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REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS EIGHTH SESSION

# Reference Guide to the Articles concerning the Law of the Sea adopted by the International Law Commission at its eighth session

(Prepared by the Secretariat)

56-28235

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## Introduction

1. At its eighth session, held at the European Office of the United Nations, Geneva, Switzerland, from 23 April to 4 July 1956, the International Law Commission adopted the text of seventy-three articles concerning the law of the sea. The text of these articles is contained in the Report of the International Law Commission covering the work of its eighth session 23 April - 4 July 1956.[1/] The same Report also contains a general account of the background of the adoption of the articles.

2. Also in the same Report the Commission has recommended, in conformity with article 23, paragraph 1 (d) of its statute, that "the General Assembly should summon an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate".[2/]

3. The object of this Guide is to contribute to a further understanding of the seventy-three articles concerning the law of the sea recently adopted by the International Law Commission. As has already been stated, the Report of the Commission itself contains a general account of the background of the adoption of these articles. Further, the Report contains commentaries which, going into greater detail, to some extent explain the circumstances of the adoption of each particular article.

4. So far as possible, the present Guide avoids mere repetition of what has already been stated by the Commission either in the introductory section of its Report, or in the commentaries to the individual articles. It seeks rather to trace and to analyse the legislative history of the text of the articles as finally adopted. It does this by setting out and comparing the texts proposed

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1/ Official Records of the General Assembly: Eleventh Session, Supplement No. 9 (A/3159).

2/ Ibid., paragraph 28.

from time to time by the special rapporteur,[1] as well as the draft articles adopted by the Commission itself during the preparatory stages of its work.

5. In the preparation of the Guide the fact has not been overlooked that, although the Conference for the Codification of International Law held at The Hague from 13 March to 12 April 1930 broke down on the question of the breadth of the territorial sea, agreement was at that time reached provisionally on a number of points concerning the legal status of the territorial sea. In recognition of this fact, which the Commission itself has acknowledged, it has been thought wise to include in the Guide, where relevant, certain texts either adopted or recommended at the 1930 Conference.[2]

6. Another function of the Guide is to set out the texts of various documents (international conventions, the reports of international committees and the like) referred to either by the special rapporteur or by the Commission itself.

7. In preparing the Guide, regard has where possible been had to a suggestion made by the Government of Israel in its comments on the Provisional articles concerning the regime of the high seas and the Draft articles on the regime of the territorial sea adopted by the International Law Commission at its seventh session, 2 May - 8 July 1955. This suggestion was in the following terms:

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1/ At its first session (1949) the Commission drew up a provisional list of topics whose codification it considered necessary and feasible. Among the items in this list were the regime of the high seas and the regime of the territorial sea. The Commission included the regime of the high seas among the topics to be given priority and appointed Mr. J.P.A. François special rapporteur for it. Subsequently, at its third session (1951), in pursuance of a recommendation contained in General Assembly resolution 374(IV), the Commission decided to initiate work on the regime of the territorial sea and appointed Mr. François special rapporteur for that topic as well.

2/ It should also not be overlooked that Mr. J.P.A. François was rapporteur of the Second Committee of the 1930 Conference. It was this Committee which was appointed to study the question of the territorial sea.

"... The Government of Israel considers that it would be useful, both in connexion with the discussion on the Commission's final draft which is due to be placed on the provisional agenda of the eleventh session of the General Assembly, and for any other discussions which might subsequently take place, were the Commission's report, or an accompanying document prepared by the Secretariat, to set forth with great particularity and detail the full history of each Article and Comment, including a chronological survey of the different drafts and attendant proposals put forward during the various deliberations of the Commission, both those adopted by the Commission and included in its various sessional reports and those which were not adopted by the Commission. Furthermore, such synoptic survey should also contain the most ample references to the summary records and documentations of the Commission's eighth and all previous sessions at which the particular item was discussed. In this connexion it is also considered that additional scientific and political value will attach to such a report could it be found possible to include in it comparable references to the proceedings of The Hague Codification Conference of 1930. Owing to the relative unavailability of much of the earlier documentation it is felt that it is incumbent upon the various organs to provide some adequate substitute." 1/

8. The Guide consists of a main section and two annexes. The main section consists, in the first place, of the text of the articles adopted by the Commission at its eighth session in 1956. Usually, the texts are set out article by article. Occasionally, however, it has been found more convenient to group together the texts of a number of consecutive articles. This has been done, for instance, in the case of articles 29-31, 38-45, 49-59, 61-65 and 67-78. Whether the articles have been set out individually or in groups, they appear under the heading "1956 draft".

9. Secondly, under each article (or group of articles) the main section of the Guide sets out and compares the texts proposed from time to time by the special rapporteur, as well as the draft articles adopted by the Commission itself during the preparatory stages of its work. The reasons for the changes that were made are briefly explained. There are also set out the texts of

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1/ A/CN.4/99/Add.1, page 13. The Provisional articles concerning the regime of the high seas and the Draft articles on the regime of the territorial sea upon which the Government of Israel was at the time commenting are included in the Report of the International Law Commission covering the work of its seventh session, 2 May - 8 July 1955 /Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)/.

various international documents (international conventions, the reports of international committees and the like) referred to either by the special rapporteur or by the Commission in connexion with the preparation of the drafts of the article or articles concerned. All this is done under the heading: "Stages and problems in the preparation of the present draft".

10. Thirdly, where relevant, there have been set out in the main section of the Guide certain texts taken from the proceedings of the 1930 Conference. These texts, which appear under the heading "Equivalent 1930 draft", consist, as the case may be, either of articles proposed by Sub-Committee No. I of the Second Committee, and provisionally approved by the Second Committee itself; or of proposals drawn up by Sub-Committee No. II of the Second Committee. The Observations of the committee or sub-committee concerned have been added where they appear to be particularly relevant.

11. The purpose of Annex A of the Guide is to show at a glance those meetings of the International Law Commission at which the matters dealt with in the articles as finally adopted by the Commission were discussed. The Annex consists of two columns. In the left-hand column is given the number of the articles (or groups of articles)[1/] adopted by the Commission. In the right-hand column appear the numbers of the various meetings of the Commission where the matters dealt with in these articles (or groups of articles) were principally discussed. Thus, by using this Annex in conjunction with the main section, and by looking up the summary records of the appropriate meetings, it should be possible to obtain a clearer picture of the process by which the Commission came to adopt the final text in the case of each article.

12. The purpose of Annex B of the Guide is to show at a glance where may be found the comments of those Governments who have commented from time to time on the draft and provisional articles adopted by the Commission at its successive sessions. As is explained by the Commission in the report covering the work of its eighth session these comments have been carefully studied both by the special rapporteur and also by the Commission itself. Along, therefore,

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1/ Certain articles have been grouped together for convenience in this Annex in exactly the same way as in the main section.

with the special rapporteur's reports, including the various records and documents cited by him, and the Commission's own deliberations, the comments of the Governments constitute a principal source of the seventy-three articles concerning the law of the sea as these have come finally to be adopted by the Commission. The object of Annex B is to render this source more capable of convenient study.

13. The comments of some Governments, either on the draft articles as a whole or on certain groups of articles, were in such general terms that it has not been found possible to mention such comments under individual articles.1/ It is emphasized that for a full comprehension of the comments of the Governments it is essential to consider them as a whole. These comments have been mentioned in Annex B under particular articles merely for the sake of convenience.

14. In addition to the comments of the Governments on various drafts adopted by the Commission which have been mentioned in Annex B, attention is drawn to document A/CN.4/19, dated 23 March 1950, in which are set out the replies of ten Governments to a request made by the International Law Commission at its first session in 1949 that Governments of Members of the United Nations should furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the three topics to which the Commission had decided to give priority, one of these topics being the regime of the high seas. Attention is also drawn to document A/CN.4/100, dated 13 March 1956, which is entitled "Comments by Inter-governmental Organizations on Articles regarding Fishing embodied in the Provisional Articles concerning the Regime of the High Seas adopted by the International Law Commission at its Seventh Session".2/

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1/ See, for instance, the comments of the Government of Austria (A/CN.4/99/Add.1, page 9); of the Government of Nepal (A/CN.4/99/Add.6); and of the Government of the United States of America (A/CN.4/99/Add.1, page 82, with respect to Chapter I of the draft articles on the regime of the territorial sea).

2/ In fact the only Comments included in the document are those of the International Commission for the Northwest Atlantic Fisheries.

15. In using Annexes A and B the following points should be borne in mind:

(i) The articles are numbered in these Annexes according to the numbers allotted to them by the Commission at its eighth session (A/3159). But the numbers of the draft articles were frequently altered during the preparatory stages.

(ii) In addition to the alterations in their numbering, the draft articles themselves were modified extensively from time to time, both in form and in substance.

(iii) In the case of some matters there was naturally a tendency for the discussions in the Commission and the comments of Governments not to stay confined to the text of any particular article. This was especially true, for instance, of article 47 (Right of Hot Pursuit) and article 66 (Contiguous Zone); and of articles 49 to 59 (Fishing), article 60 (Fisheries conducted by means of equipment embedded in the floor of the sea), article 66 (Contiguous Zone) and articles 67-68 (Definition of the "continental shelf" and statement of the rights of the coastal State over the continental shelf).

For all these reasons the list of references given in Annexes A and B should not be regarded as other than an approximate guide.

# ARTICLES CONCERNING THE LAW OF THE SEA

## PART I

## TERRITORIAL SEA

### SECTION I: GENERAL

### Juridical status of the territorial sea

### Article 1

1956 draft

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.

Stages and problems in the preparation of the present draft

The text of this article has given rise to few major problems. It may be noted, however, that in his first report (A/CN.4/53) the special rapporteur put forward two articles, as follows:

> Article 1. Meaning of the term "territorial sea". The territory of a State includes a belt of sea described as the territorial sea.
>
> Article 2. Juridical status of the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by international law.

In his second report (A/CN.4/61) the special rapporteur amended article 2 so that it read:

> Sovereignty over this belt is exercised subject to the conditions prescribed in this regulation and other rules of international law.

