Articles concerning the Law of the Sea with commentaries

1956

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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.[11]

(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." [12]

(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." [13]

(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

[11] *International Court of Justice, Reports 1951*, p. 116.

[12] *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.

[13] *Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693), p. 14.

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 ".[14] 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 in 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.

[14] *Official Records of the General Assembly, Tenth Session, Supplement No. 9* (A/2934), p. 17.

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 landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle drawn on the 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.

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 of 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 territiorial 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 Comission 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 collisions 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 intervence.

(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 or 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 internal 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." [15]

(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." [16]

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

[15] *International Court of Justice, Reports, 1949*, p. 28.

[16] *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 rached 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 immunnity 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 praticipation 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 property on board. The courts of the State which carried out the seizure may decide upon the penalities 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 some 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.[17]

(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

[17] *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 is seventh session, in 1955, the International Law Commission took note of the report of the Conference [18] 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.[19] 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

[18] 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).

[19] *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 lawe 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." [20]

(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

[20] *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 be 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 of 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 of 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.[21] 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

[21] *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." [22]

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 control 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 neccessary 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 Condification 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.[23] 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

[22] *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), para. 111.

[23] *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." [24] 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-

[24] *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 considered 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 reques 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 be 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 pacific 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 establish 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 communicate 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.