by a majority, that paragraph 2 should be deleted so as not to make the provisions of paragraph 1 too mechanical. Only the final sentence was kept and added to paragraph 1.

(4) At this same session, the Commission made a number of changes designed to bring the text even more closely into line with the Court's judgement in the above-mentioned Fisheries Case. In particular it inserted in the first sentence the words: "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".<sup>14</sup> Some Governments stated in their comments on the 1955 text that they could not support the insertion of "economic interests" in the first sentence of the article. In their opinion, this reference to economic interests was based on a misinterpretation of the Court's judgement. The interests taken into account in the judgement were considered solely in the light of the historical and geographical factors involved and should not constitute a justification in themselves. The application of the straight baseline system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines.

(5) Although this interpretation of the judgement was not supported by all the members, the great majority of the Commission endorsed this view at the eighth session, and the article was recast in that sense.

(6) The question arose whether in waters which become internal waters when the straight baseline system is applied the right of passage should not be granted in the same way as in the territorial sea. Stated in such general terms, this argument was not approved by the majority of the Commission. The Commission was, however, prepared to recognize that if a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right.

(7) Straight baselines may be drawn only between points situated on the territory of a single State. An agreement between two States under which such baselines were drawn along the coast and connecting points situated on the territories of different States, would not be enforceable against other States.

(8) Straight baselines may be drawn to islands situated in the immediate vicinity of the coast, but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. Otherwise the distance between the baselines and the coast might be extended more than is required to fulfil the purpose for which the straight baseline method

is applied, and, in addition, it would not be possible at high tide to sight the points of departure of the baselines.

### *Outer limit of the territorial sea*

#### ARTICLE 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

#### *Commentary*

(1) According to the committee of experts (see introduction to chapter II, paragraph 17 above), this method of determining the outer limit has already been in use for a long time. In the case of deeply indented coasts the line it gives departs from the line which follows the sinuosities of the coast. It is undeniable that the latter line would often be so tortuous as to be unusable for purposes of navigation.

(2) The line all the points of which are at a distance of T miles from the nearest point on the coast (T being the breadth of the territorial sea) may be obtained by means of a continuous series of arcs of circles drawn with a radius of T miles from all points on the coast line. The outer limit of the territorial sea is formed by the most seaward arcs. In the case of a rugged coast, this line, although undulating, will be less of a zigzag than if it followed all the sinuosities of the coast, because circles drawn from those points on the coast where it is most deeply indented will not usually affect the outer limit of the seaward arcs. In the case of a straight coast, or if the straight baseline method is followed, the arcs of circles method produces the same result as the strictly parallel line.

(3) The Commission considers that the arcs of circles method is to be recommended because it is likely to facilitate navigation. In any case, the Commission feels that States should be free to use this method without running the risk of being charged with a breach of international law on the ground that the line does not follow all the sinuosities of the coast.

#### *Bays*

#### ARTICLE 7

1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to certain land-locked 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 mouth of that indentation. If a bay has more than one mouth, this semi-circle shall be drawn on a line as long as the sum total of the length of the different mouths. Islands within a bay shall be included as if they were part of the water area of the bay.

2. 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 mouth does not exceed fifteen miles measured from the low-water line.

<sup>14</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934), p. 17.*

3. Where the mouth of a bay exceeds fifteen 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.

4. The foregoing provisions shall not apply to so-called "historic" bays, or in any cases where the straight baseline system provided for in article 5 is applied.

#### *Commentary*

(1) Paragraph 1, which is taken from the report of the committee of experts mentioned above, lays down the conditions that must be satisfied by an indentation or curve in order 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 and which the International Court of Justice again pointed out in its judgement in the Fisheries Case. Such an explanation was necessary in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rules for bays.

(2) If, as a result of the presence of islands, an indentation whose features as a "bay" have to be established has more than one mouth, the total length of the lines drawn across all the different mouths will be regarded as the width of the bay. Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. In such a case an indentation which, if it had no islands at its mouth, would not fulfil the necessary conditions, is to be recognized as a bay. Nevertheless, islands at the mouth of a bay cannot be considered as "closing" the bay if the ordinary sea route passes between them and the coast.

(3) The Commission discussed at length the question of the conditions under which the waters of a bay can be regarded as internal waters. The majority considered that it was not sufficient to lay down that the waters must be closely linked to the land domain by reason of the depth of penetration of the bay into the mainland, or otherwise by its configuration, or by reason of the utility the bay might have from the point of view of the economic needs of the country. These criteria lack legal precision.

(4) The majority of 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 necessarily be vague, would not suffice. It considered, however, that the limit should be more than ten miles. Although not prepared to establish a direct relationship between the length of the closing line and the breadth 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 breadth of the territorial sea by lengthening the closing line of bays. As an experiment the Commission suggested,

at its seventh session, a distance of twenty-five miles; thus, the length of the closing line would be slightly more than twice the permissible maximum breadth of the territorial sea as laid down in paragraph 2 of article 3. Since, firstly, historic bays, some of which are wider than twenty-five miles, would not come under the article and since, secondly, the provision contained in paragraph 1 of the article concerning the characteristics of a bay was calculated to prevent abuse, it seemed not unlikely that some extension of the closing line would be more readily accepted than an extension of the breadth of the territorial sea in general. At the seventh session, the majority of the Commission rejected a proposal that the length of the closing line should be set at twice the breadth of the territorial sea, primarily because it considered such a delimitation unacceptable to States that have adopted a breadth of three or four miles for their territorial sea. At its eighth session the Commission again examined this question in the light of replies from Governments. The proposal to extend the closing line to twenty-five miles had found little support; a number of Governments stated that, in their view, such an extension was excessive. By a majority, the Commission decided to reduce the twenty-five miles figure, proposed in 1955, to fifteen miles. While appreciating that a line of ten miles had been recognized by several Governments and established by international conventions, the Commission took account of the fact that the origin of the ten-mile line dates back to a time when the breadth of the territorial sea was much more commonly fixed at three miles than it is now. In view of the tendency to increase the breadth of the territorial sea, the majority in the Commission thought that an extension of the closing line to fifteen miles would be justified and sufficient.

(5) If the mouth of a bay is more than fifteen miles wide, the closing line will be drawn within the bay at the point nearest to the sea where the width does not exceed that distance. Where more than one line of fifteen miles in length can be drawn, the closing line will be so selected as to enclose the maximum water area within the bay. The Commission believes that other methods proposed for drawing this line will give rise to uncertainties that will be avoided by adopting the above method, which is that proposed by the above-mentioned committee of experts.

(6) Paragraph 4 states that the foregoing provisions shall not apply to "historic" bays.

(7) The Commission felt bound to propose only rules applicable to bays the coasts of which belong to a single State. As regards other bays, the Commission has not sufficient data at its disposal concerning the number of cases involved or the regulations at present applicable to them.

#### *Ports*

#### ARTICLE 8

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.

*Commentary*

(1) The waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State. No rules for ports have been included in this draft, which is exclusively concerned with the territorial sea and the high seas.

(2) Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works.

(3) Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article could still be applied or whether it would not be necessary, in such cases, to adopt the system of safety zones provided for in article 71 for installations on the continental shelf. As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion.

*Roadsteads*

## ARTICLE 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, 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.

*Commentary*

In substance, this article is based on the 1930 Codification Conference text. With some dissenting opinions, the Commission considered that roadsteads situated outside the territorial sea should not be treated as internal waters. While appreciating that the coastal State must be able to exercise special supervisory and police rights in such roadsteads, the Commission thought it would be going too far to treat them as internal waters, since innocent passage through them might then be prohibited. It considered that the rights of the coastal State were sufficiently safeguarded by the recognition of such waters as territorial sea.

*Islands*

## ARTICLE 10

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.

*Commentary*

(1) This article applies both to islands situated in the high seas and to islands situated in the territorial sea. In the case of the latter, their own territorial sea will partly coincide with the territorial sea of the mainland. The presence of the island will create a bulge in the outer limit of the territorial sea of the mainland. The same idea can be expressed in the following form: islands, wholly or partly situated in the territorial sea, shall be taken into consideration in determining the outer limit of the territorial sea.

(2) An island is understood to be any area of land surrounded by water which, except in abnormal circumstances, is permanently above high-water mark. Consequently, the following are not considered islands and have no territorial sea:

(i) Elevations which are above water at low tide only. Even if an installation is built on such an elevation and is itself permanently above water—a lighthouse, for example—the elevation is not an “island” as understood in this article;

(ii) Technical installations built on the sea-bed, such as installations used for the exploitation of the continental shelf (see article 71). The Commission nevertheless proposed that a safety zone around such installations should be recognized in view of their extreme vulnerability. It does not consider that a similar measure is required in the case of lighthouses.

(3) 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 was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.

(4) The Commission points out, for purposes of information, that article 5 may be applicable to groups of islands lying off the coast.

*Drying rocks and drying shoals*

## ARTICLE 11

Drying rock 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 measuring the extension of the territorial sea.

*Commentary*

(1) Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own.

(2) It was suggested that the terms of article 5 (under which straight baselines are not drawn to or from drying rocks and shoals) might be incompatible with the present article. The Commission sees no incompatibility. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks and shoals are treated as islands in every respect. In the comment to article 5 it has already been pointed out that if they were so treated, then, where straight baselines are drawn, and

particularly in the case of shallow waters off the coast, the distance between the baseline and the coast might be far greater than that required to fulfil the purpose for which the straight baseline method was designed.

*Delimitation of the territorial sea in straits and off other opposite coasts*

ARTICLE 12

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, shall be fixed by agreement between those States. Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two States are measured.

2. If the distance between the two States exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal State. If, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal State to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.

*Commentary*

(1) The 1955 draft contained an article (12) entitled "Delimitation of the territorial sea in straits", and another (14) entitled "Delimitation of the territorial sea of two States, the coasts of which are opposite each other". It was correctly pointed out that the text could be simplified by combining those two articles, since the delimitation of the territorial sea in straits did not present any different problem from that of the opposite coasts of two States generally. It is only the right of passage in straits that calls for special attention. The Commission has dealt with this in article 17, paragraph 4.

(2) The delimitation in case of disagreement between those States, of the territorial seas between two States the coasts of which are opposite each other, was one of the main tasks of the committee of experts which met at The Hague in April 1953 at the Commission's request. The Commission approved of the experts' proposals (A/CN.4/61/Add.1) and took them as a basis for this article. It considered, however, that it would be wrong to go into too much detail and that the rule should be fairly flexible. Consequently, it did not adopt certain points of detail laid down by the experts. Although the Commission noted that special circumstances would

probably necessitate frequent departures from the mathematical median line, it thought it advisable to adopt, as a general rule, the system of the median line as a basis for delimitation.

(3) Under the term "baselines" at the end of paragraph 1 the Commission includes both normal baselines and those applied under any straight baseline system adopted for the coast in question.

(4) The second paragraph deals with cases where parts of the high sea may be surrounded by the territorial seas of the two States. It was thought that there was no valid reason why these enclosed portions of sea—which may be quite large in area—should not be treated as high seas. If such areas are very small, however, their assimilation to the territorial sea may be justified on practical grounds. Such exceptions will be limited to enclaves of sea not more than two miles across, this being the width fixed by the Commission following the example of the 1930 Codification Conference, though it is not claimed that there is any existing rule of positive law to this effect.

(5) If both shores belong to the same State, the question of delimitation of the territorial sea can only arise if the distance between the two shores is more than twice the breadth of the territorial sea. The first sentence of paragraph 2 will then apply. In this case the question of enclaves may also arise. The enclave may then be assimilated to the territorial sea if it is not more than two miles across.

(6) The Commission is aware that the rules it has formulated in paragraphs 2 and 3 cannot be applied in all circumstances. Cases may arise in which, either by reason of differences in customary law or by reason of international conventions, it is necessary to apply a different rule to the sea between the two coasts. It is not impossible that the area of sea between two coasts of the same State may have the character of an internal sea subject to special rules. The Commission cannot undertake to study these special cases; it must confine itself to stating the principles which, in general, could serve as a point of departure for determining the legal status of the areas in question.

(7) The rule established by the present article does not provide any solution for cases in which the States opposite each other have adopted different breadths for their territorial seas. As long as no agreement is reached on the breadth of the territorial sea, disputes of this kind cannot be settled on the basis of legal rules; they must be settled by agreement between the parties.

*Delimitation of the territorial sea at the mouth of a river*

ARTICLE 13

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.

*Commentary*

The substance of this article is taken from the Report

of Sub-Committee II of the Second Committee of The Hague Conference of 1930 for the Codification of International Law. So far as paragraph 2 is concerned, the Commission has not the necessary geographical data at its disposal to decide whether this provision is applicable to all existing estuaries.

*Delimitation of the territorial sea of two adjacent States*

ARTICLE 14

1. The boundary of the territorial sea between two adjacent States shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest points on the baseline from which the breadth of the territorial sea of each country is measured.

2. The boundary line shall be marked on the officially recognized large-scale charts.

*Commentary*

(1) The situation described in this article can be regulated in various ways.

(2) First, it would be possible to consider extending the land frontier out to sea as far as the outer limit of the territorial sea. This line can only be used if the land frontier meets the coast at a right angle; if the angle is acute, the result is impracticable.