In 1954 (A/2693) the Commission telescoped these two draft articles into one, which read as follows:

Article 1. Juridical status of the territorial sea

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

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

In 1955 (A/2934) and 1956 (A/3159) minor drafting changes only were made by the Commission. As compared with the special rapporteur's first draft, which treated the meaning of the term "territorial sea" and the juridical status of this sea as separate items, the later drafts have tended to treat these items as amounting to one and the same question.

Equivalent 1930 draft (Appendix I[1], article 1)

The territory of a State includes a belt of sea described in this Convention as the territorial sea.

Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law.

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1/ The reference is to the Report of the Second Committee of the Conference for the Codification of International Law held at The Hague in March-April, 1930. (Acts of the Conference for the Codification of International Law held at The Hague from March 13th to April 12th, 1930, Volume I (Plenary Meetings), Annex 10. League of Nations document C.351.M.145. 1930.V). This Report was accompanied by four appendices as follows: Appendix I, consisting of thirteen articles on The Legal Status of the Territorial Sea; Appendix II (Report of Sub-Committee No. II relating to Base Line, Bays, Ports, Roadsteads, Islands, Groups of Islands, Straits, Passage of Warships through Straits and Delimitation of the Territorial Sea at the Mouth of a River); Appendix III, consisting of an Extract from the Minutes of the Thirteenth Meeting of the Second Committee, held on April 3rd, 1930, at which each delegation in turn stated its attitude on the question of the breadth of the territorial sea without any vote being taken, it being made clear that the statement of each delegation was provisional only, and not categorical or final; and Appendix IV (Resolution concerning the Continuation of the Work of Codification on the Subject of Territorial Waters).

## Juridical status of the air space over the territorial sea and of its bed and subsoil

### Article 2

1956 draft

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

Stages and problems in the preparation of the present draft

The text of this article has given rise to few major problems. In his first report (A/CN.4/53) the special rapporteur omitted any mention of the air space, the article (article 3) being entitled "Juridical status of the bed and subsoil" and the text reading as follows:

1. The territory of a coastal State also includes the bed of the territorial sea and the subsoil.

2. Nothing in the present Regulation prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains.

In his second report (A/CN.4/61) the special rapporteur included a reference to air space, the heading of the article being amended to read "Juridical status of the air space, the sea-bed and the subsoil" and the text now reading as follows:

The territory of a coastal State includes also the air space over the territorial sea, as well as the bed of the sea, and the subsoil.

In 1954 (A/2693) the Commission adopted both the heading and the text of the article exactly as they are at present, and no change was made in 1955 (A/2934).

Equivalent 1930 draft (Appendix I, article 2)

The territory of a Coastal State includes also the air space above the territorial sea, as well as the bed of the sea, and the subsoil.

Nothing in the present Convention prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains.

## SECTION II - LIMITS OF THE TERRITORIAL SEA

### Breadth of the territorial sea

### Article 3

1956 draft

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.

States and problems in the preparation of the present draft

As in 1930, this has proved to be one of the most difficult items. So much so that, in the very text of the article, the Commission is actually constrained to admit that, since it can take no firm decision on the question, it "considers that the breadth of the territorial sea should be fixed by an international conference". In his first report (A/CN.4/53) the special rapporteur suggested the following text as article 4:

> The breadth of the belt of sea defined in article 1 shall be fixed by the coastal State but may not exceed six marine miles.
>
> Basing himself on a study of current legislation, as collected by the Secretariat and others, the special rapporteur said he was "forced to the conclusion that a proposal to fix the breadth of the territorial sea at three miles would have no chance of success, and that agreement on this distance, either de lege lata, or de lege ferenda, is out of the question". At the same time, the special rapporteur felt that "the problem must be solved,

since if each State were left absolutely free to determine the breadth of its territorial sea itself, the principle of the freedom of the seas would suffer to an inadmissible extent". He therefore suggested a six-mile rule as a compromise, although admitting that this rule might be opposed both by States who support the three-mile rule and by States who claim a greater breadth than six miles.

In his second report (A/CN.4/61) the special rapporteur submitted a more elaborate proposal, still as article 4, which read as follows:

1. The breadth of the territorial sea shall be fixed by the coastal State but may not exceed twelve nautical miles measured from the base line of the territorial sea.

2. Free passage in the territorial sea is guaranteed subject to the conditions set out in this regulation.

3. The coastal State may only claim exclusive fishing rights for its nationals up to a distance of three nautical miles measured from the base line of the territorial sea. Beyond this limit of three nautical miles, fishing in the territorial sea may be made subject by the coastal State to regulations designed solely to protect the resources of the sea. There shall be no discrimination against the nationals of foreign States.

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

In his third report (A/CN.4/77) the special rapporteur amended this proposal, still as article 4, to read as follows:

1. The breadth of the territorial sea shall be three nautical miles measured from the base line of the territorial sea.

2. The coastal State may, however, extend the territorial sea up to a limit of twelve nautical miles from the base line, subject to the following conditions, that is to say that:

(a) Free passage in the territorial sea is guaranteed as provided in this regulation.

(b) The coastal State may only claim exclusive fishing rights for its nationals up to a distance of three nautical miles measured from the base line of the territorial sea. Beyond this limit of three

nautical miles, fishing in the territorial sea may be made subject by the coastal State to regulations designed solely to protect the resources of the sea.

There shall be no discrimination against the nationals of foreign States.

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

In 1954 (A/2693) the Commission reported on this question as follows:

68. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made:

(1) That a uniform limit (three, four, six or twelve miles) should be adopted;

(2) That the breadth of the territorial sea should be fixed at three miles subject to the right of the coastal State to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal State to extend this limit to twelve miles, provided that it observes the following conditions:

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal State may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal State may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

(4) That it should be admitted that the breadth of the territorial sea may be fixed by each State at a distance between three to twelve miles;

(5) That a uniform limit should be adopted for all States whose coasts abut on the same sea or for all States in a particular region;

(6) That the limit should vary from State to State in keeping with the special circumstances and historic rights peculiar to each;

(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf;

(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal State is entitled to fix the breadth of its own territorial sea in accordance with its needs;

(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.

69. The Commission realized that each of these solutions would meet with the opposition of some States. However, agreement will be impossible unless States are prepared to make concessions.

70. That being so, the Commission would be greatly assisted in its task if the Governments could state, in their comments on these draft articles, what is their attitude concerning the question of the breadth of the territorial sea and suggest how it could be solved. The Commission hopes that the replies of Governments will enable it to formulate concrete proposals concerning this matter.

In 1955 (A/2934) the Commission adopted the following text as article 3:

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

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

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

It also requested the views of Governments. A number of Governments contended that paragraphs 2 and 3 were contradictory. But, according to the Commission's 1956 report (A/3159), the comments of the Governments "showed a wide

diversity of opinion, and the same diversity was noted within the Commission". The Commission discussed in 1956 a number of proposals, which included the following:

(i) that it is for each coastal State, in the exercise of its sovereign powers, to fix the breadth of its territorial sea;

(ii) that each coastal State has the right to extend its territorial sea as far as twelve miles;

(iii) that each coastal State has the right to extend its territorial sea as far as twelve miles, provided this can be justified either on the basis of long usage or as being necessary for satisfying the justifiable interests of the State, taking into account also the interest of other States in maintaining the freedom of the high seas and the breadth generally applied in the region; and provided also that, in the case of disputes, the question should, at the request of either of the parties, be referred to the International Court of Justice.

(iv) that each coastal State may determine the breadth of its territorial sea 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; and

(v) that the breadth of the territorial sea of each State is three miles, although a greater breadth may be recognized if based on customary law.

None of these proposals secured a majority in the Commission, which proceeded to adopt the text of the article in its present form. The Commission explained that it preferred the holding of a diplomatic conference to the adoption of a rule whereby all disputes concerning the breadth of the territorial sea would be submitted to the compulsory jurisdiction of the International Court of Justice. The Commission explained that "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".

Equivalent 1930 draft. The following is an extract from the Report of the Second Committee:

... The discussions of the Committee showed that all States admit the principle of the freedom of maritime navigation. On this point there are no

differences of opinion. The freedom of navigation is of capital importance to all States; in their own interests they ought to favour the application of the principle by all possible means.

On the other hand, it was recognized that international law attributes to each coastal State sovereignty over a belt of sea round its coasts. This must be regarded as essential for the protection of the legitimate interests of the State. The belt of territorial sea forms part of the territory of the State; the sovereignty which the State exercises over this belt does not differ in kind from the authority exercised over its land domain.

This sovereignty is however limited by conditions established by international law; indeed it is precisely because the freedom of navigation is of such great importance to all States that the right of innocent passage through the territorial sea has been generally recognized.

There may be said to have been agreement among the delegations on these ideas. With regard, however, to the breadth of the belt over which the sovereignty of the State should be recognized, it soon became evident that opinion was much divided. These differences of opinion were to a great extent the result of the varying geographical and economic conditions in different States and parts of the world. Certain delegations were also anxious about the consequnces which, in their opinion, any rules adopted for time of peace might indirectly have on questions of neutrality in time of war.

The Committee refrained from taking a decision on the question whether existing international law recognizes any fixed breadth of the belt of territorial sea. Faced with differences of opinion on this subject, the Committee preferred, in conformity with the instructions it received from the Conference, not to express an opinion on what ought to be regarded as the existing law, but to concentrate its efforts on reaching an agreement which would fix the breadth of the territorial sea for the future. It regrets to confess that its efforts in this direction met with no success.

The Preparatory Committee had suggested, as a basis of discussion, the following scheme:

1. Limitation of the breadth of the territorial sea to three miles;
2. Recognition of the claim of certain States specifically mentioned to a territorial sea of greater breadth;

3. Acceptance of the principle of a zone on the high sea contiguous to the territorial sea in which the coastal State would be able to exercise the control necessary to prevent, within its territory or territorial sea, the infringement of its Customs or sanitary regulations or interference with its security by foreign vessels, such control not to be exercised more than twelve miles from the coast.1/

The Committee was unable to accept this scheme. Objections were raised by various delegations to each of the three points in turn.

The fixing of the breadth at three miles was opposed by those States which maintain that there is no rule of law to that effect, and that their national interests necessitate the adoption of a wider belt. The proposal to recognize a wider belt for these States and for them alone, led to objections from two sides: some States were not prepared to recognize exceptions to the three-mile rule, while the above-mentioned States themselves were of opinion that the adoption of such a rule would be arbitrary and were not prepared to accept any special position which was conceded to them merely as part of the terms of an agreement. The idea embodied in the third point, namely, the acceptance of a contiguous zone, found a number of supporters though it proved ineffective as the basis for a compromise.

The first question to be considered was the nature of the rights which would belong to the coastal States in such a zone. The supporters of the proposal contemplated that, first of all, the coastal State should be able to enforce its customs regulations over a belt of sea extending twelve miles out from the coast. It need scarecely be said that States would still be free to make treaties with one another conferring special or general rights in a wider zone - for instance, to prevent pollution of the sea. Other States, however, were of opinion that in Customs matters bilateral or regional agreements would be preferable to the making of collective conventions, in view of the special circumstances which would apply in each case. These

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1/ On the question of the contiguous zone, see under article 66 below.

States were opposed to granting the coastal State any right of exercising Customs or other control on the high seas outside the territorial sea, unless the right in question arose under a special convention concluded for the purpose. The opposition of these States to the establishment of such a zone was further strengthened by the possibility that, if such rights were accorded, they would eventually lead to the creation of a belt of territorial sea which included the whole contiguous zone.

Other States declared that they were ready to accept, if necessary, a contiguous zone for the exercise of Customs rights, but they refused to recognize the possession by the coastal State of any rights of control with a view to preventing interference with its security. The recognition of a special right in the matter of legitimate defence against attack would, in the opinion of these States, be superfluous, since that right already existed under the general principles of international law; if, however, it was proposed to give the coastal State still wider powers in this matter, the freedom of navigation would thereby be seriously endangered, without, on the other hand, affording any effective guarantee to the coastal State. But other States regarded the granting of powers of this nature in the contiguous zone as being a matter of primary importance. The opinion was expressed that the coastal State should be able to exercise in the air above the contiguous zone rights corresponding to those it might be in a position to claim over the contiguous zone itself. The denial of such rights over the contiguous zones both of sea and air would therefore, they stated, influence the attitude of the States in question with regard to the breadth of the territorial sea.

Certain delegations pointed out how important it was that the coastal State should have in the contiguous zone effective administration of its fishery laws and the right of protecting fry. It was, on the other hand, agreed that it was probably unneccesary to recognize special rights in the contiguous zone in the matter of sanitary regulations.

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After discussions, which could not be prolonged because of the limited time available, the Committee came to the conclusion that in view of these wide divergencies of opinion no agreement could be reached for the present on these fundamental questions.

.....

## Normal baseline

### Article 4

1956 draft

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.

Stages and problems in the preparation of the present draft

The adoption of this article has given rise to little difficulty. In his first report (A/CN.4/53) the special rapporteur recommended as follows (in article 5 of his draft):

1. As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.
2. ... (See under article 5, below.)
3. The line of low-water mark is that indicated on the charts officially used by the coastal State, provided that the latter line does not appreciably depart from the line of mean low-water spring tides.
4. ... (See under article 11, below.)

The special rapporteur pointed out that, in its Judgement of 18 December 1951 in the Fisheries case, the International Court of Justice found that, for the purpose of measuring the breadth of the territorial sea, "it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States" (I.C.J. Reports 1951, p. 128)

In his second report (A/CN.4/61) the special rapporteur removed the words "along the entire coast" at the end of paragraph 1. In an addendum to this report (A/CN.4/61, Add.1) the special rapporteur included the observations of

a Committee of Experts consulted by him[1/]. The experts were asked this question: "Assuming the territorial sea to be measured from the low-water line, what line might then preferably be taken as such?" They answered: "1. Except as otherwise provided for, the base-line for measuring the territorial sea should be the low-water line along the coast as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn, which show the low-water line, the shore line (high-water line) should be used." The Committee of Experts also stated that it "did not consider that there was any danger that omission of the provisions made by the

1/ The members of the Committee were Professor L.E.G. Asplund (Geographic Survey Department, Stockholm); Mr. S. Whittemore Boggs (Special Adviser on Geography, Department of State, Washington, D.C.); Mr. P.R.V. Couillault (Ingénieur en chef du Service central hydrographique, Paris); Commander R.H. Kennedy, O.B.E.R.N. (Retd.) (Hydrographic Department, Admiralty, London) accompanied by Mr. R.C. Shawyer (Administrative Officer, Admiralty, London); Vice-Admiral A.S. Pinke (Retd.) Royal Netherlands Navy, The Hague). This Committee of Experts met under the chairmanship of the special rapporteur.

1930 Conference as regards special indications in this matter, might tempt governments unreasonably to extend their low-water lines on their charts."[1/]

Taking account of the suggestions of the Committee of Experts, the special rapporteur in his third report (A/CN.4/77) revised the article (article 5) to read as follows:

> As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn which show the low-water line, the shore line (high-water line) shall be used.

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1/ In 1930 Sub-Committee No. II had recommended in its article on the Base Line that "the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides". (underlining not in the original) In its Observations on the same article, the Sub-Committee had stated the following: "The line of low-water mark following all the sinuosities of the coast is taken as the basis for calculating the breadth of the territorial sea, excluding the special cases of (1) bays, (2) islands near the coast and (3) groups of islands, which will be dealt with later. The article is only concerned with the general principle.

The traditional expression 'low-water mark' may be interpreted in different ways and requires definition. In practice, different States employ different criteria to determine this line. The two following criteria have been taken more particularly into consideration: first, the low-water mark indicated on the charts officially used by the Coastal State, and, secondly, the line of mean low-water spring tides. Preference was given to the first, as it appeared to be the more practical. Not every State, it is true, possesses official charts published by its own hydrographic services, but every Coastal State has some chart adopted as official by the State authorities, and a phrase has therefore been used which also includes these charts. The divergencies due to the adoption of different criteria on the different charts are very slight and can be disregarded. In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides. The term 'appreciably' is admittedly vague. Inasmuch, however, as this proviso would only be of importance in a case which was clearly fraudulent, and as, moreover, absolute precision would be extremely difficult to attain, it is thought that it might be accepted."

The special rapporteur also referred again to the above-mentioned passage in the Judgement of the International Court of Justice.

In 1954 (A/2693) the Commission adopted the following article as article 4, under the heading of "Normal base line":

> Subject to the provisions of article 5[1/] and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn which show the low-water line, the shore-line (high-water line) shall be used.

In 1955 (A/2934) the last sentence of the above (1954) article was removed. It was pointed out by the Commission that the sentence "might lead to confusion since it could be interpreted as meaning that not only a ship on the high seas but also the coastal State must take the high-water line as base line in the absence of detailed charts, which was not the Commission's intention." Only minor alterations in drafting were made in 1956.

Equivalent 1930 draft (Appendix II)

Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

For the purposes of this Convention, the line of low-water mark is that indicated on the charts officially used by the Coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.

... (See under article 11, below.)

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1/ This article was entitled "Straight base lines."

## Straight baselines

### Article 5

1956 draft

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.

Stages and problems in the preparation of the present draft

The problem here has been that of drafting in a form suitable for a code, and to some extent giving greater precision to, the principles laid down by the International Court of Justice in the Fisheries case concerning the right of the coastal State to substitute, on suitable occasions, for the normal physical base line (see article 4), a base line consisting of a line drawn on a chart. In his first report (A/CN.4/53) the special rapporteur, under the single heading of "Base Line", recommended in the same article 5 of his draft as follows:

1. ... (See under article 4, above.)

2. Nevertheless, where a coast is deeply indented and cut into, or where it is bordered by an archipelago, the base-line becomes independent of the low-water mark and the method of base-lines joining appropriate points on the coast must be employed. The drawing of base-lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. ... (See under article 4, above.)

4. ... (See under article 11, below.)

In his second draft (A/CN.4/61) the special rapporteur slightly amended the text. This text (article 5) read as follows:

1. ... (See under article 4, above.)

2. As an exception, where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In this special case, the method of base lines joining appropriate points on the coast may be employed. The drawing of base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. ... (See under article 4, above.)

4. ... (See under article 11, below.)

In the light of the report of the Committee of Experts (A/CN.4/61/Add.1),[1] the special rapporteur in his third report (A/CN.4/77) substituted a new text. This text (article 6) reads as follows:

1. As an exception, where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In this special case, the methods of base lines joining appropriate points on the coast may be employed. The drawing of base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

2. As a general rule the maximum permissible length for a "straight base line" shall be ten miles. Such base lines may be drawn, where justified, between headlands on the coastline or between any such headland and an island, or between two islands provided that every such line remains within five miles from the coast and provided further that such headlands and/or islands are not more than ten miles apart. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea.

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1/ In its report the Committee of Experts had recommended ten miles as the maximum permissible length for straight base lines. This distance was chosen as being twice the range of vision to the horizon in clear water from the eye of a mariner at a height of five metres (which is the internationally accepted height for hydrographical purposes). The experts had also emphasized that it was the responsibility of the coastal State to give adequate publicity to the straight base lines which it selected. It was explained that, if it was desirable that the base lines should, as a general rule, not depart to any appreciable extent from the general direction of the coast, fixing the maximum length of the lines at ten miles was a method of achieving this result. The experts further commented: "In exceptional cases, especially justified by international law, the drawing of longer lines may be permitted in regard to a particular coast. No point, however, on such lines should be farther than five miles from the coast."

3. Where "straight base lines" are justified, it shall be the responsibility of the coastal State to give adequate publicity thereto.