(3) A second solution would be to draw a line at right angles to the coast at the point where the land frontier reaches the sea. This method is open to criticism if the coastline curves in the vicinity of the point in question; for in that case the line drawn at right angles may meet the coast again at another point.

(4) A third solution would be to adopt as the demarcation line the geographical parallel passing through the point at which the land frontier meets the coast. This solution is not applicable in all cases either.

5) A fourth solution would be to draw a line at right angles to the general direction of the coastline. The Norwegian and Swedish Governments drew attention to the arbitral award of 23 October 1909 in a dispute between Norway and Sweden, of which the statement of reasons contains the following sentence:

“The delimitation shall be made by tracing a line perpendicularly to the general direction of the coast.” (A/CN.4/71, p. 14 and A/CN.4/71/Add.1, p. 3.)

(6) The group of experts, mentioned above, was unable to support this last method of drawing the boundary line. It was of opinion that it was often impracticable to establish any “general direction of the coast”; the result would depend on the “scale of the charts used for the purpose and . . . how much coast shall be utilized in attempting to determine any general direction whatever”. Consequently, since the method of drawing a line at right angles to the general direction of the coastline is too vague for purposes of law, the best solution seems to be the median line which the group of experts suggested. Such a line should be drawn according to the principle of equidistance from the

respective coastlines. Where the coast is straight, a line drawn according to this method will coincide with one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account, while avoiding the difficulties of the problem of the general direction of the coast.

(7) The Commission agreed with the view taken by the group of experts. As in the case dealt with by the preceding article, however, it considers that the rule should be very flexibly applied.

SECTION III. RIGHT OF INNOCENT PASSAGE

(1) This section contains four sub-sections: sub-section A. General rules; sub-section B. Merchant ships; sub-section C. Government ships other than warships; sub-section D. Warships. The general rules laid down in sub-section A are fully applicable to merchant ships (sub-section B). They apply to the ships referred to in sub-sections C and D subject to the reservations stated there.

(2) The Commission wishes to point out that this section, like the whole of these regulations, is applicable only in time of peace. No provision of this section affects the rights and obligations of Members of the United Nations Organization under the Charter.

SUB-SECTION A. GENERAL RULES

*Meaning of the right of innocent passage*

ARTICLE 15

1. Subject to the provisions of the present rules, ships 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 a ship 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 only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

5. Submarines are required to navigate on the surface.

*Commentary*

(1) This article lays down that ships of all States, including fishing boats, have the right of innocent passage through the territorial sea. It reiterates a principle recognized by international law and confirmed by the 1930 Codification Conference.

(2) According to paragraph 2 the general rule recommended for ships passing through the territorial sea is equally applicable to ships proceeding to or from ports. In the latter cases, however, certain restrictions are necessary: these are mentioned in article 17, para-

graph 2, article 20, paragraph 2 and article 21, paragraph 3.

(3) For the right in question to be claimable, passage must in fact be innocent. It will not be innocent if the ship commits any of the acts referred to in paragraph 3. This paragraph follows the lines of that included in article 5 of the rules proposed by the Second Committee of the 1930 Codification Conference. The Commission considered that "fiscal interests of the State"—a term which, according to the 1930 comments, should be interpreted very broadly as including all matters relating to customs and to import, export and transit prohibitions—could be regarded as being included in the more general expression used in paragraph 3. This expression covers, *inter alia*, questions relating to customs and health as well as the interests enumerated in the comment to article 18.

(4) Paragraph 3 contains only general criteria and does not go into details. There was therefore no need to mention the case—to which attention has been specifically drawn—of ships using the territorial sea for the express purpose of defeating import and export controls and contravening the customs regulations of the coastal State ("hovering ships"). The Commission considers, however, that passage undertaken for this purpose cannot be regarded as innocent.

(5) Under the 1955 draft, the provision in paragraph 5 was inserted in the sub-section on warships. It has been transferred to the general sub-section in order to make it equally applicable to commercial submarines, if these ships are ever re-introduced.

#### *Duties of the coastal State*

##### ARTICLE 16

1. The coastal State must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other States.

2. The coastal State is required to give due publicity to any dangers to navigation of which it has knowledge.

#### *Commentary*

(1) This article confirms the principles which were upheld by the International Court of Justice in its judgement of 9 April 1949 in the Corfu Channel Case between the United Kingdom and Albania.

(2) If they hamper innocent passage, installations intended for the exploitation of the sea-bed and subsoil of the territorial sea must not be sited in narrow channels or in sea lanes forming part of the territorial sea and essential for international navigation.

#### *Rights of protection of the coastal State*

##### ARTICLE 17

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 and other rules of international law.

2. In the case of ships 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 ships to those waters is subject.

3. The coastal State may suspend temporarily 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 ships through straits normally used for international navigation between two parts of the high seas.

#### *Commentary*

(1) This article recognizes the right of the coastal State to verify the innocent character of the passage, if need should arise, and to take the necessary steps 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 and other rules of international law. The Second Committee of the 1930 Codification Conference used the expression "public order" in this context. The Commission prefers to avoid this expression, which is open to various interpretations.

(2) In exceptional cases a temporary suspension of the right of passage is permissible if compelling reasons connected with general security require it. Although it is arguable that this power was in any case implied in paragraph 1 of the article, the Commission considered it desirable to mention it expressly in a third paragraph which specifies that only a temporary suspension in definite areas is permissible. The Commission is of the opinion that the article states the international law in force.

(3) The Commission also included a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas. The expression "straits normally used for international navigation between two parts of the high seas" was suggested by the decision of the International Court of Justice in the Corfu Channel Case. 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".

(4) The question was asked what would be the legal position of straits forming part of the territorial sea of one or more States and constituting the sole means of access to a port of another State. The Commission considers that this case could be assimilated to that of a bay whose inner part and entrance from the high seas belong to different States. As the Commission felt bound to confine itself to proposing rules applicable to bays, wholly belonging to a single coastal State, it also reserved consideration of the above-mentioned case.

#### *Duties of foreign ships during their passage*

##### ARTICLE 18

Foreign ships exercising the right of passage shall

comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.

#### *Commentary*

(1) International law has long recognized the right of the coastal State to enact, in the general interest of navigation, special regulations applicable to ships exercising the right of passage through the territorial sea.

(2) Ships entering the territorial sea of a foreign State remain under the jurisdiction of the flag State. Nevertheless, the fact that they are in waters under the sovereignty of another State imposes some limitation on the exclusive jurisdiction of the flag State. Such ships must comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation. At its seventh session, the Commission thought it useful to give the following examples:

- (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 ships;
- (c) The conservation of the living resources of the sea;
- (d) The rights of fishing and hunting and analogous rights belonging to the coastal State;
- (e) Any hydrographical survey.

(3) At the eighth session, a proposal was made for the addition of the following to this list: use of the national flag, use of the route prescribed for international navigation and observance of rules relating to security and of customs and health regulations. The Commission considered that such a list, which could not be exhaustive, would be somewhat arbitrary and preferred to mention these cases in the commentary without including them in the body of the article.

(4) The corresponding article drafted by the Second Committee of the 1930 Conference contained a second paragraph reading:

“The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.”

(5) By omitting this paragraph, the Commission did not mean to imply that it does not contain a general, established rule of international law. The Commission considers, however, that cases may occur in which special rights granted by one State to another given State may be fully justified by the special relationship between the two States, and that in the absence of treaty provisions to the contrary, the grant of such rights cannot be invoked by other States as a ground for claiming similar treatment. The Commission prefers, therefore,

that this question should continue to be governed by the general rules of law.

#### SUB-SECTION B. MERCHANT SHIPS

##### *Charges to be levied upon foreign ships*

#### ARTICLE 19

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may only be levied upon a foreign ship passing through the territorial sea as payment for specific services rendered to the ship.

#### *Commentary*

(1) The purpose of this article is to bar any charges in respect of general services to shipping (light or buoyage dues, etc.) and to allow payment to be demanded only for special services rendered to the ship (pilotage, towage, etc.).

(2) It is, of course, understood that special rights in this connexion may be recognized in international conventions.

(3) As a general rule, these charges should be levied on terms of equality. For reasons analogous to those given for the omission from article 18 of the 1930 paragraph mentioned at the end of the comment on that article, the Commission did not include in article 19 the words “these charges shall be levied without discrimination” which occurred in the corresponding article drafted by the 1930 Conference.

(4) A proposal was made that the following clause be added to paragraph 2: “The right of the coastal State to demand and obtain information on the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the levying of charges is reserved.” The Commission was unwilling to insert in the article a clause which, if injudiciously applied, might seriously interfere with the passage of ships. But the Commission has no wish to dispute the fact that, in certain circumstances, the coastal State may be entitled to ask for the above-mentioned information. Any unjustifiable interference with navigation must, however, be avoided.

##### *Arrest on board a foreign ship*

#### ARTICLE 20

1. A coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the ship during its passage, save only in the following cases:

- (a) If the consequences of the crime extend beyond the ship 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 ship or by the consul of the country whose flag the ship 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 ship lying in its territorial sea or passing through the territorial sea after leaving 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.

#### *Commentary*

(1) This article enumerates the cases in which the coastal State may stop a foreign ship passing through its territorial sea for the purpose of arresting persons or conducting an investigation in connexion with a criminal offence committed on board the ship during the said passage. In such a case a conflict of interests occurs; on the one hand, there are the interests of shipping, which should suffer as little interference as possible; on the other hand, there are the interests of the coastal State, which wishes to enforce its criminal law throughout its territory. The coastal State's authority to bring the offenders before its courts (if it can arrest them) remains undiminished, but its power to arrest persons on board ships which are merely passing through the territorial sea is limited to the cases enumerated in the article.

(2) The coastal State has no authority to stop a foreign ship passing through the territorial sea without entering internal waters merely because some person happens to be on board who is wanted by the judicial authorities of that State in connexion with some punishable act committed elsewhere than on board the ship. *A fortiori*, a request for extradition addressed to the coastal State by reason of an offence committed abroad cannot be considered a valid reason for stopping the ship.

(3) In the case of a ship lying in the territorial sea, the jurisdiction of the coastal State should be regulated by the State's own municipal law. Such jurisdiction is more extensive than in the case of ships which are simply passing through the territorial sea along the coast. This applies also to ships which have called at a port or left a navigable waterway in the coastal State; the fact that a ship has moored in a port and had contact with the land, taken on passengers, etc., increases the coastal State's powers in this respect. But the coastal State must always do its utmost to interfere as little as possible with navigation. The inconvenience caused to navigation by the stopping of a large liner outward bound in order to arrest a person alleged to have committed some minor offence ashore cannot be regarded as of less importance than the interest which the State may have in securing the arrest of the offender. Similarly, the judicial authorities of the coastal State should, as far as possible, refrain from arresting any of the officers or crew of the ship if their absence would make it impossible for the voyage to continue.

(4) Thus the proposed article does not attempt to solve conflicts of jurisdiction between the coastal State and the flag State in the matter of criminal law, nor does it in any way prejudice their respective rights. The Commission is fully aware of the desirability of codifying the law relating to these matters. It appreciates in particular that it would be useful to determine what court is competent to deal with any criminal proceedings arising out of col-

lisions in the territorial sea. Nevertheless, following the example set by the 1930 Conference, the Commission refrained from formulating specific rules on this subject, because it felt that in this very broad field certain limits must inevitably be set to its work. Another reason for the Commission's not dealing with the matter of collisions is the existence since 1952 of a convention on the subject, which has not yet been ratified by many States, namely the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions or Other Incidents of Navigation, signed at Brussels on 10 May 1952.

(5) The question was raised whether the coastal State is entitled to make an arrest when the consequences of the crime, although extending beyond the ship, are limited to the territory of the flag State. The Commission did not feel that this case warranted making an exception to the rule in sub-paragraph (a) of paragraph 1. It is obvious that, particularly in such cases, the coastal State must act very warily, but it may well be that sometimes in these cases the arrest would also be in the interests of the flag State; hence, it would not be justifiable to forbid the coastal State to intervene.

(6) An arrest for the purpose of suppressing illicit traffic in narcotic drugs may be justifiable, if the condition in sub-paragraph (a) is fulfilled.

#### *Arrest of ships for the purpose of exercising civil jurisdiction*

#### ARTICLE 21

1. A coastal State may not arrest or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. A coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph 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 ship lying in the territorial sea or passing through the territorial sea after leaving the internal waters.

#### *Commentary*

(1) The Commission followed a rule analogous to that adopted for the exercise of criminal jurisdiction. A ship which is only passing through the territorial sea without entering internal waters may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board; nor may the ship itself be arrested or seized except as a result of events occurring in the waters of the coastal State during the voyage in question, as for example, a collision, a salvage operation, etc., or in respect of obligations incurred for the purpose of the voyage.

(2) The article does not attempt to provide a general solution for conflicts of jurisdiction under private law

between the coastal State and the flag State. Questions of this kind will have to be settled in accordance with the general principles of private international law and cannot be dealt with by the Commission in this report. Hence, questions of competence with regard to liability under civil law for collisions in the territorial sea are not covered by this article.

(3) At its sixth session, the Commission had inserted in this article a provision concerning the coastal State's right to levy execution against, or to arrest for the purpose of civil proceedings, ships passing through the territorial sea. Certain Governments pointed out that there was a discrepancy between the rules adopted by the Commission and those of the Brussels Convention of 10 May 1952 for the Unification of Certain Rules relating to the Arrest of Sea-going Ships. This Convention gives a longer list of cases in which arrest is permitted than the Commission's 1954 draft, which had followed the example of The Hague Conference of 1930 for the Codification of International Law. At its seventh session, the Commission felt it should adopt the rules of the Brussels Convention, not only because unification is needed 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. For this reason the Commission attempted to bring the article into line with the provisions of the Brussels Convention.