The Commission in 1954 (A/2693) stated that it took the Court's Judgement in the Fisheries case as expressing the law in force and as the basis of its draft. Since, however, it was of the opinion that the rules recommended by the experts added certain desirable particulars to the general method advised by the Court, it decided to endorse the expert's recommendations in a slightly modified form. The Commission was careful to add that it considered these additions represented a "progressive development" of international law and that they could not be regarded as binding until approved by States. The Commission's 1954 draft (article 5) was as follows:

1. As an exception, where this is justified for historical reasons or where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

2. As a general rule, the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals.

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

In 1955, however, the Commission decided substantially to modify this draft (A/2934). It explained that some Governments had raised objections to the second paragraph in particular, arguing that the maximum distance of ten miles for base lines and the maximum distance from the coast of five miles seemed arbitrary and, moreover, not in conformity with the Court's decision. The Commission decided

by a majority vote that the second paragraph, except for the last sentence, should be deleted so as not to make the provisions of the first paragraph too mechanical. The last sentence, stating "Base lines shall not be drawn to and from drying rocks and shoals" was inserted at the end of the first paragraph, the adjective "drying" now being made to qualify the word "shoals" as well as the word "rocks".

The 1955 version, contained in article 5, came finally to read as follows:

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

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

The Commission explained that in the first sentence of paragraph 1 the words "as an exception" were deleted as having no legal relevance in the context: the system advocated by the article would be applicable in all cases where the circumstances mentioned existed. The Commission also made a number of changes designed to bring the text even more closely into line with the Court's Judgement in the Fisheries case. In addition, the Commission cut out the words "on the coast" in the second sentence of paragraph 1 so as not to rule out the possibility of straight base lines being drawn from the coast to islands or between the islands themselves. The Commission, however, added the following statement: "Obviously, the general conditions laid down in paragraph 1 of the article for drawing the lines must always be observed. It would not be permissible to draw the lines from the sea itself where such landmarks do not exist."

In 1956 further changes were made. In particular, the reference to "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" underwent some change. This phrase, which is taken

from the Judgement of the International Court of Justice in the Fisheries case, was removed from the first sentence of the first paragraph to the penultimate sentence of that paragraph. The reason was that it was argued by some Governments - and the great majority of the Commission endorsed this view - that the economic interests taken into account in the Judgement were considered solely in the light of the historical and geographical factors involved and should not constitute in themselves a justification for a straight base line system. The application of such a system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines.

Equivalent 1930 draft

There is no exact equivalent. As Sub-Committee No. II explained in its Observations on its article entitled "Base Line", the line of low-water mark following all the sinuosities of the coast was to be taken as the basis for calculating the breadth of the territorial sea, save for the special cases of (1) bays, (2) islands near the coast and (3) groups of islands. These special cases were dealt with separately.

## Outer limit of the territorial sea

### Article 6

1956 draft

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.

Stages and problems in the preparation of the present draft

This text originated in the report of the Committee of Experts (A/CN.4/61/Add.1). Asked the question, "How should the outer limit of the territorial sea be drawn, when the width of the territorial sea is T miles", the experts answered: "The outer limit of the territorial sea is the line, every point of which is at a distance of T miles from the nearest point of the base-line. It constitutes a continuous series of intersecting arcs of circles drawn with a radius of T miles from all points on the base-line. The limit of the territorial sea is formed by the most seaward arcs." The special rapporteur included this proposal in the amendments and additions to his second report (A/CN.4/61/Add.1), recommending the text as an addition to the article on the breadth of the territorial sea - then article 4. In his third report (A/CN.4/77) the special rapporteur recommended that the text be included in the draft as a separate article, as article 7.

In 1954 (A/2693) the Commission approved the text in its present form. The effect of this text, as the Commission pointed out in 1956, is to make it possible for States "to use this method (i.e. the arcs of circles method for delimiting the outer limit of the territorial sea) 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." The Commission also stated that it "considers that the arcs of circles method is to be recommended because it is likely to facilitate navigation."

Both the Committee of Experts and the Commission appear to have been anxious to remove a false impression, which might otherwise have arisen from a certain passage in the Judgement of the International Court of Justice in the Fisheries case, to the effect that the use of this method was illegal. The Court had said:

"The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by the Counsel for the United Kingdom Government in his oral reply." (I.C.J. Reports 1951, p.129)

The Court clearly stated here that the use of the arcs of circles method is not obligatory by international law. But equally the Court did not say that the use of this method is forbidden by international law.

Equivalent 1930 draft. There is no equivalent. In 1930, Sub-Committee No. II concerned itself only with the delimitation of the base line, and not with the delimitation of the outer limit of the territorial sea.

## Bays

### Article 7

1956 draft

1. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain 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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur suggested the following text as article 6:

> In the case of bays the coasts of which belong to a single State, the belt of territorial sea shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles.

The special rapporteur was thus advocating the so-called "ten-mile rule" in the form which that rule assumed, for instance, in the International Convention for

the purpose of regulating the Police of the Fisheries in the North Sea outside Territorial Waters, signed at the Hague on 6 May 1882, where Article 2 stated: "As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed ten miles."[1/]

The special rapporteur drew attention to the fact that in the Fisheries case the International Court of Justice had pointed out that, although the ten-mile rule had been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions had applied it as between these States, other States had adopted a different limit; and that consequently the ten-mile rule had not acquired the authority of a general rule of international law (I.C.J. Reports 1951, p. 131). At the same time, considering that the Commission's task was one of the "progressive development" of international law as well as its codification, he decided to propose the ten-mile rule. But he also thought the question was so technical that the Commission should study it with the assistance of experts.

After consulting the Committee of Experts, the special rapporteur in his second report (A/CN.4/61/Add.1) put forward the following text as article 6:

> 1. A bay is a bay in the juridical sense, if its area is as large as, or longer[2/] than that of the semi-circle drawn on the entrance of that bay. Historical bays are excepted ; they shall be indicated as such on the maps.

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1/ c.f. the form assumed by the rule in the earlier Convention of 2 August 1839 between the United Kingdom of Great Britain and Ireland and His Majesty the King of the French defining Fishery Limits on the Coasts of Great Britain and France, of which Article 9 states that "It is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall with respect to bays, the mouth of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

2/ It seems that the word "larger" is intended here. See the actual text of the experts' report (A/CN.4/61/Add.1).

2. If a bay has more than one entrance, this semi-circle shall be drawn on a line as long as the sum-total of the length of the different entrances.

3. Islands within a bay shall be included as if they were part of the water area of the bay.

4. The closing line across a (juridical) bay shall not exceed 10 miles in width, this being twice the range of vision to the horizon in clear weather, from the eye of a mariner at a height of 5 metres. In cases of considerable tidal differences the low-water lines shall be taken as the shore-lines between which the width of the bay shall be computed.

5. If the entrance of a (juridical) bay is split into a number of smaller openings by various islands, closing lines across these openings may be drawn, provided that none of these lines exceeds 5 miles in length, except one which may extend up to a maximum of 10 miles.

6. In case the entrance of the bay does not exceed 10 miles in width, the line inter fauces terrarum shall constitute the delimitation between inland waters and the territorial sea.

7. In case the entrance of the bay exceeds 10 miles, a closing line of this length shall be drawn within the bay. When different lines of this length can be drawn, that line shall be chosen which encloses the maximum water area within the bay.

In his third report (A/CN.4/77) the special rapporteur modified this text, now contained in article 8, to read as follows:

1. The waters within a bay shall be considered inland waters if the line drawn across the opening does not exceed ten miles.

2. The term "bay", for the purposes of the preceding paragraph, means an indentation of an area as large as or larger than that of the semi-circle drawn on the entrance of that indentation. If a bay has more than one entrance, this semi-circle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

3. If the entrance of a bay is split up into a number of smaller openings by various islands, closing lines across these openings may be drawn provided that more of these lines exceeds five miles in length, except one such line which may extend up to a maximum of ten miles.

4. Where the entrance of a bay exceeds ten 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.

In 1955 (A/2934) the Commission agreed on certain rules relating to bays. These were to some extent influenced by the proposals of the experts. But, whereas the experts had favoured the ten-mile rule, a majority of the Commission expressed itself in favour of a twenty-five mile rule. The Commission explained that "Although not prepared to establish a direct ratio between the length of the closing line and the width of the territorial sea - such a relationship was formally denied by certain members of the Commission - it felt bound to take some account of tendencies to extend the width of the territorial sea by prolonging the closing line in bays." Thus the twenty-five mile rule was justified on the ground that the closing line across bays would be slightly more than twice the permissible maximum width of the territorial sea which the Commission was considering at that stage (i.e. 12 miles).

The text adopted in 1955 was the following (article 7):

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

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

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

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

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

But in 1956, after taking into account the views of a number of Governments that a twenty-five mile rule for bays would be excessive, the Commission decided to reduce this figure to fifteen miles. The Commission felt, however, that an extension of the closing line across bays to fifteen miles, as compared with ten miles, would be justified in view of the fact that the origin of the ten-mile rule dated back to a time when the breadth of the territorial sea was much more commonly fixed at three miles than it is now, and that since that time there had been a tendency to increase the breadth of the territorial sea.

Equivalent 1930 draft (Appendix II)

In the case of bays the coasts of which belong to a single State, the belt of territorial waters shall be measured from a straight line drawn across the opening of the bay. If the opening of the bay is more than ten miles wide, the line shall be drawn at the nearest point to the entrance at which the opening does not exceed ten miles.

## Ports

### Article 8

1956 draft

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.

Stages and problems in the preparation of the present draft

This article has given rise to few difficulties: the text follows closely that of the 1930 draft. The Commission has explained that the waters of a port up to a line drawn between the outermost installations form part of the internal waters of the coastal State and that permanent structures on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works. The Commission has suggested that, where these structures are of excessive length (for instance, a jetty extending several kilometres into the sea), this article may not be fully applicable, and that it may be necessary to adopt instead the system of safety zones provided for in article 71.

Equivalent 1930 draft (Appendix II)

In determining the breadth of the territorial sea, in front of ports the outermost permanent harbour works shall be regarded as forming part of the coast.

In 1930 Sub-Committee No.II also added the following Observations :

The waters of the port as far as a line drawn between the outermost fixed works thus constitute the inland waters of the coastal State.

## Roadsteads

### Article 9

1956 draft

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.

Stages and problems in the preparation of the present draft

This article has given rise to few difficulties: the text follows closely that of the 1930 draft. The Commission has, however, commented as follows (A/3159):

> 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.

Equivalent 1930 draft (Appendix II)

Roadsteads used for the loading, unloading and anchoring of vessels, the limits of which have been fixed for that purpose by the Coastal State, are included in the territorial sea of that State, although they may be situated partly outside the general belt of territorial sea. The coastal State must indicate the roadsteads actually so employed and the limits thereof.

In 1930 Sub-Committee No.II also added the following Observations:

> It had been proposed that roadsteads which serve for the loading and unloading of vessels should be assimilated to ports. These roadsteads would then have been regarded as inland waters, and the territorial sea would have

been measured from their outer limits. It was thought, however, impossible to adopt this proposal. Although it was recognised that the Coastal State must be permitted to exercise special rights of control and of police over the roadsteads, it was considered unjustifiable to regard the waters in question as inland waters, since in that case merchant vessels would have had no right of innocent passage through them. To meet these objections it was suggested that the right of passage in such waters should be expressly recognised, the practical result being that the only difference between such "inland waters" and the territorial sea would have been the possession by roadsteads of a belt of territorial sea of their own. As, however, such a belt was not considered necessary, it was agreed that the waters of the roadstead should be included in the territorial sea of the State, even if they extend beyond the general limit of the territorial sea.

## Islands

### Article 10

1956 draft

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.

Stages and problems in the preparation of the present draft

The drafting of this article has given rise to few problems, the text following closely that of 1930. At the same time it may be noted that, whereas in 1930 a majority of Sub-Committee No. II, in an Observation with regard to a group of islands (archipelago) and islands situated along the coast, was of the opinion "that a distance of 10 miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea", in 1956 the International Law Commission has pointed out that article 5 of the present draft - entitled "Straight baselines" - may be applicable to groups of islands off the coast. Possibly, therefore, a separate article on the subject of groups of islands is not necessary.1/

There remains the question of artificial islands. For the most part the Commission has dealt with this question under article 71 (continental shelf installations). It has also observed, in its commentary in 1956 on article 10 (A/3159), with regard to "elevations which are above water at low-tide only", that "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".

By contrast, Sub-Committee No. II in 1930 stated that its definition of the term "island" - which was similar to that adopted by the Commission in 1956 - did "not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored bucys, etc.". But Sub-Committee No. II, after saying that "The case of an artificial island erected near to the line of

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1/ Footnote on following page

1/ In his first report (A/CN.4/53) the special rapporteur proposed an article entitled "Groups of Islands". This was article 10, which read as follows:

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

He explained, however, that he had inserted this text "not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject." He referred to a passage in the Judgement of the International Court of Justice in the Fisheries case where the Court had said (I.C.J. Reports 1951, p. 131):

"In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."

In his second report (A/CN.4/61) the special rapporteur suggested as article 10 an abbreviated version of his earlier proposal, which now simply read as follows:

"With regard to a group of islands (archipelago) and islands situated along the coast, the ten mile line shall be adopted as the base line."

After consulting the Committee of Experts the special rapporteur put forward a more elaborate proposal (see article 10 in A/CN.4/61/Add.1) and yet a further proposal in his third report (see article 12 in A/CN.4/77).

The latter proposal read as follows:

"1. The term 'group of islands', in the juridical sense, shall be deemed to mean three or more islands enclosing a portion of the sea when joined by straight lines not exceeding five miles in length, except that one such line may extend to a maximum of ten miles.

"2. The straight lines specified in the preceding paragraph shall be the base lines for measuring the territorial sea; waters lying within the area bounded by such base lines and the islands themselves shall be considered as inland waters.

"3. A group of islands may likewise be formed by a string of islands taken together with a portion of the mainland coastline. The rules set forth in paragraphs 1 and 2 of this article shall apply pari passu."

The Commission, however, after postponing the question in 1954, decided in 1955 that article 5, which dealt with "Straight baselines", might be applicable to groups of islands situated off the coasts, while the general rules would normally apply to other islands forming a group. This position was confirmed in 1956, the Commission adding that it was prevented from stating an opinion on this subject not only by disagreement on the breadth of the territorial sea but also by lack of technical information. The Commission hoped, however, that if an international conference were subsequently to study the proposed rules, it would give attention to this problem which the Commission recognized to be an important one.

demarcation between the territorial waters of two countries is reserved" went on to add:

> An elevation of the sea bed, which is only exposed at low tide, is not deemed to be an island for the purpose of this Convention.

The Sub-Committee qualified this statement, however, by referring to its proposal concerning the Base Line, where it had said:

> Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.1/

In his third report (A/CN.4/77), the special rapporteur inserted a sentence in article 11, entitled "islands", which had a bearing on the question of artificial islands. This sentence ran as follows: "Groups of dwellings built on piles erected in the sea are deemed to be islands." The special rapporteur explained that this sentence had been added so as to take into account villages built on piles erected in the sea, such as exist in certain parts of the world, especially off the Western coast of Sumatra.2/

In his first report (A/CN.4/53, page 29) the special rapporteur suggested that the Commission might assimilate lighthouses built on drying rocks to installations constructed for the exploration of the continental shelf and the exploitation of its natural resources. Under the Commission's régime (viz: article 71 of its 1956 draft) this would have the effect of giving to lighthouses not a territorial sea of their own, but a safety zone up to a reasonable distance within which the coastal State could take measures necessary for the protection of such lighthouses. The Commission, however, in 1956 did not consider that a similar régime was required in the case of lighthouses.

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1/ Low-tide elevations, which were dealt with by Sub-Committee No. II as part of the proposal concerning the Base Line are allotted a separate article in the International Law Commission's 1956 draft (see article 11, entitled "Drying rocks and drying shoals").

2/ In the course of the discussion in 1956, the special rapporteur withdrew the sentence (see A/CN.4/SR.260).

Equivalent 1930 draft (Appendix II)

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

In 1930 Sub-Committee No. II also added the following Observations:

The definition of the term "island" does not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored buoys, etc. The case of an artificial island erected near to the line of demarcation between the territorial waters of two countries is reserved.

An elevation of the sea bed, which is only exposed at low tide, is not deemed to be an island for the purpose of this Convention.

## Drying rocks and drying shoals

### Article 11

1956 draft

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

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53), the special rapporteur inserted no separate article on this question. Instead, following the precedent of 1930, he included a reference to "elevations of the sea bed" in the article on the Base Line. This reference (paragraph 4 of article 5 on the Base Line) read as follows:

> Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.

In his second report (A/CN.4/61), the special rapporteur amended this text (still paragraph 4 of article 5) to read as follows:

> Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea.

After consulting the Committee of Experts the special rapporteur put forward the following recommendations, still as paragraphs 2 to 4 of article 5 (A/CN.4/61/Add.1):

> 2. Rocks (and similar elevations) awash at the datum of the chart (au niveau qu'on a choisi pour la carte) should not be taken into consideration.
>
> 3. Drying rocks and shoals that are exposed between the datum of the chart and high water if within the territorial sea, may be taken as individual points of departure for measuring the territorial sea, thereby causing a bulge in the outer limit of the latter.

4. As regards coral reefs, the edge of the reef as marked on the abovementioned charts, should be accepted as the low-water line for measuring the territorial sea.

In his third report (A/CN.4/77) the special rapporteur simplified the text to read simply as follows:

> Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea.

Moreover, this text was inserted as a separate article (13), entitled "Drying rocks".

In 1954 (A/2693) the Commission approved the following text as article 12 under the heading "Drying rocks and shoals":

> Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea.

In 1955 (A/2934) the Commission approved the following text as article 11 under the heading "Drying rocks and drying shoals":

> Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea. (The words underlined were added.)

In 1956 the words "for measuring the extension of" were substituted in place of the words "for further extending".

Equivalent 1930 draft (Appendix II)

(Under heading of "Base Line"): Elevations of the sea bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea.

There then followed these Observations by Sub-Committee No. II:

> If an elevation of the sea bed which is only uncovered at low tide is situated within the territorial sea off the mainland, or off an island, it is to be taken into consideration on the analogy of the

North Sea Fisheries Convention of 1882 in determining the base line of the territorial sea. 1/

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1/ In Article 2 of this Convention it was stated: "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks."

## Delimitation of the territorial sea in straits and off other opposite coasts

### Article 12

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur put forward the following proposal as article 11, under the heading of "Straits":

> 1. In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores.
>
> 2. When the width of the straits exceeds the breadth of the two belts of territorial sea, the waters between those two belts form part of the high sea. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to territorial sea.

In the addendum to his second report (A/CN.4/61/Add.1) the special rapporteur, after consulting the Committee of Experts, put forward the following proposal as article 13, entitled "Delimitation of the territorial sea of two States":

1. An international boundary between countries the coasts of which are opposite each other at a distance of less than 2 T miles (T being the width of the territorial sea) should as a general rule be the median line, every point of which is equidistant from the base-lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line. The line should be laid down on charts of the largest scale available, especially if any part of the body of water is narrow and relatively tortuous.

2. The boundary line through the territorial sea of two adjacent States - if not already fixed otherwise - should be drawn according to the principle of equidistance from the respective coastlines. The most suitable method of applying the principle should be arrived at by agreement between States for each individual case.

In his third report (A/CN.4/77) the special rapporteur inserted the following articles:

Article 14 (Straits)

1. In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores.

2. When the width of the straits exceeds the breadth of the two belts of territorial sea, the waters between those two belts form part of the high sea. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to territorial sea.