(4) The new wording, however, did not satisfy a number of Governments. It was pointed out that to attempt to summarize the Convention in the draft articles by extracting brief passages from it would probably create even greater difficulties on account of the lack of uniformity which might arise between the terms of the summary inserted in the rules and the Convention itself, in view of the impossibility of dealing with the whole substance of the Convention in the rules. The Commission recognized the soundness of that comment. In addition, certain members pointed out that the Brussels Convention, which recognizes the right of arrest in many more cases than the Commission had done in its 1954 draft, affected innocent passage to what seemed an unjustifiable extent. Possibly the Brussels Convention, which regulated arrest within the full jurisdiction of the State, had been directed more to arrest in port than to arrest during passage through the territorial sea. The majority of the Commission were of opinion that the 1954 text should be restored. They did not feel it advisable to leave the question in abeyance, as certain members had suggested, for they considered that the proposed rules would then be marred by a gap detrimental to international navigation. Even admitting that the authors of the 1952 Brussels Convention had wished to increase the number of cases in which the coastal State is entitled to exercise its civil jurisdiction over foreign ships merely passing through the territorial sea without entering a port, the existence of different rules on this point could hardly be regarded as a bar to the adoption of the above-mentioned provision since the Brussels Convention would bind only the contracting parties in their mutual relations.

(5) If, on the other hand, a foreign vessel lies in the territorial sea or passes through it after leaving the inter-

nal waters, the coastal State has far wider powers. It is then entitled, in accordance with its laws, to levy execution against or to arrest the ship for the purpose of any civil proceedings.

#### SUB-SECTION C. GOVERNMENT SHIPS OTHER THAN WARSHIPS

##### *Government ships operated for commercial purposes*

#### ARTICLE 22

The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes.

##### *Commentary*

(1) The Commission followed the rules of the Brussels Convention of 1926 concerning the immunity of government ships. It considered that these rules followed the preponderant practice of States and it therefore formulated article 22 accordingly.

(2) Certain members felt unable to accept the rules of the Brussels Convention and opposed this article.

##### *Government ships operated for non-commercial purposes*

#### ARTICLE 23

The rules contained in sub-section A shall apply to government ships operated for non-commercial purposes.

##### *Commentary*

The question of the application of sub-section D to government ships operated for non-commercial purposes is left in abeyance. The Commission, not wishing on this occasion to settle in detail the status of this category of ships, left in abeyance the question whether they should be assimilated, entirely or in certain respects, to warships. In so doing, the Commission followed the example of The Hague Conference of 1930 for the Codification of International Law.

#### SUB-SECTION D. WARSHIPS

##### *Passage*

#### ARTICLE 24

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 17 and 18.

##### *Commentary*

(1) At its sixth session in 1954, the Commission took the view that passage should be granted to warships without prior authorization or notification. At its seventh session in 1955, after noting the comments of certain Governments and reviewing the question, the Commission felt obliged to amend this article 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 17 and 18. In certain parts of the territorial sea, or in certain special circumstances, the coastal State may, however, deem it necessary to limit the right of passage more strictly in the case of warships than in that of merchant ships. The 1955 article provides a clearer recognition of this right than the 1954 text.

(2) The Commission reconsidered this matter at its eighth session, in the light of the comments of certain Governments, which pointed out that in practice passage was effected without formality and without objection on the part of coastal States. The majority of the Commission, however, saw no reason to change its view. While it is true that a large number of States do not require previous authorization or notification, the Commission can only welcome this attitude, which displays a laudable respect for the principle of freedom of communications, but this does not mean that a State would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure. Since it admits that the passage of warships through the territorial sea of another State can be considered by that State as a threat to its security, and is aware that a number of States do require previous notification or authorization, the Commission is not in a position to dispute the right of States to take such a measure. But so long as a State has not enacted—and duly published—a restriction upon the right of passage of foreign warships through its territorial sea, such ships may pass through those waters without previous notification or authorization provided that they do not lie in them or put in at a port. In these latter cases previous authorization—except in cases of putting in through stress of weather—is always required. The Commission did not consider it necessary to insert an express stipulation to this effect since article 15, paragraph 4, applies equally to warships.

(3) The right of the coastal State to restrict passage is more limited in the case of passage through straits. The International Court of Justice in its judgement of 9 April 1949 in the Corfu Channel Case says:

“It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.”<sup>15</sup>

(4) The Commission relied on that judgement of the Court when inserting in the 1955 draft, a second paragraph worded as follows:

“It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas.”<sup>16</sup>

It was pointed out at the eighth session that this second

paragraph was unnecessary, as paragraph 4 of article 17, which forms part of sub-section A entitled “General Rules”, was applicable to warships. The majority of the Commission supported the view that the second paragraph of the article included in 1955 was not strictly necessary. In deleting this paragraph the Commission, in order to avoid any misunderstanding on the subject, nevertheless wishes to state that article 24, in conjunction with paragraph 4 of article 17, must be interpreted to mean that the coastal State may not interfere in any way with the innocent passage of warships through straits normally used for international navigation between two parts of the high seas; hence the coastal State may not make the passage of warships through such straits subject to any previous authorization or notification.

(5) The article does not affect the rights of States under a convention governing passage through the straits to which it refers.

### *Non-observance of the regulations*

#### ARTICLE 25

If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea 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.

#### *Commentary*

The article indicates the course to be followed by the coastal State in the event of failure to observe the regulations of the coastal State.

## PART II

### HIGH SEAS

#### SECTION I. GENERAL REGIME

##### *Definition of the high seas*

#### ARTICLE 26

1. The term “high seas” means all parts of the sea that are not included in the territorial sea, as contemplated by Part I, or in the internal waters of a State.

2. Waters within the baseline of the territorial sea are considered “internal waters”.

#### *Commentary*

(1) The waters of the sea belong either to the high seas or to the territorial sea or to internal waters. In that part of these articles which deals with the territorial sea, the Commission has attempted to define the external limits of the territorial sea and has indicated the baselines from which it should be measured. Waters within these baselines are internal waters, over which, subject to the provisions of international law limiting the rights of the State—particularly as regards ports and international waterways—the State exercises its sovereignty in the same way as over the land.

(2) Some large stretches of water, entirely surrounded by dry land, are known as “lakes”, others as “seas”. The latter constitute internal seas, to which the régime of

<sup>15</sup> *International Court of Justice, Reports, 1949*, p. 28.

<sup>16</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*, p. 22.

the high seas is not applicable. Where such stretches of water communicate with the high seas by a strait or arm of the sea, they are considered as "internal seas" if the coasts, including those of the waterway giving access to the high seas, belong to a single State. If that is not the case, they are considered as high seas. These rules may, however, be modified for historical reasons or by international arrangement.

### *Freedom of the high seas*

#### ARTICLE 27

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. 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.

#### *Commentary*

(1) The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject. No State may subject any part of the high seas to its sovereignty; hence no State may exercise jurisdiction over any such stretch of water. States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States. Freedom to fly over the high seas is expressly mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea; the Commission has, however, refrained from formulating rules on air navigation, since the task it set itself in the present phase of its work is confined to the codification and development of the law of the sea.

(2) 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, but it is aware that there are other freedoms, such as freedom to undertake scientific research on the high seas—a freedom limited only by the general principle stated in the third sentence of paragraph 1 of the commentary to the present article. The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf—a case dealt with separately in section III below—such exploitation had not yet assumed sufficient practical importance to justify special regulation.

(3) Nor did the Commission make any express pronouncement on the freedom to undertake nuclear weapon tests on the high seas. In this connexion the general principle enunciated in the third sentence of paragraph 1 of this commentary is applicable. In addition, the Commission draws attention to article 48, paragraphs 2 and 3, of these articles. The Commission did not, however, wish to prejudge the findings of the Scientific Committee set up under General Assembly resolution 913 (X) of 3 December 1955 to study the effects of atomic radiation.

(4) The term "submarine cables" applies not only to

telegraph and telephone cables, but also to high-voltage power cables.

(5) 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. These rules concern particularly:

- (i) The right of States to exercise their sovereignty on board ships flying their flag;
  - (ii) The exercise of certain policing rights;
  - (iii) The rights of States relative to the conservation of the living resources of the high seas;
  - (iv) The institution by a coastal State of a zone contiguous to its coast for the purpose of exercising certain well-defined rights;
  - (v) The rights of coastal States with regard to the continental shelf.
- (6) These matters form the subject of the present articles.

#### SUB-SECTION A. NAVIGATION

##### *The right of navigation*

#### ARTICLE 28

Every State has the right to sail ships under its flag on the high seas.

#### *Commentary*

See commentaries to articles 29 and 30.

##### *Nationality of ships*

#### ARTICLE 29

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.

2. A merchant ship's right to fly the flag of a State is evidenced by documents issued by the authorities of the State of the flag.

#### *Commentary*

(1) Each State lays down the conditions on which 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 grant of nationality to persons, national legislation on the subject must not depart 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.

(2) On this principle, the Institute of International Law, as long ago as 1896, adopted certain rules governing permission to fly the flag. At its seventh session the Commission deemed these rules acceptable in slightly amended form, while realizing that, if the practical ends in view were to be achieved, States would have to work out more detailed provisions when incorporating these rules in their legislation.

(3) At its eighth session, the Commission, after examining the comments of Governments, felt obliged to abandon this viewpoint. It came to the conclusion that the criteria it had formulated could not fulfil the aim it had set itself. Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission. Regulations of this kind would be bound to leave a large number of problems unsolved and could not prevent abuse. The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission preferred a vague criterion to no criterion at all. While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new State. The jurisdiction of the State over ships, and the control it should exercise in conformity with article 34 of these articles, can only be effective where there exists in fact a relationship between the State and the ship other than mere registration or the mere grant of a certificate of registry.

(4) Paragraph 2 has been added so that the nationality can be proved in case of doubt.

(5) The question was raised whether the United Nations, and possibly other international organizations also, should be recognized as having the right to sail ships exclusively under their own flags. The Commission fully recognized the importance of this question. Member States will obviously respect the protection exercised by the United Nations over a ship in cases where the competent organ has authorized the ship to fly the United Nations flag. But it must not be forgotten that the legal system of the flag State applies to the ship authorized to fly the flag. In this respect, the flag of the United Nations or of another international organization cannot be assimilated to the flag of a State. The Commission had instructed the special rapporteur to submit a report on the subject. In his report (A/CN.4/103) the special rapporteur proposes that consideration be given to the following measures:

(a) The Members of the United Nations would recognize a special United Nations registration entitling the ship to fly the United Nations flag and to special protection by the United Nations;

(b) The Secretary-General of the United Nations would be authorized to conclude, as occasion may require, a special agreement with one more Member States by which such Member States would allow the ships concerned to fly their flag in combination with the United Nations flag;

(c) The Members of the United Nations would undertake, in a general agreement, to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in subparagraph (b), has been concluded, and to assimilate such ships to their own ships, in so far as that would be compatible with the United Nations' interests;

(d) The Members of the United Nations would declare in the same general agreement that they recognize the special agreements between the Secretary-General and other Members of the United Nations, referred to in subparagraph (b), and that they extend to the United Nations all international agreements relating to navigation to which they are a party.

(6) The Commission, after discussion, merely took note of these proposals. Having regard to the diversity of the problems raised by this question, the Commission was unable to take a decision. It has, however, inserted these proposals in its report, since it regards them as useful material for any subsequent study of the problem.

### *Status of ships*

#### ARTICLE 30

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

#### *Commentary*

(1) The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.

(2) In certain cases, 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 contained by the latter 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 articles (articles 43, 46 and 47).

(3) The Commission is aware that changes of flag during a voyage are calculated to encourage the abuses stigmatized by this article. The Commission also realizes that the interests of navigation are opposed to total prohibition of change of flag during a voyage or while in a port of call. In adopting the second sentence of this article, the Commission intended to condemn any change of flag which cannot be regarded as a *bona fide* transaction.

*Ships sailing under two flags*

## ARTICLE 31

A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

*Commentary*

(1) Double nationality may give rise to serious abuse by a ship using one or another flag during the same voyage, according to its convenience. This practice cannot be tolerated. There is a definite school of thought which recognizes the right of other States to regard a ship sailing under two flags as having no proper nationality. In view of the serious disadvantages in this "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 abandon this irregular practice. The Commission has therefore laid down this rule.

(2) 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 regulation would give rise to somewhat complicated problems outside the agreed scope of this initial attempt to codify the law of the sea.

*Immunity of warships*

## ARTICLE 32

1. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

*Commentary*

The principle embodied in paragraph 1 is generally accepted in international law. The definition of the term "warship" has been based on articles 3 and 4 of The Hague Convention of 18 October 1907 relating to the conversion of merchant ships into warships.

*Immunity of other government ships*

## ARTICLE 33

For all purposes connected with the exercise of powers on the high seas by States other than the flag State, ships owned or operated by a State and used only on government service, whether commercial or non-commercial, shall be assimilated to and shall have the same immunity as warships.