Article 16. (Delimitation of the territorial sea of two States the coasts of which are opposite each other)

1. An international boundary between countries the coasts of which are opposite each other at a distance of less than two T miles (T being the breadth of the territorial sea) is as a general rule the median line, every point of which is equidistant from the base lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands shall be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State shall be taken into account, but similar elevations that are within T miles of both States, shall be disregarded in laying down the median line.

2. Exceptional considerations of navigation and fishing rights may justify a different delimitation of the boundary, in such manner as the parties concerned may agree.

3. The line shall be marked on the largest-scale charts available which are officially recognized.

He also included yet another article (17), entitled "Delimitation of the territorial sea of two adjacent States", as it was clear that in the addendum to the second report article 13 had attempted to deal both with the case of States the coasts of which are opposite each other and with the case of States the coasts of which are adjacent to each other. (The latter question is now dealt with by the Commission separately: See under article 14 below).

With regard to the delimitation of the territorial sea of two States the coasts of which are opposite each other, the special rapporteur explained that the Commission had already expressed itself in favour of the application of a system similar to that which he was recommending when it had considered the delimitation of the boundary on a continental shelf which adjoins the territory of two States situated opposite each other.1/

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1/ See, for instance, the first paragraph of article 7 of the draft articles on the continental shelf adopted by the Commission in 1953 and the commentary thereon in paragraphs 81-84 of the report covering the work of the Commission's fifth session (A/2456); and see also the first paragraph of article 72 of the 1956 draft.

In 1954 (A/2693) the Commission adopted the following two articles:

Article 13 (Delimitation of the territorial sea in straits)

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

2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 15.

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

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

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

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

Minor changes only were made in the 1955 draft (A/2934), though the articles appeared now as articles 12 and 14, and a second paragraph was added to the latter article providing that "Lines shall be marked on the largest scale charts available which are officially recognized". In 1956 (A/3159), it was decided to simplify the text by combining the two articles.

Equivalent 1930 draft (Appendix II)

In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the Coastal State of both shores.

When the width of the straits exceeds the breadth of the two belts of territorial sea, the waters between those two belts form part of the high sea. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to territorial sea.

## Delimitation of the territorial sea at the mouth of a river

### Article 13

1956 draft

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.

Stages and problems in the preparation of the present draft

The drafting of this article has given rise to little difficulty. The text is based upon that recommended by Sub-Committee No. II in 1930 which was as follows:

> When a river flows directly into the sea, the waters of the river constitute inland water up to a line following the general direction of the coast drawn across the mouth of the river whatever its width. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

But, with regard to paragraph 2 of the present draft, it should be noted that "the rules applicable to bays" referred to by Sub-Committee No. II in 1930 differ considerably from the rules applicable to bays contained in article 7 of the 1956 draft. Moreover, in paragraph 1 the expression "a line drawn inter fauces terrarum across the mouth of the river" has been substituted for the expression "a line following the general direction of the coast drawn across the mouth of the river whatever its width". The special rapporteur made the substitution in his third report (A/CN.4/77, article 15). He has explained that he was advised by the Committee of Experts that it was often impracticable to establish any "general direction of the coast" and 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" (see under A/CN.4/77, article 17, and A/CN.4/61/Add.1, page 4 of the Annex).

As for the Latin expression inter fauces terrarum, this expression was used by the International Court of Justice in the Fisheries case in the following context. The question was whether Norway could draw straight lines only across bays or also between islands, islets and rocks, acrosss the sea areas separating them, even when such areas did not fall within the conception of a bay. In the Court's view it was sufficient that the areas of sea across which the straight lines were drawn should be situated between the island formations concerned, inter fauces terrarum. (I.C.J. Reports 1951, p. 130).

Equivalent 1930 draft (Appendix II)

When a river flows directly into the sea, the waters of the river constitute inland water up to a line following the general direction of the coast drawn across the mouth of the river whatever its width. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

## Delimitation of the territorial sea of two adjacent States

### Article 14

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur suggested the following text as article 13:

> The territorial sea of two adjacent States is normally delimited by a line every point of which is equidistant from the nearest point on the coastline of the two States.

In the addendum to his second report (A/CN.4/61/Add.1) the special rapporteur included as the second paragraph of article 13 (which has already been referred to in connexion with article 12 of the Commission's 1956 draft), the following provision:

> The boundary line through the territorial sea of two adjacent States - if not already fixed otherwise - should be drawn according to the principle of equidistance from the respective coastlines. The most suitable method of applying the principle should be arrived at by agreement between States for each individual case.

The text was slightly modified by the rapporteur in his third report (A/CN.4/77) to read (as article 17):

Except where already otnerwise determined the boundary line through the territorial sea of two adjacent States shall be drawn according to the principle of equidistance from the respective coastlines. The method whereby this principle is to be applied shall be agreed upon between the parties concerned in each specific case.

In 1954 (A/2693) the Commission approved the following text (as article 16):

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

In 1955 (A/2934) a second paragraph was added, and the article (as article 15) was approved in the following form:

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

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

It should be noted that, in the case of the continental shelf, the Commission adopted corresponding provisions (see article 72, paragraph 2, below).

Equivalent 1930 draft

The 1930 Codification Conference formulated no rules on this question.

## SECTION III: RIGHT OF INNOCENT PASSAGE

### SUB-SECTION A: GENERAL RULES

#### Meaning of the right of innocent passage

#### Article 15

1956 draft

1. Subject to the provisions of the present rules, ships of all States shall enjoy the right of innocent passage through the territorial sea.
2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
3. Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law.
4. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.
5. Submarines are required to navigate on the surface.

Stages and problems in the preparation of present draft

In his first report (A/CN.4/53) the special rapporteur inserted the following text as article 14, entitled "Meaning of the right of passage":

> 1. "Passage" means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.
>
> 2. Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

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

In 1954 (A/2693) the Commission adopted the following text as article 17 (Meaning of the right of passage):

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

2. Passage is not innocent if a vessel makes use of the territorial sea of a coastal State for the purpose of committing any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect.

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

This article appeared as the first article in Chapter III of the Provisional articles concerning the Régime of the Territorial Sea. This chapter was entitled "Rights of Passage". It consisted, in addition to article 17 - the introductory article - of Section A (articles 18-25) and Section B (articles 26-27). The eight articles of Section A related to the passage through the territorial sea of vessels other than warships, and the two articles of Section B related to the passage of warships through the territorial sea.

In 1955 (A/2934) this arrangement was altered. Chapter III, now entitled "Right of Innocent Passage", was divided into sections as follows: Section A (General Rules); Section B (Merchant Vessels); Section C (Government Vessels other than Warships); and Section D (Warships). This arrangement, which is retained in the present draft, was introduced because it was realized that there are some general rules relating to the passage of all vessels through the territorial sea, and also because it is necessary to provide for the case of government ships other than warships. In the present draft this latter category is further divided into "government ships operated for commercial purposes" (article 22) and "government ships operated for non-commercial purposes" (article 23).

To return to article 15 in the present draft, the text was adopted in more or less its present form in 1955 (A/2934) as article 16. In 1956, however, it was decided to transfer the provision relating to submarines from the article concerned with the passage of warships, where it had previously been, to its present position in the Section on General Rules. It was explained that the requirement that submarines navigate on the surface should be made equally applicable to commercial submarines, if such vessels are ever reintroduced.1/

The present article is clearly influenced by the work of the 1930 Conference. But that there are some important differences is plain from a comparison with the 1930 text.

Equivalent 1930 draft (Appendix I, article 3) Right of Passage

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

Passage is not innocent when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

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

Thus, paragraph 1 of the present draft has no exact counterpart in the 1930 draft. Paragraph 2 of the present draft is similar to the corresponding provision in the 1930 draft except that it uses the expression "internal waters" instead of "inland waters". Paragraph 3 of the present draft bears some similarity

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1/ In 1930, article 4, as adopted by the Second Committee, contained a provision to the effect that "Submarine vessels shall navigate on the surface". This article was concerned with the right of passage through the territorial sea of vessels other than warships. It must, therefore, have been intended to cover the case of commercial submarines. The case of non-commercial submarines was covered in the 1930 draft by article 12 which under the heading of warships, provided that "Submarines shall navigate on the surface".

to the corresponding provision in the 1930 draft. But it differs from the 1930 text in that, whereas the latter text defines passage that is "not innocent", the present text defines passage that is "innocent". Moreover paragraph 3 of the present text contains no reference to the "public policy" or the "fiscal interests" of the coastal State. The expression "public policy" was omitted by the Commission because it was thought that this expression was open to various interpretations. (See comment on article 18 of the Commission's 1955 draft - A/2934.) As for the expression "fiscal interests", this was omitted in 1954 because it was thought that these interests - which, according to the Observations of the Second Committee in 1930, were to be interpreted in a wide sense as including "all matters relating to customs, import, export and transit prohibitions, even when not enacted for revenue purposes but e.g. for purposes of public health" - could be included in the more general expression "such other of its interests as the territorial sea is intended to protect". It was explained that this expression comprised, inter alia, questions relating to immigration, customs and health as well as certain other interests, such as the safety of traffic and the protection of channels and buoys; the protection of the waters of the coastal State against pollution of any kind caused by vessels; the protection of the products of the territorial sea; and the rights of fishing, hunting and analogous rights belonging to the coastal State. (See comment on article 17 of the 1954 draft - A/2693.)

The present draft, however, while continuing to prefer a more general expression to the term "fiscal interests", uses - in the phrase "contrary to the present rules, or to other rules of international law" - an expression which is possibly even more general than that adopted in 1954, namely "prejudicial ... to such other of its (i.e. the coastal State's) interests as the territorial sea is intended to protect".

Paragraph 4 of the present draft is similar to the corresponding provision in the 1930 draft.

## Duties of the coastal State

### Article 16

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur inserted the following text as article 15 under the heading "Right of innocent passage through the territorial sea":

> 1. A coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea.
> 2. It is bound to use the means at its disposal to safeguard in the territorial sea the principle of the freedom of maritime communication and not to allow such waters to be used for acts contrary to the rights of other States.

He explained that this proposal was based partly on article 4 adopted by the Second Committee in 1930, and partly on the Judgment of the International Court of Justice in the Corfu Channel case (I.C.J. Reports 1949, page 22). In article 4 in 1930 the Second Committee had proposed that "A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea ..."[1/] Also, in the Corfu Channel case the International Court of Justice had stated the following:

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1/ Article 4, however, applied only to "vessels other than warships".

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In 1954 (A/2693) the Commission adopted article 19, which was entitled "Duties of the coastal State" and read as follows:

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

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

The new title of the article, which emphasized the duties of the coastal State rather than the rights of the State whose vessel was exercising the right of passage, seemed more appropriate, having regard especially to the matters dealt with in the text. In 1955 (A/2934) the Commission introduced an amendment into the first paragraph of the article - now numbered 17 and still entitled "Duties to the coastal State" - by inserting, at the beginning, the following sentence: "The coastal State must not hamper innocent passage through the territorial sea". As the Commission explained in its commentary: "the duty of ensuring innocent passage to the fullest possible extent consists primarily in the duty not to hamper such passage".[1/]

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1/ Thus the duty of the coastal State is seen mainly as a negative one rather than as a positive one. Some Governments had pointed out that the duty placed upon the coastal State should not be made too onerous.

In 1956 the expression "respect in the territorial sea for the principle of the freedom of communication" was replaced by the expression "respect for innocent passage through the territorial sea".

Equivalent 1930 draft (Appendix I, article 4)

A Coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea.

Submarine vessels shall navigate on the surface.

## Rights of protection of the coastal State

### Article 17

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur put forward the following text as article 16, under the heading "Steps to be taken by the coastal State":

> The right of passage does not prevent the coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

As the special rapporteur explained, this text was taken word for word from article 5 of the Second Committee's draft in 1930.

In 1954 (A/2693) the Commission adopted the following text as article 20, under the heading "Right of protection of the coastal State":

1. The coastal State may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that that is necessary for the maintenance of public order and security. In this case the coastal State is bound to give due publicity to the suspension.

This text had the effect of somewhat enlarging the rights of the coastal State. Although the reference to its "fiscal interests" was removed, the coastal State was now given the right to protect itself not only "against any act prejudicial to the security or public policy of that State", but also against any act prejudicial "to such other of its interests as the territorial sea is intended to protect". It was explained in the commentary that this meant that the coastal State was entitled "to take the steps necessary to protect itself against any act prejudicial to its security, public order, customs interests, import, export and transit prohibitions, and so forth". Moreover, under the second paragraph, the coastal State was given the right to suspend the exercise of the right of innocent passage altogether, provided that such action was temporary, related to definite areas of the territorial sea, was necessary for the maintenance of public order and security, and was duly notified.

In 1955 (A/2934) the Commission gave rather greater precision to both the rights and the duties of the coastal State in this respect by adopting the following text as article 18, under the heading "Rights of protection of the coastal State":

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

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

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

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

The Commission explained that, since the term "public policy" was open to various interpretations, it had decided not to use it.

Minor changes only were made in the 1956 draft. The Commission has explained that the requirement that "there must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas" was suggested by the decision of the International Court of Justice in the Corfu Channel case. The revelant passage in that Judgment (I.C.J. Reports 1949, page 28) reads as follows:

> "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.
>
> The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

> It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic. ...

The Commission has stated, however, that it considers that it would be in conformity with the Court's opinion to insert the word "normally" before the word "used" (e.g. compare paragraph 4 of the 1956 draft of the article with the first paragraph of the above quotation).

Equivalent 1930 draft (Appendix I, article 5)

> The right of passage does not prevent the coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

## Duties of foreign ships during their passage

### Article 18

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur put forward the following text as article 17 under the heading "Duty of foreign vessels during their passage":

1. Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the coastal State, and, in particular, as regards:

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

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

(c) the protection of the products of the territorial sea;

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

2. 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.

As the special rapporteur explained, this text was identical with article 6 of the Second Committee's draft in 1930.

In 1954 (A/2693) the Commission adopted the following text as article 21:

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

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

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

(c) the protection of the products of the territorial sea;

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

Explaining the omission of the second paragraph, which had appeared in the earlier versions, the Commission stated that it did not mean to imply that the paragraph did not contain a general rule valid in international law. It thought, however, that cases might occur in which special rights granted by one State to another specified State might be fully justified by the special relationship between those States, and that the question should be governed by the general rules of law.

In 1955 (A/2934) the Commission confirmed this text as article 19, but added to the list of regulations enacted by the coastal State, with which foreign vessels exercising the right of passage must comply during their passage, regulations concerning hydrographical surveys.

In 1956 the Commission decided to formulate in a more general way the duty of foreign ships to comply with the laws and regulations of the coastal State. Accordingly, it transferred the list of examples to the commentary.

Equivalent 1930 draft (Appendix I, article 6)

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

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

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

(c) the protection of the products of the territorial sea;

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

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.

SUB-SECTION B: MERCHANT SHIPS

## Charges to be levied upon foreign ships

### Article 19

1956 draft

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.

Stages and problems in the preparation of the present draft

As in the case of the previous article, the text adopted by the Commission has followed closely, throughout all stages of the preparation of the present draft, the 1930 text, which is reproduced below. The only difference is that, for reasons which it has explained in connexion with article 18, the Commission has not thought it necessary to include a specific provision against discrimination.

Equivalent 1930 draft (Appendix I, article 7)

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

Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination.

## Arrest on board a foreign ship

### Article 20

1956 draft

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

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

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

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

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

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

Stages and problems in preparation of the present draft

Throughout all stages, the text of this article has followed very closely the 1930 text, which is reproduced below. The main difference is in the wording of paragraph 3. The Commission explained in 1955 (A/2934), in its comment on article 21 of the draft of that year, that the revised text was intended to emphasize the need for taking the utmost care not to hamper navigation by making arrests unless absolutely necessary.

It will also be noted that, whereas the second paragraph of the 1930 text contains a reference to the right of the coastal State to take certain steps on board a foreign vessel "in the inland waters of that State", the second paragraph of the present text contains no such reference. (For an explanation of this omission, see under article 21, below.)

Equivalent 1930 draft (Appendix I, article 8)

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

(1) if the consequences of the crime extend beyond the vessel; or

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

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

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

The local authorities shall in all cases pay due regard to the interest of navigation when making an arrest on board a vessel.

## Arrest of ships for the purpose of exercising civil jurisdiction

### Article 21

1956 draft

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.

Stages and problems in preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur put forward the following text (as article 20):

1. A coastal State may not arrest or divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State.

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

This text, he explained, was identical with article 9 of the Second Committee's report in 1930. The Commission approved this text as article 24 in 1954 (A/2693).

In 1955 (A/2934) the Commission adopted the following text as article 22:

1. A coastal State may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel.

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

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

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

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

(c) The mortgage or hypothecation of any vessel.

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

As the Commission explained in its commentary, the article was revised in order to bring it into line with the International Convention relating to the Arrest of Sea-going Ships signed at Brussels on 10 May 1952.

Article 2 of this Convention states that "A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any

right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction."

Article 1 (1) of the Brussels Convention of 1952 defines a "maritime claim" as "a claim arising out of one or more of the following:

(a) damage caused by any ship either in collision or otherwise;

(b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;

(c) salvage;

(d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;

(f) loss of or damage to goods including baggage carried in any ship;

(g) general average;

(h) bottomry;

(i) towage;

(j) pilotage;

(k) goods or materials wherever supplied to a ship for her operation or maintenance;

(l) construction, repair or equipment of any ship or dock charges and dues;

(m) wages of Masters, Officers, or crew;

(n) Master's disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner;

(o) disputes as to the title to or ownership of any ship;

(p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;

(q) the mortgage or hypothecation of any ship.

But in 1956 the Commission decided, for reasons which it has explained (see A/3159, paragraph 4 of commentary to article 21), to abandon the attempt to bring the article into line with the provisions of the Brussels Convention of 1952. Accordingly, the 1956 draft is similar to the 1954 draft, except that the article now has three paragraphs instead of only two.

It should also be noted that, whereas paragraph 2 of the 1930 text contains a reference to the right of the coastal State "to levy execution against, or to arrest, a foreign vessel in the inland waters of the State", the corresponding paragraph - paragraph 3 - of the present text contains no such reference. The special rapporteur has explained that these words are not necessary since the Commission is only concerned with the problem of the territorial sea, and therefore that any reference in its draft to inland (internal) waters would be out of place (A/CN.4/SR.306, paragraph 46).

Equivalent 1930 draft (Appendix I, article 9)

A coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State.

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

## SUB-SECTION C: GOVERNMENT SHIPS OTHER THAN WARSHIPS

### Government ships operated for commercial purposes

### Article 22

1956 draft

The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes.

Stages and problems in preparation of the present draft

The purpose of this article is to render applicable to government ships operated for commercial purposes the provisions of Articles 15-21. So far as all their rights and obligations in the matter of passage through the territorial sea are concerned, such ships are therefore assimilated to privately-owned merchant ships.

The principle stated in this article was adopted by the Commission in 1954 (A/2693) in Article 25 of the draft, as it was then. The Commission explained that it was following the rules of the Brussels Convention of 10 April 1926 for the Unification of Certain Rules relating to the Immunity of State-owned Vessels.

Articles 1-3 of this Convention read as follows:

> Article 1: Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.
>
> Article 2: For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.
>
> Article 3: 1. The provisions of the two preceding articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or

operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.

Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

(1) In case of action in respect of collision or other accidents of navigation;

(2) In case of actions in respect of assistance, salvage and general average;

(3) In case of action in respect of repairs, supplies, or other contracts relating to the vessel.

2. The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned.

3. State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention by any legal process, nor to judicial proceedings in rem.

Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under Article 2.