*Commentary*

(1) The Commission discussed the question whether ships used on commercial government service on the high

seas could claim the same immunity as warships with respect to the exercise of powers by other States, and answered this question 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 pointing out that the assimilation referred to in article 33 concerns only the immunity of ships for the purpose of the exercise of powers by other States, so that there is no question of granting to ships that are not warships policing rights over other ships, exercisable under international law only by warships.

(2) In order to avoid the ships concerned being stopped by warships not informed of their special character, it will be desirable for States, by mutual agreement, to determine the external signs by which that character can be indicated.

*Safety of navigation*

## ARTICLE 34

1. Every State is required to issue for ships under its jurisdiction regulations to ensure safety at sea with regard *inter alia* to:

(a) The use of signals, the maintenance of communications and the prevention of collisions;

(b) The crew, which must be adequate to the needs of the ship and enjoy reasonable labour conditions;

(c) The construction, equipment and seaworthiness of the ship.

2. In issuing such regulations, each State is required to observe internationally accepted standards. It shall take the necessary measures to secure observance of the regulations.

*Commentary*

(1) In its 1955 provisional articles concerning the régime of the high seas the Commission had confined itself in the matter of safety of navigation at sea to prescribing, in article 9, rules concerning signals and the prevention of collisions. The Commission's attention has been drawn to the existence of other regulations of great value in promoting safety at sea, and it was suggested that the article be extended to cover these points. The Commission recognized the soundness of this suggestion. Regulations concerning the construction, equipment and seaworthiness of ships, and the labour conditions of crews, can contribute much to the safety of navigation. Objections to the transfer of ships to another flag have often been accentuated by the fact that such regulations, and an effective control over their application, were lacking in the State of the new flag. The Commission accordingly deemed it desirable to insert provisions of this kind in the present article.

(2) These are technical questions which the Commis-

sion cannot settle in detail. The Commission's sole aim has been to lay down general principles.

(3) 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 applied, and hence likely to cause confusion. Where there is no danger of confusion, certain departures might be admissible if the occasion arose. There is also broad agreement with regard to the construction, equipment and seaworthiness of ships. As regards reasonable labour conditions, the Commission refers to the conventions prepared under the auspices of the International Labour Organisation.

(4) At its seventh session, the Commission took the view that in the matter of safety of life at sea, the interest of each State might be measured by the number of persons on board its ships, and that shipping tonnage therefore appeared to be the best criterion. At its eighth session, however, the majority of the Commission preferred the more general expression "internationally accepted standards". This expression also covers regulations which are a product of international co-operation, without necessarily having been confirmed by formal treaties. This applies particularly in the case of signals.

#### *Penal jurisdiction in matters of collision*

##### ARTICLE 35

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which the accused person is a national.

2. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

#### *Commentary*

(1) 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 penal proceedings arising out of a collision. In view of the judgement 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 judgement, which was carried by the President's casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. 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. It did so with the object of protecting ships and their crews from the risk of penal 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 ship on which the persons in question were serving, or of the State of which they 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 power to withdraw or suspend certificates rests solely with the State which has issued them.

(2) Damage to a submarine telegraph, telephone or high-voltage power cable or to a pipeline (see article 62) may be regarded as an "incident of navigation", as referred to in paragraph 1 of this article.

#### *Duty to render assistance*

##### ARTICLE 36

Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all speed to the rescue of persons in distress if informed of their need for assistance, in so far as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

#### *Commentary*

The Commission deemed it advisable to include a provision to the effect that ships must render assistance to all persons in danger on the high seas. The Commission has 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, article 8 of the Convention of the same date for the Unification of Certain Rules of Law with respect to Collisions between Vessels, and Regulation 10 of Chapter V of the Regulations annexed to the International Convention on the Safety of Life at Sea, of 10 June 1948. In the opinion of the Commission, the article as worded above states the existing international law.

#### *Slave trade*

##### ARTICLE 37

Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its colours, shall *ipso facto* be free.

#### *Commentary*

The duty of States to prevent and punish the transport

of slaves in ships authorized to fly their colours is generally recognized in international law. The General Act of Brussels of 2 July 1890 stipulates that any slave taking refuge on board a warship or a merchant ship shall be free. The Commission has broadened the wording so as not to exclude government ships other than warships.

### Piracy

#### ARTICLE 38

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

#### Commentary

(1) 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.

(2) 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 case.

#### ARTICLE 39

Piracy consists in any of the following acts:

1. Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or against persons or property on board such a ship;

(b) Against a ship, persons or property in a place 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 making it a pirate ship or aircraft.

3. Any act of incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

#### Commentary

(1) The Commission had to consider certain controversial points as to the essential features of piracy. It reached the conclusion that:

(i) 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;

(ii) The acts must be committed for private ends;

(iii) Save in the case provided for in article 40, piracy can be committed only by private ships and not by warships or other government ships;

(iv) 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;

(v) Acts of piracy can be committed not only by ships on the high seas, but also by aircraft, if such acts are directed against ships on the high seas;

(vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy.

(2) With regard to point (iii), the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant ships 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 ships. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships 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 confirmed a new law in process of development. In particular, 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 order and security 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.

(3) As regards point (iv), 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.

(4) In considering as "piracy" acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

(5) With regard to point (v), the Commission feels that acts committed in the air by one aircraft against another aircraft can hardly 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 ship on the high seas may, in the Commission's view, be assimilated to acts committed by a pirate ship.

(6) The view adopted by the Commission in regard to point (vi) tallies with the opinion of most writers. Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy.

## ARTICLE 40

The acts of piracy, as defined in article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

*Commentary*

A State ship or State aircraft whose crew has mutinied and taken control of the ship or aircraft must be assimilated to a private ship or aircraft. Acts committed by the crew or passengers of such a ship against another ship can therefore assume the character of acts of piracy. Clearly, the article ceases to apply once the mutiny has been suppressed and lawful authority restored.

## ARTICLE 41

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

*Commentary*

The purpose of this article is to define the terms "pirate ship" and "pirate aircraft" as used in these articles. The mere fact that a ship sails without a flag is not sufficient to give it the character of a "pirate" ship. Two cases of pirate ships must be distinguished. First, there are ships intended to commit acts of piracy. Secondly, there is the case of ships which have already been guilty of such acts. Such ships can be considered as pirate ships so long as they remain under the control of the persons who have committed those acts.

## ARTICLE 42

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 the national character was originally derived.

*Commentary*

It has been argued that a ship loses its national character by the fact of committing acts of piracy. The Commission does not share this view. Such acts involve the consequences referred to in article 43. Even though the rule under which a ship on the high seas is subject only to the authority of the flag State no longer applies, the ship keeps the nationality of the State in question, and, subject to the provisions of article 43, that State can apply its law to the ship in the same way as to other ships 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 a ground for loss of nationality.

## ARTICLE 43

On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the prop-

erty on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

*Commentary*

This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under the jurisdiction of another State. The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts.

## ARTICLE 44

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 loss or damage caused by the seizure.

*Commentary*

This article penalises the unjustified seizure of ships on grounds of piracy. The penalty applies to seizure in the circumstances described in article 43, and to all acts of interference as mentioned in article 46 (see the commentary on article 46), committed on the ground of suspicion of piracy.

## ARTICLE 45

A seizure on account of piracy may only be carried out by warships or military aircraft.

*Commentary*

(1) 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 the use of other government ships does not provide the same safeguards against abuse.

(2) Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a "seizure" within the meaning of this article.

*Right of visit*

## ARTICLE 46

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That while in the maritime zones treated as suspect in the international conventions for the abolition of the slave trade, the ship is engaged in that trade; or

(c) That, though flying a foreign flag or refusing to

show its flag, the ship 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 ship's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

#### Commentary

(1) The principle of freedom of the seas implies that, generally speaking, a merchant ship 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:

(i) That the ship is a pirate ship;

(ii) That the ship is engaged in the slave trade. The right to visit in this latter case was recognized by the treaties for the repression of slavery, especially the Brussels Act of 2 July 1890. For purposes of repression, this Act 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 precedent, 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;

(iii) That the ship is concealing its proper nationality and is in reality of the same nationality as the warship. In this case it is permissible to presume that the ship has committed unlawful acts, and the warship should be at liberty to verify whether its suspicions are justified.

(2) 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 ship. As a general rule, the warship may not require the merchant ship 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 ship's papers does not allay the suspicions, a further examination may be made on board the ship. 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.

(3) The State to which the warship belongs must compensate the merchant ship for any delay caused by the warship's action, not only where the ship was stopped without reasonable grounds but in all cases where suspicion proves unfounded and the ship committed no act calculated to give rise to suspicion. This severe penalty

seems justified in order to prevent the right of visit being abused.

(4) The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the State to which the warship belongs, at a time of imminent danger to 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. The Commission draws attention in this connexion to its comments on the institution of a contiguous zone for security measures.

#### Right of hot pursuit

##### ARTICLE 47

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship is within the internal waters or the territorial sea of the pursuing State, and may only be continued outside the territorial sea if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship giving the order should likewise be within the territorial sea. If the foreign ship is within a contiguous zone, as defined in article 66, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by bearings, sextant angles or other like means, that the ship 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 pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of the present article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself.

6. The release of a ship 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,

may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

#### *Commentary*

(1) 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 concerned is not contested in international law. Only certain details as to the exercise of the right call for comment:

(i) It is not necessary that, at the time when the foreign ship within the territorial sea receives the order to stop, the ship 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 ship committing the infringement must be in the territorial sea when the pursuit begins.

(ii) Hot pursuit must be continuous. Once it is broken off it cannot be resumed. The right of hot pursuit in any case ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

(iii) Hot pursuit cannot be considered to have begun until the pursuing vessel has spotted the foreign ship in the territorial sea and has ordered it to stop by giving the prescribed signal. To prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance; the words "visual or auditory signal" exclude signals given at a great distance and transmitted by wireless.

(iv) The article also applies to ships which lie outside the territorial sea and cause their boats to commit unlawful acts in that sea. The Commission, however, refused to assimilate to such cases that of a ship staying outside the territorial sea and using, not its own boats, but other craft.

(2) 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:

(a) The majority of the Commission was of the opinion that the right of hot pursuit should also be recognized when the ship is in a zone contiguous to the territorial sea, provided such pursuit is undertaken on the ground of violation of 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 hot pursuit of a fishing boat accused of unlawful fishing in the territorial sea if the fishing boat is already in the contiguous zone. Some members of the Commission were of the opinion that since the coastal State does not exercise sovereignty in the contiguous zone, no pursuit commenced when the ship is already in the contiguous zone can be recognized. The majority of the Commission did not share that opinion. It admitted, however, that the offences giving rise to hot pursuit must always have been committed in internal waters or in the territorial sea: acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit.

(b) The Commission wished to make it clear that the right of hot pursuit may be exercised only by warships and ships on government service specially authorized by the flag State to that effect. It is quite natural that customs and police vessels should be able to exercise the right of hot pursuit, but there can be no question of government ships on commercial service, for example, claiming that right.

(c) The ship finally arresting the ship pursued need not necessarily be the same as the one which began the pursuit, provided that it has joined in the pursuit and has not merely effected an interception.

(d) The Commission also dealt with the right of hot pursuit of a ship by aircraft. In spite of the dissenting opinions of some of its members, it felt able to recognize the lawfulness of such a practice, provided it is exercised in accordance with the principles governing its exercise by ships. It accordingly made the exercise of an aircraft's right to pursue a ship on the high seas and to arrest it—if necessary in co-operation with a ship—subject to the conditions laid down in paragraph 5. It is essential for the purposes of the proper exercise of the right of hot pursuit that the ship pursued should have been ordered to stop while it was still in the territorial sea or the contiguous zone. The aircraft must be in a position to give a visible and comprehensible signal to that effect; signals by wireless are barred in the case of aircraft also.

(e) It is recommended that the ship or aircraft should establish the position of the ship pursued at the moment when hot pursuit commences; it must wherever possible mark this position by physical means, for example, by dropping a buoy.

(f) The Commission included in this article a case which presents some analogy with the right of hot pursuit and which gave rise to differences of opinion, since it arose after the 1930 Conference. The question was whether a ship 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, while at the same time refusing to the government ship, in respect of a ship already apprehended in the territorial sea, the right to escort it to port across the high seas in cases where special circumstances forced it to leave the territorial sea in order to reach the port.

#### *Pollution of the high seas*

##### ARTICLE 48

1. Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

2. Every State shall draw up regulations to prevent pollution of the seas from the dumping of radioactive waste.

3. All States shall co-operate in drawing up regulations

with a view to the prevention of pollution of the seas or air space above, resulting from experiments or activities with radioactive materials or other harmful agents.

*Commentary*

(1) Water pollution by oil 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 oils discharged from ships. 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.

(2) Article 48 stipulates first that States shall draw up regulations which their ships must observe, even on the high seas. Pollution can also be caused by leaks in pipelines or defects in installations for the exploitation of the seabed and its subsoil. All these cases are covered by the stipulation in article 48.

(3) A new source of pollution of the sea is the dumping of radioactive waste. The Commission considered that such dumping, which may be particularly dangerous for fish and fish eaters, should be put on the same footing as pollution by oil.

(4) Finally, the Commission considered the case of the pollution of the seas or air space above resulting from experiments or activities with radioactive materials or other harmful agents. In this connexion, it felt that in view of the many-sidedness of the subject and the difficulties besetting any attempt to impose a general prohibition, it should merely provide for an obligation upon States to co-operate in drawing up regulations with a view to obviating the grave dangers involved. In adopting this provision, the Commission in no way intended to prejudge the findings of the Scientific Committee set up under General Assembly resolution 913 (X) of 3 December 1955 to study the effects of atomic radiation.

SUB-SECTION B. FISHING

*Right to fish*

ARTICLE 49

All States have the right for their nationals 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.

*Commentary*

(1) This article confirms the principle of the right to fish on the high seas. The Commission admitted no exceptions to that principle in the parts of the high seas covering the continental shelf, save as regards sedentary

fisheries and fisheries carried on by means of equipment embedded in the sea floor (see article 60). 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. 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 50-59. 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.

(2) In articles 49, 51, 52, 53, 54 and 56 the term "nationals" denotes fishing boats having the nationality of the State concerned, irrespective of the nationality of the members of their crews.

*Conservation of the living resources of the high seas*

(1) 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 sea. This question was discussed in conjunction with the continental shelf, because certain claims of 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.

(2) 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.<sup>17</sup>

(3) 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 provided 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.

(4) 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. If the nationals of one State only were engaged in fishing in the areas in question, that State could fully achieve the desired object by adopting appropriate legislation and enforcing its observance. If nationals of several States were engaged in fishing in a given area, the concurrence 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

<sup>17</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), para. 94.*

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.

(5) 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 889 (IX) of 14 December 1954".

(6) At its seventh session, in 1955, the International Law Commission took note of the report of the Conference<sup>18</sup> with great interest. Mr. García Amador, then Vice-Chairman of the Commission, who had 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, to replace the article approved by the Commission in 1953.

(7) The Commission made a careful study of these draft articles and found them generally acceptable, although it introduced certain amendments.

(8) The draft articles, as amended, are reproduced as an annex to Chapter II of the Commission's report on the work of its seventh session.<sup>19</sup> This annex was preceded by a preamble worded as follows:

*"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:"*

(9) The articles are also included as articles 25-33 in the draft text on the régime of the high seas adopted by the Commission at that session. Articles 25, 26 and 27 broadly reproduce the principles laid down in the first two articles of the 1953 text. The idea of an international body with legislative powers was dropped and replaced by that of compulsory arbitration in case of dispute (article 31).

(10) From the beginning of its work, the Commission has considered the question whether the position of coastal States as regards measures for the conservation of the living resources in parts of the high seas adjacent to their coasts did not call for some form of recognition by other States. A proposal was submitted in 1951 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 Committee decided to mention it in its report without sponsoring it. The Commission did not include such a provision in its 1953 draft.

(11) 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, and the same idea underlay the proposal submitted to the Commission by Mr. García Amador at the seventh session. The granting of special rights to coastal States on the ground of their special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to their coasts was linked in that proposal with the obligation to resort to arbitration if the exercise of those rights gave rise to objection by other interested States.

(12) At its seventh session, the Commission adopted two articles—28 and 29—designed to protect the special interests of coastal States. The first of these articles stated that 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. The second article

<sup>18</sup> See *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Rome, 18 April-10 May 1955* (A/Conf. 10/6).

<sup>19</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9* (A/2934).

stipulated that 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 and also subject to the provisions of paragraph 2 of article 29. The two articles provided for compulsory arbitration in the event of differences of opinion between the States concerned.

(13) These two articles in particular gave rise to further discussion in the Commission at its eighth session.

(14) Some members were of the opinion that these articles did not adequately protect the interests of coastal States. They argued that the coastal State, by the mere fact of being coastal, possesses a special interest in maintaining the productivity of the living resources in a part of the area adjacent to its coasts. In their view, this opinion, which was in any case already contained in the preamble to the articles in the annex to chapter II of the report on the work of the seventh session, should be clearly expressed in the draft. This opinion was shared by the majority of the Commission, and articles 28 and 29 were recast. The "special" character of the interest of the coastal State should be interpreted in the sense that the interest exists by reason of the sole fact of the geographical situation. However, the Commission did not wish to imply that the "special" interest of the coastal State would take precedence *per se* over the interests of the other States concerned.

(15) Unlike the 1953 draft, the articles in question contain no express limitation of the breadth of the zone where the coastal State may claim its rights. The fact that the coastal State's right is based on its special interest in maintaining the living resources, implies that any extension of this zone beyond the limits within which such an interest may be supposed to exist would exceed the purpose of the provision.

(16) At its earlier sessions the Commission had used the expression "area of the high seas *contiguous* to its coasts," and the same term was used by the Rome Conference. At its eighth session the Commission, wishing to avoid any confusion with the "contiguous zone" provided for under article 66 of the present articles, replaced the term "contiguous" in the articles concerning the protection of the living resources of the sea, by "adjacent". This modification does not imply any change in the meaning of the rules adopted.

(17) The insertion of a compulsory arbitration clause was opposed by some members of the Commission at both the seventh and eighth sessions. They expressed the opinion that the Commission, whose task was the codification of law should not concern itself with safeguards for the application of the rules. In any case, it would be impossible to do so at the present stage, and the study of the question would have to be deferred to later sessions. Other members were of opinion that it would be sufficient, as regards disputes arising from the interpretation and application of the articles concerned, to refer to existing provisions imposing on States an obligation to

seek a settlement by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, reference to regional bodies, or other peaceful means, and they made a proposal to insert a provision on this subject in the draft.

(18) The majority of the Commission did not share this view. Without claiming that all rules prepared by the Commission should be accompanied by compulsory jurisdiction or arbitration clauses, it felt that, in proposing for States rights over the high seas going beyond existing international law, the Commission could not rely upon the due functioning of the general rules for the peaceful settlement of disputes, but would have to create effective safeguards for the settlement of disputes by an impartial authority. Hence the majority of the Commission did not wish merely to grant States the rights in question and leave the matter of the settlement of disputes open for future consideration. While recognizing that the settlement of disputes must be sought by the means indicated in the general rule proposed by certain members, it felt that in this matter it would not be enough to have a general clause of that kind which did not guarantee that, if necessary, disputes would in fact be submitted to an impartial authority for decision. For this reason, the majority of the Commission accepted the idea of compulsory arbitration, the procedure for which is laid down in article 57.

(19) The 1953 proposal to establish a central authority with legislative powers was not adopted; on the other hand, consideration was given to the possibility of setting up a permanent international body within the framework of the United Nations, with the status of a specialized agency, to be responsible not only for making technical and scientific studies of problems concerning the protection and use of living resources of the sea, but also for settling disputes between States on this subject. The Commission is of the opinion that the establishment of an international study commission is worthy of close attention. It considers, however, that in view of the diversity of the interests which may be involved in such disputes, the idea of *ad hoc* arbitral commissions would have more chance of being carried into practice in the near future than that of a central judicial authority.

(20) Before concluding these introductory remarks the Commission wishes to reiterate its opinion that the proposed measures will fail in an important part of their purpose if they do not help to smooth out the difficulties arising out of exaggerated claims in regard to the extension of the territorial sea or other claims to jurisdiction over areas of the high seas, and thus safeguard the principle of the freedom of the seas.

#### ARTICLE 50

As employed in the present articles, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

#### Commentary

A clear definition of the expression "conservation of the living resources of the sea" is required. The International Commission for the Northwest Atlantic Fisheries

has pointed out that the time is past when the sole concern is conservation of stocks, and that an attempt is now being made to develop useful stocks to beyond their present strength. The Commission accepted the definition given by the International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome in 1955. Paragraph 18 of the Conference's report states that "the principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products." The purport of this definition is further clarified by the preceding paragraph: "The immediate aim of conservation of living marine resources is to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form."

#### ARTICLE 51

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, shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

#### *Commentary*

(1) The Commission considers it perfectly normal that 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, should be able to prescribe conservation regulations for its nationals and control their observance. There is nothing to prevent a State exercising this right even in an area adjacent to the coasts of other States whose nationals do not fish there and which have not themselves enacted such regulations. Nevertheless, the existence of such regulations issued by States engaged in fishing does not prevent the coastal State from invoking article 54 or article 55.

(2) Conservation regulations under article 51 must be enacted by the State when necessary. If a non-coastal State which does not engage in fishing in the area but has a special interest in the conservation of the living resources there, considers that such regulations are necessary and that the State in question is not providing them, it can adopt the course indicated in article 56. In the same circumstances the coastal State could apply article 54 and, if necessary, article 55.

#### ARTICLE 52

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

#### *Commentary*

(1) To be able to invoke this article, it will not be

sufficient for the nationals of a State to engage occasionally in fishing in an area where the nationals of other States also fish; the article only covers the case where two or more States are regularly engaged in fishing in the same area of the high seas. Should the nationals of a State only fish there casually, that State cannot invoke article 52; but if it has a special interest in conservation in that area, it will be able to invoke article 56. In making use of the term "regularly", the Commission does not mean to indicate that fishing must be carried on continually: interruptions that can be regarded as natural to the exercise of the fishing in question will not deprive the State concerned of the benefit of this article.

(2) The Commission had specially in mind the case where nationals of different States exploit the same stock of fish or other marine resources. In general, a State should not be entitled to request the opening of negotiations and to initiate arbitral procedure in cases where other States are fishing in the same area but exploiting another stock of fish. It may, however, happen that the conservation measures which one of the States wishes to take would be thwarted by fishing methods applied by the nationals of other States, even though they are exploiting another stock of fish. In that case a request for the opening of negotiations as provided under article 52 cannot be refused.

(3) The criteria on which the arbitral award provided for under paragraph 2 should be based are enunciated in article 58. Some members were of the opinion that these criteria should be more precise. The Commission thought it would be sufficient to insert a number of guiding principles in the commentary to article 58, to which the Commission draws attention.

#### ARTICLE 53

1. If, subsequent to the adoption of the measures referred to in articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States 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 contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

#### *Commentary*

(1) It seems to be indicated that newcomers should comply with the regulations in force in the waters where they wish to engage in fishing. If the States of which the newcomers are nationals are not prepared to apply the regulations as they stand, they can open negotiations for their amendment with the States concerned. Failing agreement, the procedure laid down in article 57 will have to be followed.

(2) The regulations should be applicable to newcomers only if they engage in fishing on a scale which would substantially affect the stock or stocks in question. Any dispute regarding the applicability of the regulations shall

be submitted for decision in accordance with article 57.

(3) In connexion with this article, the Commission considered a proposal that would encourage States to create, build up, or restore productive resources which without special efforts by the interested States would be either destroyed or remain latent or at levels far below their potential productivity. This problem was discussed at the Rome Conference as a special case in connexion with new entrants into a fishery under conservation management. The report of the Rome Conference stated: "Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such development or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action."<sup>20</sup>

(4) The report of the Rome Conference also described a procedure now in operation which provides a method for handling this special case. This procedure, under the designation "principle of abstention", was proposed by certain Governments for inclusion in the Commission's fishery articles. This proposal provided that:

(a) When States have created, built up, or restored productive resources through the expenditure of time, effort and money on research and management, and through restraints on their own fishermen, and

(b) The continuing and increasing productivity of these resources is the result of and dependent on such action by the participating States, and

(c) Where the resources are being so fully utilized that an increase in the amount of fishing would not result in any substantial increase in the sustainable yield, then:

(d) States not fishing the resources in recent years, except for the coastal State, should be required to abstain from fishing these stocks as long as these conditions are fulfilled.

(5) The Commission recognized that both this proposal, the purpose of which was to encourage the building up or restoration of the productivity of resources, and the proposals of some other Governments, based on the concept of vital economic necessity, may reflect problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making any concrete proposal.

#### ARTICLE 54

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State 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.

3. If the States concerned do not reach agreement

within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

#### Commentary

(1) In the introduction to the article concerning the conservation of the living resources of the high seas the Commission has already pointed out that it recognizes the special interest of the coastal State in the maintenance of the productivity of the living resources in any part of the high seas adjacent to its territorial sea.

(2) Paragraph 1 of this article contains a stipulation to that effect. Paragraph 2 of the article and article 55 are based on that idea.

(3) Paragraph 2 recognizes the coastal State's right to take part on an equal footing in any system of research and regulation in the area. Should any doubt arise as to whether a coastal State is justified in asserting a claim to a special interest in areas far removed from its shores, the question would have to be settled by the arbitral procedure contemplated by article 57.

#### ARTICLE 55

1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect 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 previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an 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 contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

#### Commentary

(1) Article 55 gives a coastal State the right to adopt conservation measures unilaterally, if 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.

(2) One of the requirements is that the State shall demonstrate the urgent need for the measures. Should there be no such urgent need and the area be one where other States fish, the coastal State will have to adopt the course indicated in article 54. If the case is so urgent that article 54 cannot be applied, it will nevertheless be necessary for the State not to take unilateral action until it has

<sup>20</sup> Report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/Conf. 10/6), para. 61.

consulted the other States concerned and has attempted to reach agreement.

(3) The Commission is fully aware that the application of article 55 may give rise to difficulties if a coastal State wishes to enact regulations in an area which is also adjacent to the coasts of other States. In that case the application of the measures will depend upon an agreement between the coastal States concerned.

(4) The stipulation that, if challenged, the measures adopted remain obligatory pending the arbitral decision has been criticized by certain Governments. The Commission nevertheless considers that this provision is essential. If objections by another State to the unilateral regulations of the coastal State sufficed to suspend their application, the whole purpose of the article, which is to give the coastal State the right to take measures in case of urgent need, would be frustrated. The power given to the arbitral commission under article 58, paragraph 2, to suspend application pending its award seems an adequate safeguard against abuse.

#### ARTICLE 56

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent 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 contemplated by article 57.

#### *Commentary*

(1) 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 where the nationals of the State concerned do engage in fishing. The Commission took the view that in such an event the State concerned could request the State whose nationals engage in fishing in the areas exposed to exhaustion to take the necessary steps to safeguard the interests threatened. Where no agreement can be reached, the question will be settled in accordance with the procedure contemplated by article 57.

(2) For the criteria to be applied by the arbitral commission, see article 58 and the commentary thereto.

#### ARTICLE 57

1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the State or States on the one side of the dispute, and two members shall be named by the State or States contending to the

contrary, but only one of the members nominated by each side may be a national of a State on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute. Failing agreement they shall, upon the request of any State party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization from amongst well qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

#### *Commentary*

(1) 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 disputes to the International Court of Justice by agreement of or in accordance with mutual treaty obligations; they may set up courts of arbitration; they may, if they so desire, seek to compose their disagreements 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 partly or wholly without their co-operation.

In this connexion, the article distinguishes between:

(i) The case of a dispute between two States or a dispute between several States divided into two opposing

groups, each group being homogeneous as regards the interests to be safeguarded;

(ii) The case of several parties to the dispute divided into more than two groups, each with different interests.

(2) The first will be the more frequent case. If, on either side, there are several States parties to the dispute, they may join together and act as one party in regard to the appointment of arbitrators. In this case there is no need to depart from the usual methods in forming the arbitral commission. Each State, or each group of States, will appoint two arbitrators, only one of whom may be a national of the State or of one of the States appointing him. Failing agreement between the parties, the other three members of the commission will be appointed by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of States not parties to the dispute. In the second case the above method cannot be applied, and recourse must be had to an impartial authority which will appoint the whole arbitral commission. In this case too the most appropriate authority seems to be the Secretary-General of the United Nations, acting after consultation with the two authorities previously mentioned.

(3) In view of the diversity of the interests involved, the number of arbitrators will have to be fairly large. Hence the Commission provides for a commission of seven members. The appointment to be made by the Secretary-General must be from amongst properly qualified persons, experts in legal, administrative or scientific matters appertaining to fisheries, depending upon the nature of the dispute. 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.

(4) It seemed fair to let the arbitral commission determine how the costs entailed by its proceedings should be divided between the parties.

(5) The fifth paragraph prescribes certain time limits for the purpose of preventing the arbitration procedure from being protracted. The arbitral commission will be entitled to extend the five-months' period allowed for rendering its award. But it must not exercise this right except in case of necessity. Having regard to the provision that the measures adopted remain in force pending the arbitral award, it might be prejudicial to the interests of one of the parties if the procedure dragged on too long. If necessary, the arbitral commission could apply article 58 which authorizes it to suspend the application of the measures in dispute.

#### ARTICLE 58

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

#### Commentary

(1) Paragraph 1 mentions the criteria on which the arbitral commission's decision should be based. In the case of article 55, the criteria are of course those listed in that article. But these criteria do not wholly apply in the other cases. It seems desirable to give the arbitral commission some discretion in regard to the criteria to be applied in these cases. Subject to this remark, the Commission wishes to formulate the following guiding principles.

(i) Common to all the determinations are the requirements:

(a) That scientific findings shall demonstrate the necessity of conservation measures to make possible the optimum sustainable productivity of the stock or stocks of fish;

(b) That the measures do not discriminate against foreign fishermen.

(ii) Common to articles 52, 53, 54 and 55 is the requirement:

That the specific measures shall be based on scientific findings and appropriate for the purpose. In determining appropriateness, the elements of effectiveness and practicability are to be considered as well as the relation between the expected benefits, in terms of maintained and increased productivity, and the cost of application and enforcement of the proposed measures.

(iii) In the case of article 56, the State requesting the fishing State to take necessary measures of conservation would be a non-adjacent and non-fishing State. Such a State would be concerned only with the continued productivity of the resources. Therefore, the matter to be determined would be the adequacy of the over all conservation programme.

(iv) Article 55 contains a criterion which is not included in the other articles: that of the urgency of action. Recourse to unilateral regulation by the coastal State prior to arbitration of the dispute can only be regarded as justified when the delay caused by arbitration would seriously threaten the continued productivity of the resources.

#### ARTICLE 59

The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

#### Commentary

(1) The arbitral commission's decisions are binding only upon the parties to the dispute; they have no effect *erga omnes*. Hence, a State whose nationals wish to engage in fishing in an area regarding which an arbitral decision binding other States *inter se* has already been rendered is entitled to use paragraph 2 of article 53 to initiate fresh arbitral proceedings.

(2) The arbitral commission is required to give a ruling on the points in dispute; it is no part of its duty to issue new regulations, unless the parties have requested

it to do so. The arbitral commission may append proposals for conservatory measures to its decisions, but they will not be binding.

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*Claims of exclusive fishing rights, on the basis of special economic circumstances*

(1) The Commission's attention had been directed to a proposal that where a nation is primarily dependent on the coastal fisheries for its livelihood, the State concerned should have the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance from the coast having regard to relevant local considerations, when this is necessary for the conservation of these fisheries as a means of subsistence for the population. It was proposed that in such cases the territorial sea might be extended or a special zone established for the above-mentioned purpose.

(2) After some discussion of this problem the Commission realized that it was not in the position fully to examine its implications and the elements of exclusive use involved therein. The Commission recognized, however, that the proposal, as in the case of the principle of abstention (see commentary to article 53), may reflect problems and interests which deserve recognition in international law. However, lacking competence in the fields of biological science and economics adequately to study these exceptional situations the Commission, while drawing attention to the problem, has refrained from making any concrete proposals.

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*Fisheries conducted by means of equipment embedded in the floor of the sea*

ARTICLE 60

The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals. Such regulations will not, however, affect the general status of the areas as high seas.

*Commentary*

(1) The present article, in a slightly modified form, figured amongst the articles on sedentary fisheries adopted by the Commission at its third session. When, at its fifth session, the Commission decided to recognize a right for coastal States to exploit the natural resources of the continental shelf, the article disappeared from the draft. However, at its eighth session, the Commission recognized that the article deserved to be maintained in so far as it dealt with fisheries conducted by means of equipment embedded in the bed of the sea. In fact, fisheries are described as sedentary either by reason of the species caught or by reason of the equipment used. The first case concerns products attached to the bed of the sea; in the

second case the "sedentary" character of the fishery is determined by the fact that the fishing is conducted by means of equipment embedded in the bed of the sea. The Commission decided to keep the term "sedentary fisheries" for the first type of activity only. This form of fishery is regulated by article 68 concerning the continental shelf. The second type of activity is regulated in the present article. This form of fishery is not covered by article 68 concerning the continental shelf because the species fished are mobile and therefore cannot be regarded as natural resources of the seabed in the sense in which that term is used in the aforesaid article.

(2) Banks where there are fisheries conducted by means of equipment embedded in the bed of the sea have been regarded by some coastal States as under their occupation and as forming part of their territory. Without wishing to describe these areas as "occupied" or as constituting "property" of the coastal State, the Commission considers that the special position of these areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.

(3) The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal State should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article.

(4) The special rights which the coastal State may exercise in such areas must be strictly limited to such rights as are essential to achieve the ends for which they are recognized. The waters covering the seabed where the fishing grounds are located remain subject to the régime of the high seas.

SUB-SECTION C. SUBMARINE CABLES AND PIPELINES

ARTICLE 61

1. All States shall be entitled to lay telegraph, telephone or high-voltage power 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 such cables or pipelines.

*Commentary*

(1) 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.

(2) The Commission has enunciated in the present article certain principles which, in its view, reflect existing international law. It thought that the regulations concerning telegraph and telephone cables could be extended to

include high-voltage cables and pipelines beneath the high seas.

(3) Paragraph 1 of article 61 is 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 route to be followed, in order to prevent undue interference with the exploitation of the natural resources of the seabed and subsoil. Clearly, cables and pipelines must not be laid in such a way as to hamper navigation.

(4) For the laying of submarine cables and pipelines on the floor of a continental shelf, see article 70 and the commentary thereto.

#### ARTICLE 62

Every State shall take the necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine high-voltage power cable or pipeline, 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 ships, after having taken all necessary precautions to avoid such break or injury.

#### *Commentary*

This article is substantially the same as article II of the 1884 Convention, but extends the latter to include pipelines and high voltage power cables. Like the succeeding articles, it was so worded as to require States to take the necessary legislative measures to ensure that their nationals comply with the regulations. Obviously if the presence of the cable or pipeline has not been adequately marked, there can be no question of "culpable negligence" on the part of navigators (cf. article V of the Convention).

#### ARTICLE 63

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.

#### *Commentary*

Cf. article IV of the 1884 Convention.

#### ARTICLE 64

Every State shall regulate trawling so as to ensure that all the fishing gear used shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

#### *Commentary*

Cf. resolution I of the London Conference of 1913.

#### ARTICLE 65

Every State shall take the necessary legislative measures

to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

#### *Commentary*

(1) Cf. article VII of the 1844 Convention.

(2) The last phrase has been added in order to make it quite clear that compensation cannot be claimed if there has been any negligence on the part of the ship.

### SECTION II. CONTIGUOUS ZONE

As part of its work on the régime of the high seas, the Commission adopted at its third session, an article on the contiguous zone.<sup>21</sup> Apart from some qualifications and reservations, the principle underlying that article has encountered no opposition on the part of Governments which have commented on the subject. The article, as adopted after the discussions at the fifth and eighth sessions, differs only slightly from the 1951 draft. The wording has been modified, however, in order to express the Commission's idea more clearly. The article is as follows:

#### ARTICLE 66

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to

- (a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

#### *Commentary*

(1) International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State, which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties.

(2) Many States have adopted the principle that in the contiguous zone the coastal State may exercise customs control in order to prevent attempted infringements of its customs and fiscal regulations within its territory or territorial sea, and to punish infringements of those regulations committed within its territory or territorial sea. The Commission considered that it would be impossible to deny to States the exercise of such rights.

(3) Although the number of States which claim rights over the contiguous zone for the purpose of applying

<sup>21</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), p. 20.*

sanitary regulations is fairly small, the Commission considers that, in view of the connexion between customs and sanitary regulations, such rights should also be recognized for sanitary regulations.

(4) The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.

(5) Nor was the Commission willing to recognize any exclusive right of the coastal State to engage in fishing in the contiguous zone. The Preparatory Committee of The Hague Codification Conference found, in 1930, that the replies from Governments offered no prospect of an agreement to extend the exclusive fishing rights of the coastal State beyond the territorial sea. The Commission considered that in that respect the position has not changed.

(6) The Commission examined the question whether the same attitude should be adopted with regard to proposals to grant the coastal State the right to take whatever measures it considered necessary for the conservation of the living resources of the sea in the contiguous zone. The majority of the Commission were unwilling to accept such a claim. They argued, first, that measures of this kind applying only to the relatively small area of the contiguous zone would be little practical value and, secondly, that having provided for the regulation of the conservation of living resources in a special part of the present draft, it would be inadvisable to open the way for a duplication of these rules by different provisions designed to regulate the same matters in the contiguous zone only. Since the contiguous zone is a part of the high seas, the rules concerning conservation of the living resources of the sea apply to it.

(7) The Commission did not maintain its previous decision to grant the coastal State, within the contiguous zone, a right of control in respect of immigration. In its report on the work of its fifth session the Commission commented on this provision as follows:

"It is understood that the term 'customs regulations' as used in the article refers not only to regulations concerning import and export duties but also to other regulations concerning the exportation and importation of goods. In addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration, a term which is also intended to include emigration."<sup>22</sup>

Reconsidering this decision, the majority of the Commission took the view that the interests of the coastal State do not require an extension of the right of control to immigration and emigration. It considered that such con-

trol could and should be exercised in the territory of the coastal State and that there was no need to grant it special rights for this purpose in the contiguous zone.

(8) The Commission considered the case of areas of the sea situated off the junction of two or more adjacent States, where the exercise of rights in the contiguous zone by one State would not leave any free access to the ports of another State except through that zone. The Commission, recognizing that in such cases the exercise of rights in the contiguous zone by one State may unjustifiably obstruct traffic to or from a port of another State, considered that in the case referred to it would be necessary for the two States to conclude a prior agreement on the exercise of rights in the contiguous zone. In view of the exceptional nature of the case, however, the Commission did not consider it necessary to include a formal rule to this effect.

(9) The Commission considers that the breadth of the contiguous zone cannot exceed twelve miles from the coast, the figure adopted by the Preparatory Committee of The Hague Codification Conference (1930). Until such time as there is unanimity in regard to the breadth of the territorial sea, the zone should be measured from the coast and not from the outer limit of the territorial sea. States which have claimed extensive territorial waters have in fact less need for a contiguous zone than those which have been more modest in their delimitation.

(10) The Commission thought it advisable to clarify the expression "from the coast" by stating that the zone is measured from the baseline from which the breadth of the territorial sea is measured.

(11) The exercise by the coastal State of the rights enunciated in this article does not affect the legal status of the air space above the contiguous zone. The question whether the establishment of such an air control zone could be contemplated is outside the scope of these rules of the law of the sea.

### SECTION III. CONTINENTAL SHELF

(1) At its third session, held in 1951, the Commission adopted draft articles on the continental shelf with accompanying comments. After the third session, the special rapporteur re-examined these articles in the light of comments received from the Governments of eighteen countries. The comments of the Governments are reproduced in Annex II to the report on the fifth session.<sup>23</sup> In March 1953, the special rapporteur submitted a further report on the subject (A/CN.4/60) which was examined by the Commission at its fifth session. The Commission adopted draft articles, which it re-examined at its eighth session, in the context of the other sections of the rules of the law of the sea. This examination did not give rise to any major changes, except with regard to the delimitation of the continental shelf (see article 67).

(2) The Commission accepted the idea that the coastal State may exercise control and jurisdiction over the continental shelf, with the proviso that such control and jurisdiction shall be exercised solely for the purpose of

<sup>22</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456), para. 111.*

<sup>23</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456).*

exploiting its resources; and it rejected any claim to sovereignty or jurisdiction over the superjacent waters.

(3) In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally. In present circumstances, however, such internationalization would meet with insurmountable practical difficulties, and would not ensure the effective exploitation of natural resources necessary to meet the needs of mankind.

(4) The Commission is aware that exploration and exploitation of the seabed and subsoil, which involves the exercise of control and jurisdiction by the coastal State, may affect the freedom of the seas, particularly in respect of navigation. Nevertheless, this cannot be a sufficient reason for obstructing a development which, in the opinion of the Commission, can be to the benefit of all mankind. The necessary steps must be taken to ensure that this development affects the freedom of the seas no more than is absolutely unavoidable, since that freedom is of paramount importance to the international community. The Commission thought it possible to combine the needs of the exploitation of the seabed and subsoil with the requirement that the sea itself must remain open to all nations for navigation and fishing. With these considerations in mind, the Commission drafted the following articles.

#### ARTICLE 67

For the purposes of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

#### Commentary

(1) In its first draft, prepared in 1951, the Commission designated the continental shelf as "the seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil."<sup>24</sup> It followed from this definition that areas in which exploitation was not technically possible by reason of the depth of the water, were excluded from the continental shelf.

(2) The Commission had considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seemed likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 metres would at present be sufficient for all practical needs. This depth also coincides with that at which the continental shelf in the geological sense generally comes to an end and the continental slope begins, falling steeply to a great depth. The Commission felt, however, that such a limit would have the disadvantage of instability. Technical developments in the near future might make it possible to exploit

the resources of the seabed at a depth of over 200 metres. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 metres, but susceptible of exploitation by means of installations erected in neighbouring areas where the depth does not exceed this limit. Hence the Commission decided not to specify a depth limit of 200 metres.

(3) At its fifth session, in 1953, the Commission reconsidered this decision. It abandoned the criterion of exploitability in favour of that of a depth of 200 metres. In the light of the comments submitted by certain Governments, the Commission came to the conclusion that the text previously adopted lacked the necessary precision and might give rise to disputes and uncertainty. The Commission considered that the limit of 200 metres would be sufficient for all practical purposes at present and probably for a long time to come. It took the view that the adoption of a fixed limit would have considerable advantages, in particular with regard to the delimitation of continental shelves between adjacent States or States opposite each other. The adoption of different limits by different States might cause difficulties of the same kind as differences in the breadth of the territorial sea. The Commission was aware that future technical progress might make exploitation possible at a depth greater than 200 metres; in that case the limit would have to be revised, but meanwhile there was every advantage in having a stable limit.

(4) At its eighth session, the Commission reconsidered this provision. It noted that the Inter-American Specialized Conference on "Conservations of Natural Resources: Continental Shelf and Oceanic Waters", held at Ciudad Trujillo (Dominican Republic) in March 1956, had arrived at the conclusion that the right of the coastal State should be extended beyond the limit of 200 metres, "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil". Certain members thought that the article adopted in 1953 should be modified. While agreeing that in present circumstances the limit adopted is in keeping with practical needs, they disapproved of a provision prohibiting exploitation of the continental shelf at a depth greater than 200 metres even if such exploitation was a practical possibility. They thought that in the latter case, the right to exploit should not be made subject to prior alteration of the limit adopted. While maintaining the limit of 200 metres in this article as the normal limit corresponding to present needs, they wished to recognize forthwith the right to exceed that limit if exploitation of the seabed or subsoil at a depth greater than 200 metres proved technically possible. It was therefore proposed that the following words should be added to the article, "or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas". In the opinion of certain members this addition would also have the advantage of not encouraging the belief that up to 200 metres depth there is a fixed zone where rights of sovereignty other than those stated in article 68 below can be exercised. Other members contested the usefulness of the addition, which in their opinion unjustifiably and dangerously impaired the sta-

<sup>24</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), p. 17.*

bility of the limit adopted. The majority of the Commission nevertheless decided in favour of the addition.

(5) The sense in which the term "continental shelf" is used departs to some extent from the geological concept of the term. The varied use of the term by scientists is in itself an obstacle to the adoption of the geological concept as a basis for legal regulation of this problem.

(6) There was yet another reason why the Commission decided not to adhere strictly to the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in regard to submarine areas where the depth of the sea would nevertheless permit of exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal régime to these regions.

(7) While adopting, to a certain extent, the geographical test for the "continental shelf" as the basis of the juridical definition of the term, the Commission therefore in no way holds that the existence of a continental shelf, in the geographical sense as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles. Thus, if, as is the case in the Persian Gulf, the submarine areas never reach the depth of 200 metres, that fact is irrelevant for the purposes of the present article. Again, exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense.

(8) In the special cases in which submerged areas of a depth less than 200 metres, situated fairly close to the coast, are separated from the part of the continental shelf adjacent to the coast by a narrow channel deeper than 200 metres, such shallow areas could be considered as adjacent to that part of the shelf. It would be for the State relying on this exception to the general rule to establish its claim to an equitable modification of the rule. In case of dispute it must be a matter for arbitral determination whether a shallow submarine area falls within the rule as here formulated.

(9) Noting that it was departing from the strictly geological concept of the term, *inter alia*, in view of the inclusion of exploitable areas beyond the depth of 200 metres, the Commission considered the possibility of adopting a term other than "continental shelf". In considering whether it would not be better, in conformity with the usage employed in certain scientific works and also in some national laws and international instruments, to call these regions "submarine areas". The majority of the Commission decided to retain the term "continental shelf" because it is in current use and because the term "submarine areas" used without further explanation would not give a sufficient indication of the nature of the areas in question. The Commission considered that some departure from the geological meaning of the term "continental shelf" was justified, provided that the meaning of the term for the purpose of these articles was clearly defined. It has stated this meaning of the term in the present article.

(10) The term "continental shelf" does not imply that it refers exclusively to continents in the current

connotation of that word. It also covers the submarine areas contiguous to islands.

(11) Lastly the Commission points out that it does not intend limiting the exploitation of the subsoil of the high seas by means of tunnels, cuttings or wells dug from *terra firma*. Such exploitation of the subsoil of the high seas by a coastal State is not subject to any legal limitation by reference to the depth of the superjacent waters.

#### ARTICLE 68

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

#### Commentary

(1) While this article, as provisionally formulated in 1951 (article 2 of the draft), referred to the continental shelf as "subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources", the article as now formulated lays down that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources".

(2) The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and the air space above it. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law. The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.

(3) At its fifth session, the Commission decided after long discussion to retain the term "natural resources", as distinct from the more limited term "mineral resources". In its previous draft the Commission had only dealt with "mineral resources" and some members proposed adhering to that course. The Commission, however, came to the conclusion that the products of "sedentary" fisheries, in particular, to the extent that they were natural resources permanently attached to the bed of the sea should not be left outside the scope of the régime adopted, and that this aim could be achieved by using the term "natural resources". It is clearly understood that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.

(4) At the eighth session it was proposed that the condition of permanent attachment to the seabed should be mentioned in the article itself. At the same time the opinion was expressed that the condition should be made less strict; it would be sufficient that the marine fauna and

flora in question should live in constant physical and biological relationship with the seabed and the continental shelf; examination of the scientific aspects of that question should be left to the experts. The Commission however decided to leave the text of the article and of the commentary as it stood.

(5) It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.

(6) In the view of the Commission, the coastal State, when exercising its exclusive rights, must also respect the existing rights of nationals of other States. Any interference with such rights, when unavoidably necessitated by the requirements of exploration and exploitation of natural resources, is subject to the rules of international law concerning respect for the rights of aliens. However, apart from the case of acquired rights, the sovereign rights of the coastal State over its continental shelf also cover "sedentary" fisheries in the sense indicated above. As regards fisheries which are also sometimes described as "sedentary" because they are conducted by means of equipment fixed in the sea, but which are not concerned with natural resources attached to the seabed, the Commission refers to article 60 of these rules.

(7) The rights of the coastal State over the continental shelf do not depend on occupation, effective or national, or on any express proclamation.

(8) The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State. The considerations relevant to this matter cannot be reduced to a single factor. In particular, it is not possible to base the sovereign rights of the coastal State exclusively on recent practice, for there is no question in the present case of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. However, that practice itself is considered by the Commission to be supported by considerations of law and of fact. In particular, once the seabed and the subsoil have become an object of active interest to coastal States with a view to the exploration and exploitation of their resources, they cannot be considered as *res nullius*, i.e., capable of being appropriated by the first occupier. It is natural that coastal States should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must presuppose the existence of installations on the territory of the coastal State. Neither is it possible to disregard the geographical phenomenon whatever the term—propinquity, contiguity, geographical continuity, appurtenance or identity—used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission. As already stated, that principle, which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas.

(9) Although for the reasons stated, as well as for practical considerations, the Commission was unable to endorse the idea of internationalization of the submarine areas comprised in the concept of the continental shelf, it did not discard the possibility of setting up an international body for scientific research and assistance with a view to promoting their most efficient use in the general interest. It is possible that some such body may one day be set up within the framework of an existing international organization.

(10) The proposals made by the Commission in its report for 1953 caused some anxiety in scientific circles, where it was thought that freedom to conduct scientific research in the soil of the continental shelf and in the waters above would be endangered. In so far as such researches are conducted in the waters above a continental shelf, this anxiety seems to be unjustified since the freedom to conduct research in these waters—which still form part of the high seas—is in no way affected. The coastal State will not have the right to prohibit scientific research, in particular research on the conservation of the living resources of the sea. The consent of the State will only be required for research relating to the exploration or exploitation of the seabed or subsoil. It is to be expected that the coastal State will only refuse its consent exceptionally, and in cases in which it fears an impediment to its exclusive rights to explore and exploit the seabed and subsoil.

#### ARTICLE 69

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

#### Commentary

Article 69 is intended to ensure respect for the freedom of the seas in face of the sovereign rights of the coastal State over the continental shelf. It provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters. A claim to sovereign rights in the continental shelf can only extend to the seabed and subsoil and not to the superjacent waters; such a claim cannot confer any jurisdiction or exclusive right over the superjacent waters, which are and remain a part of the high seas. The articles on the continental shelf are intended as laying down the régime of the continental shelf, only as subject to and within the orbit or the paramount principle of the freedom of the seas and of the airspace above them. No modification of or exceptions to that principle are admissible unless expressly provided for in the various articles.

#### ARTICLE 70

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 on the continental shelf.

*Commentary*

(1) The coastal State is required to permit the laying of submarine cables on the seabed of its continental shelf, but in order to avoid unjustified interference with the exploitation of the natural resources of the seabed and subsoil, it may impose conditions concerning the route to be followed.

(2) The Commission considered whether this provision should not be extended to pipelines. In principle, the answer must be in the affirmative. The question is, however, complicated by the fact that it would often be necessary to install pumping stations at certain points, which might hinder the exploitation of the soil more than cables. It follows that the coastal State might be less liberal in this matter than in the case of cables. As the question does not yet seem to be of practical importance, the Commission has not expressly referred to pipelines in the present article.

## ARTICLE 71

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

*Commentary*

(1) While article 69 lays down in general terms the basic principle of the unaltered legal status of the superjacent sea and the air above it, article 71 applies that basic principle to the main manifestations of the freedom of the seas, namely, freedom of navigation and of fishing. Paragraph 1 of this article lays down that the exploration of the continental shelf must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea. It will be noted, however, that what the article prohibits is not any kind of interference, but only unjustifiable interference. The manner and the significance of that qualification were the subject of prolonged discussion in the Commission. The progressive development of international law, which takes place against the background of established rules, must often result in the modification of those

rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result in many cases in rendering somewhat nominal both the sovereign rights of exploration and exploitation and the very purpose of the articles as adopted. The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal State must be the judge of the reasonableness—or the justification—of the measures adopted, in case of dispute the matter must be settled on the basis of article 73, which governs the settlement of all disputes regarding the interpretation or application of the articles.

(2) With regard to the conservation of the living resources of the sea, everything possible should be done to prevent damage by exploitation of the subsoil, seismic exploration in connexion with oil prospecting, and leaks from pipelines.

(3) Paragraphs 2 to 5 relate to the installations necessary for the exploration and exploitation of the continental shelf, as well as to safety zones around such installations and the measures necessary to protect them. These provisions, too, are subject to the overriding prohibition of unjustified interference. Although the Commission did not consider it essential to specify the size of the safety zones, it believes that generally speaking a maximum radius of 500 metres is sufficient for the purpose.

(4) Interested parties, i.e., not only Governments but also groups interested in navigation and fishing, should be duly notified of the construction of installations, so that these may be marked on charts. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

(5) There is, in principle, no duty to disclose in advance plans relating to contemplated construction of installations. However, in cases where the actual construction of provisional installations is likely to interfere with navigation, due means of warning must be maintained, in the same way as in the case of installations already completed, and as far as possible due notice must be given. If installations are abandoned or disused they must be entirely removed.

(6) With regard to the general status of installations, it has been thought useful to lay down expressly in paragraph 3 of this article, that they do not possess the status of islands and that the coastal State is not entitled to claim for installations any territorial waters of their own or treat them as relevant for the delimitation of territorial waters. In particular, they cannot be taken into consideration for the purpose of determining the baseline. On the other hand, the installations are under the juris-

diction of the coastal State for the purpose of maintaining order and of the civil and criminal competence of its courts.

(7) While, generally, the Commission, by formulating the test of unjustifiable interference, thought it advisable to eliminate any semblance of rigidity in adapting the existing principle of the freedom of the sea to what is essentially a novel situation, it thought it desirable to rule out expressly any right of interference with navigation in certain areas of the sea. These areas are defined in paragraph 5 of this article as narrow channels or recognized sea lanes essential to international navigation. They are understood to include straits in the ordinary sense of the word. The importance of these areas for the purpose of international navigation is such as to preclude, in conformity with the tests of equivalence and relative importance of the interests involved, the construction of installations or the maintenance of safety zones therein, even if such installations or zones are necessary for the exploration or exploitation of the continental shelf.

#### ARTICLE 72

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the breadth of the territorial sea of each country is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of each of the two countries is measured.

#### *Commentary*

(1) For the determination of the limits of the continental shelf the Commission adopted the same principles as for the articles 12 and 14 concerning the delimitation of the territorial sea. As in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic.

(2) There would be certain advantages in having the boundary lines marked on official large-scale charts. But as it is less important to users of such charts to have this information than to know the boundary of the territorial sea, the Commission refrained from imposing any obligation in the matter.

#### ARTICLE 73

Any disputes that may arise between States concerning the interpretation or application of articles 67-72 shall be

submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

#### *Commentary*

(1) The text of the draft as adopted at the fifth session contained a general arbitration clause providing that any disputes which might arise between States concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties.

(2) At its eighth session the Commission amended this article to provide that disputes should be settled by the parties by a method agreed between them. Failing such agreement, each of the parties would have the right to submit the dispute to the International Court of Justice.

(3) The majority of the Commission considered that a clause providing for compulsory arbitration would not be of much practical value unless the Commission at the same time laid down the procedure to be followed, as in the case of disputes relating to conservation of the living resources of the sea. It was pointed out, however, that in the present context the disputes would not be of an extremely technical character as in the case of the conservation of the living resources of the sea. It was therefore considered that arbitration could be replaced by reference to the International Court of Justice.

(4) The Commission did not agree with certain members who were opposed to the insertion in the draft of a clause on compulsory arbitration or jurisdiction, on the ground that there was no reason to impose on States one only of the various means provided by existing international law, and particularly by Article 33 of the United Nations Charter, for the peaceful settlement of international disputes. These members also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. The majority of the Commission nevertheless considered such a clause to be necessary. The articles on the continental shelf are the result of an attempt to reconcile the recognized principles of international law applicable to the régime of the high seas, with recognition of the rights of the coastal State over the continental shelf. Relying, as it must, on the continual necessity to assess the importance of the interests at stake on either side, this compromise solution must allow for some power of discretion. Thus, it will often be necessary to rely on a subjective assessment—with the resultant possibilities of disagreement—to determine whether, in the terms of article 71 paragraph 1, the measures taken by the coastal State to explore and exploit the continental shelf result in “unjustifiable” interference with navigation or fishing; whether, as is laid down in paragraph 2 of that article, the safety zones established by the coastal State do not exceed a “reasonable” distance around the installation; whether, in the terms of paragraph 5 of the article, a sea lane is “recognized” and whether it is “essential to international navigation”; finally, whether the coastal State, when preventing the laying of submarine cables or pipelines, is really acting in the spirit of article 70, which only authorizes such action when it comes within

the scope of "reasonable" measures for the exploration and exploitation of the continental shelf. If it is not kept within the limits of respect for law and is not impartially complied with, the new régime of the continental shelf may endanger the higher principle of the freedom of the seas. Consequently, it seems essential that States which disagree concerning the exploration and exploitation of the continental shelf should be required to submit any dispute arising on this subject to an impartial authority. For this reason the majority of the Commission thought it necessary to include the clause in question. It is incumbent on the parties to decide the manner in which they wish to settle their differences; if the parties are unable to reach agreement on the manner of settlement, however, either party may refer the matter to the International Court of Justice.

### CHAPTER III

#### PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

##### I. Law of treaties

34. The special rapporteur for the law of treaties, Sir Gerald Fitzmaurice, submitted a report (A/CN.4/101) at the eighth session. Because of lack of time, the Commission was unable to enter upon a full discussion of the report; at its 368th to 370th meetings, however, it considered certain general questions placed before it by the special rapporteur regarding the form and scope of the codification envisaged in this field. The special rapporteur was requested to continue his work in the light of the debate.

##### II. State responsibility

35. At its 370th to 373rd meetings the Commission considered the bases of discussion submitted by the special rapporteur, Mr. F. V. García Amador, in chapter X of his report entitled "International Responsibility" (A/CN.4/96). Without taking any decisions on the particular points the Commission requested the special rapporteur to continue his work in the light of the views expressed by the members.

##### III. Consular intercourse and immunities

36. At its 373rd and 374th meetings the Commission considered a number of questions submitted in a paper by the special rapporteur, Mr. J. Zourek, with a view to obtaining the opinion of the members thereon for his guidance in the preparation of his report for the next session. The special rapporteur was requested to continue his work in the light of the debate.

### CHAPTER IV

#### OTHER DECISIONS OF THE COMMISSION

##### I. Question of amending article 11 of the statute of the Commission

37. By its resolution 986 (X) dated 3 December 1955 the General Assembly invited the Commission to com-

municate its opinion concerning the question whether article 11 of its statute relating to the filling of casual vacancies in its membership should be modified in view of the fact that the term of office of the members had been increased from three to five years.

38. Careful consideration was given by the Commission to a proposal to recommend to the General Assembly that article 11 should be amended to provide that casual vacancies should be filled by the General Assembly instead of by the Commission itself as has been the case under the present wording of the article. The Commission decided not to adopt that proposal, for the reason, *inter alia*, that, as the General Assembly meets shortly after the session of the Commission, the filling of such vacancies by the General Assembly would be delayed with the result that the Commission would have to work for at least one session with the vacancy unfilled.

##### II. Publication of the documents of the Commission

39. By its resolution 987 (X) dated 3 December 1955, the General Assembly gave instructions to the Secretary-General concerning the printing of the Commission's documents and invited the Commission to express its views for the guidance of the Secretary-General regarding the selection and editing of the documents to be printed and also invited it, if necessary, to re-submit the question of the printing of the documents to the General Assembly.

40. The matter was considered on the basis of a note prepared by the Secretariat (A/CN.4/L.67).

41. The Commission does not deem it necessary to re-submit the question of the printing of the documents to the Assembly.

42. The Commission recommends that the records and documents be published in the form of a year-book, consisting of one or two volumes *according to the size of the documentation of each session*. With respect to presentation, it is proposed that the year-book shall consist of three parts; namely:

(a) Reports of special rapporteurs, communications from Governments and memoranda and studies by the Secretariat (i.e., essentially documents *issued in preparation of each session*);

(b) Summary records, *including working documents issued during the session*;

(c) The report on the work of the session.

The Commission considers it indispensable that the report on each session be included in the year-book, and also that the latter be provided with an index.

43. The documents to be included shall be decided at the end of each session by the Chairman, acting under the authority of the Commission, in consultation with the Secretary.

44. The Commission suggests that the publication should be entitled: "Year-book of the International Law Commission".

45. Regarding the publication of the documents of previous sessions the Commission would recommend that priority should be given to those sessions at which the law of the sea was discussed.

### III. Co-operation with inter-American bodies

46. The Commission heard a statement of its Secretary introducing the report (A/CN.4/102) submitted by him to the Commission on the third meeting of the Inter-American Council of Jurists held in Mexico City from 17 January to 4 February 1956, which he attended in the capacity of an observer for the Commission. It also heard a statement by Mr. M. Canyes, representative of the Secretary-General of the Organization of American States.

47. On the proposal of the Chairman, the Commission thereafter adopted the following resolution:

*"The International Law Commission,*

*"Recalling* the resolutions adopted at its sixth and seventh sessions regarding co-operation with Inter-American bodies,

*"Considering* that the contacts established between the Commission and the Inter-American Council of Jurists through the participation of their respective secretaries in the session of these bodies should be continued,

*"1. Expresses its appreciation* to the Secretary-General of the United Nations for sending the Secretary of the Commission to attend the third meeting of the Inter-American Council of Jurists;

*"2. Takes note* of the report of the Secretary on that meeting;

*"3. Expresses its thanks* to the Secretary-General of the Organization of American States for sending the Assistant Director of the Department of International Law of the Pan American Union to attend the eighth session of the Commission;

*"4. Requests* the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, in the capacity of an observer for the Commission, the fourth meeting of the Inter-American Council of Jurists to be held in Santiago, Chile, in 1958, and to report to the Commission at its following session."

### IV. Presence of the Rapporteur at the eleventh session of the General Assembly

48. On the proposal of the Chairman, the Commission decided that Mr. François, the Rapporteur for the current session, who had been the special rapporteur on the régime of the high seas and the régime of the territorial sea since the beginning of the work of the Commission on those subjects, should attend the eleventh session of the General Assembly and furnish such information on the Commission's draft on the law of the sea as might be required in connexion with the consideration of the matter by the Assembly.

### V. Date and place of next session

49. In accordance with the provisions of article 12 of its statute as amended by General Assembly resolution 984 (X) of 3 December 1955, the Commission decided to hold its next session at Geneva, Switzerland, for a period of ten weeks beginning on 23 April 1957.

50. In view of the fact that most of the current session had to be devoted to the study of the law of the sea, in order to complete the Commission's work on that subject in pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission considers that a ten weeks' session is the minimum required to enable it to make substantial progress in the other five major items on its agenda.

51. The aforementioned date for the beginning of its next session was fixed by the Commission in order to avoid overlapping with the summer session of the Economic and Social Council, as requested by General Assembly resolution 694 (VII) of 20 December 1952. For many reasons, the Commission, however, would prefer a later opening date for its sessions in the future and expresses the hope that its wishes in that respect will be taken into account when the programme of conferences at Headquarters and Geneva is to be reviewed.

## LIST OF OTHER DOCUMENTS PERTAINING TO THE EIGHTH SESSION OF THE COMMISSION BUT NOT REPRODUCED IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/3028	Report of the International Law Commission on the work of its seventh session: report of the Sixth Committee	<i>Official Records of the General Assembly, Tenth Session, Annexes, agenda item 50</i>
A/CN.4/23	Report on the law of treaties by J. L. Brierly, Special Rapporteur	Mimeographed
A/CN.4/25	Draft code of offences against the peace and security of mankind: report by J. Spiropoulos, Special Rapporteur	Ditto
A/CN.4/43	Second report on the law of treaties by J. L. Brierly, Special Rapporteur	Ditto
A/CN.4/44	Second report on a draft code of offences against the peace and security of mankind by J. Spiropoulos, Special Rapporteur	Ditto
A/CN.4/61 and Add.1	Second report on the régime of the territorial sea by J. P. A. François, Special Rapporteur	Ditto
A/CN.4/63	Report on the law of treaties by H. Lauterpacht, Special Rapporteur	Ditto
A/CN.4/77	Third report on the régime of the territorial sea by J. P. A. François, Special Rapporteur	Ditto
A/CN.4/85	Third report relating to a draft code of offences against the peace and security of mankind by J. Spiropoulos, Special Rapporteur	Ditto
A/CN.4/87 and Corr.1	Second report on the law of treaties by H. Lauterpacht, Special Rapporteur	Ditto
A/CN.4/95	Provisional agenda	Adopted without change. For the text of this document, see A/3159, para. 5
A/CN.4/104	Report of the International Law Commission covering the work of its eighth session	Same text as A/3159
A/CN.4/L.55	Law of treaties: working paper prepared by the Secretariat	Mimeographed
A/CN.4/L.66	Agenda of the 331st meeting of the Commission	Ditto
A/CN.4/L.68 and Add.1 to 5	Draft report of the International Law Commission covering the work of its eighth session	Ditto
A/CN.4/SR.331 to 381	Summary records of the 331st to 381st meetings of the Commission	See <i>Yearbook of the International Law Commission 1956, Vol. I</i>
A/CONF.10/6	<i>Report of the International Technical Conference on the Conservation of the Living Resources of the Sea. Rome, 18 April to 10 May 1955</i>	United Nations publication, Sales No.: 1955.II.B.2





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