Equivalent 1930 draft (Appendix I, articles 8, 9 and 10)

In its report in 1930, the Second Committee stated in an Observation to article 10 that Government vessels operated for commercial purposes fall within the scope of articles 8 and 9. Articles 8, 9 and 10 of the Second Committee's report in 1930 read as follows:

Article 8. A Coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(1) if the consequences of the crime extend beyond the vessel; or

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

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

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

The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel.

Article 9. A Coastal State may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A Coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the Coastal State.

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

Article 10. The provisions of the two preceding Articles (Arts. 8 and 9) are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels.

To article 10, Sub-Committee No. II added the following Observations:

> The question arose whether, in the case of vessels belonging to a Government and operated by a Government for commercial purposes, certain privileges and immunities might be claimed as regards the application of Articles 8 and 9. The Brussels Convention relating to the immunity of State-owned vessels deals with immunity in the matter of civil jurisdiction. In the light of the principles and definitions embodied in that Convention (see in particular Article 3), the Article now under consideration lays down that the rules set out in the two preceding Articles are without prejudice to the question of the treatment of

vessels exclusively employed in a governmental and non-commercial service, and the persons on board such vessels. Government vessels operated for commercial purposes therefore fall within the scope of Articles 8 and 9.

## Government ships operated for non-commercial purposes

### Article 23

1956 draft

The rules contained in sub-section A shall apply to government ships operated for non-commercial purposes.

Stages and problems in the preparation of the present draft

The purpose of this article is to render applicable to government ships operated for non-commercial purposes the provisions of sub-section A (articles 15-18). So far as concerns the application to these ships of sub-section B (articles 19-21) the Commission has not taken up a position, although it has expressly declared in its commentary on article 23 that "the question of the application of sub-section D to government ships operated for non-commercial purposes is left in abeyance".

In his first report (A/CN.4/53) the special rapporteur put forward the following text as article 21, under the heading of "Vessels employed in a governmental and non-commercial service":

> The provisions of articles 19 and 20[1/] are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels.

As the special rapporteur explained, this text was identical in substance with that of article 10 of the Second Committee's report in 1930.

In 1954 (A/2693) the Commission included in its draft no article specifically dealing with this category of vessels. But in 1955 (A/2934) it included article 24 entitled "Government vessels operated for non-commercial

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1/ Articles 19 and 20 of this draft were entitled, respectively, "Arrest on board a foreign vessel" and "Arrest of vessels for the purpose of exercising civil jurisdiction."

purposes". The text of this article simply stated "The status of these vessels is left in abeyance". But in its comment the Commission stated the following:

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

As has been shown above, the position of these vessels has been clarified to some extent in the 1956 draft by rendering applicable to them the provisions of articles 15-18.

Equivalent 1930 draft (Appendix I, article 10)

The provisions of the two preceding Articles (Articles 8 and 9) are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels.

For further details see under article 22, above.

## SUB-SECTION D: WARSHIPS

### Passage (i.e. of warships)

### Article 24

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/53) the special rapporteur proposed the following text:

1. As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification.

2. The coastal State has the right to regulate the conditions of such passage.

3. Submarines shall navigate on the surface.

4. Under no pretext, however, may there be any interference with the passage of warships through straits used for international navigation between two parts of the high seas.

As the special rapporteur explained, the first three paragraphs were taken from article 12 of the Second Committee's report in 1930; whilst the fourth paragraph was based on, though not identical with, the third paragraph of the Observations attached to article 12 by the Second Committee in 1930. He made the change in the light of the Judgment of the International Court of Justice in the Corfu Channel case, where it is stated (I.C.J. Reports 1949, p. 28):

> 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.

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.

In 1954 (A/2693) the Commission adopted the following text as aritcle 26:

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

2. The coastal State has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances envisaged in article 20.1/

3. Submarines shall navigate on the surface.

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

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1/ Article 20 of the 1954 draft reads as follows:

1. The coastal State may take the necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that that is necessary for the maintenance of public order and security. In this case the coastal State is bound to give due publicity to the suspension.

In 1955 (A/2934) the Commission adopted the following text as article 25:

1. The costal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 18 1/ and 19.2/

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1/ Article 18 of the 1955 draft reads as follows:

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

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

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

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

2/ Article 19 of the 1955 draft reads as follows:

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

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

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

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

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

(e) Any hydrographical survey.

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

3. Submarines shall navigate on the surface.

The Commission explained that, "after noting comments by certain Governments and reviewing the question", it felt obliged to amend the 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". At the same time the Commission considered that, where such authorization is required, it should not normally be subject to conditions other than those laid down in articles 18 and 19 of the 1955 draft (for the text of these articles see footnotes). In certain parts of the territorial sea or in certain special circumstances, the coastal State might deem it necessary to limit the right of passage more strictly in the case of warships than in the case of merchant vessels. The 1955 text was considered to provide a clearer recognition of this right than the 1954 text. But, said the Commission, the right of passage of warships must not be made subject to previous authorization or notification in the case of straits normally used for international navigation between two parts of the high seas.

In the 1956 draft, the paragraphs which appeared as the second and third paragraphs in the 1955 draft have disappeared. But, as the Commission has explained, the second paragraph is not needed in this article, because the same intention is conveyed by the fourth paragraph of article 17, which applies to warships as well as to merchant ships; whilst the third paragraph is similarly not needed here, because the same intention is conveyed by paragraph 5 of article 15, which applies to military as well as to commercial submarines.

It may be noted that, in the Corfu Channel case, the International Court of Justice, whilst asserting the right of States in time of peace 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, left open the question "whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait" (I.C.J. Reports 1949, pp. 28-30).

Equivalent 1930 draft (Appendix I, article 12)

As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification.

The Coastal State has the right to regulate the conditions of such passage.

Submarines shall navigate on the surface.

The Second Committee added the following Observations:

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

The Coastal State may regulate the conditions of passage, particularly as regards the number of foreign units passing simultaneously through its territorial sea - or through any particular portion of that sea - though as a general rule no previous authorization or even notification will be required.

Under no pretext, however, may there be any interference with the passage of warships through straits constituting a route for international maritime traffic between two parts of the high sea.

Also, under the heading "Passage of Warships through Straits", Sub-Committee No. II recommended that

Under no pretext whatever may the passage even of warships through straits used for international navigation between two parts of the high sea be interfered with.

The Sub-Committee added the following Observations:

According to the previous Article the waters of straits which do not form part of the high sea constitute territorial sea. It is essential to ensure in all circumstances the passage of merchant vessels and warships through straits between two parts of the high sea and forming ordinary routes of international navigation.

## Non-observance of the regulations (i.e. by warships)

### Article 25

1956 draft.

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.

Stages and problems in the preparation of the present draft.

In his first report (A/CN.4/53) the Special Rapporteur reproduced the text of article 13 of the Second Committee's report in 1930, which is given below:

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

In 1954 (A/2693) the Commission adopted the following text as article 27:

> 1. Warships shall be bound, when passing through the territorial sea, to respect the laws and regulations of the coastal State.
>
> 2. If any warship does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea.

The Commission explained that the terms of the first paragraph did not mean that the exterritoriality of warships was limited in any way during the passage through the territorial sea. The object of the provision was "only to emphasize that, while the warship is in the territorial sea of the coastal State, the vessel must comply with the laws and regulations of that State concerning navigation, security, health questions, water pollution and the like". But in 1955 (A/2934) the first paragraph was dropped. It was explained that it had become superfluous, since by then the article concerning the duty of foreign vessels to respect the laws and regulations of the coastal State had been made applicable to all vessels, including warships.

Equivalent 1930 draft (Appendix I, article 13)

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

# PART II

# HIGH SEAS

## SECTION I: GENERAL REGIME

### Definition of the high seas

### Article 26

1956 draft

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".

Stages and problems in the preparation of the present draft

In his sixth report (A/CN.4/79) in 1954 the special rapporteur put forward the suggestion, under article 1, that

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

In 1955 (A/2934) the Commission adopted the following text as article 1 of the Provisional articles concerning the regime of the high seas:

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

Referring to its work on the parallel problem of the law of the territorial sea, the Commission explained that it had attempted to define the external limits of the territorial sea and had indicated the base lines from which the territorial sea should be measured. The Commission also stated that "waters within these base lines constitute internal waters". Finally, the Commission observed that the text of his article (i.e. article 1 of the 1955 draft), together with its articles on the territorial sea, constituted a definition of the high seas.

## Freedom of the high seas

### Article 27

1956 draft

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.

Stages and problems in the preparation of the present draft

In his sixth report (A/CN.4/79) the special rapporteur suggested, under article 2, the following text:

> The high seas shall be immune from all acts of sovereignty or territorial dominion on the part of any State.

In 1955 (A/2934) the Commission adopted the following text as article 2:

> The high seas being open to all nations, no State may subject them to its jurisdiction. Freedom of the high seas comprises, inter alia:
>
> 1. Freedom of navigation;
> 2. Freedom of fishing;
> 3. Freedom to lay submarine cables and pipelines;
> 4. Freedom to fly over the high seas.

SUB-SECTION A: NAVIGATION

The right of navigation

Article 28

1956 draft

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

Stages and problems in the preparation of the present draft

In 1955 (A/2934) the Commission adopted the following text as article 3:

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

## Nationality of ships; Status of ships; Ships sailing under two flags

### Articles 29 - 31

(It is convenient to take these three articles together.)

1956 draft

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.

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.

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, page 6) the special rapporteur stated the following:

The attribution of an identity and a nationality to sea-going ships is the corollary of the principle of the free use of the high seas. Generally speaking, it is for every sovereign State to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of the right. In order that the legislation of a State on this subject should be effective, in all circumstances, however, it should not depart too far from the principles which have been adopted by the greater number of States and which may therefore be considered to constitute an element of international law in that connexion. That is why it would be desirable, as Mr. T.M.C. Asser and Lord Reay stated in their report to the Institute of International Law at Venice in 1896, "if not to bring about the adoption of absolutely uniform regulations with regard to the nationality of ships - this might be extremely difficult to bring about - at least to achieve a greater degree of similarity between the laws of the various States on the fundamental principles involved".

It has been impossible hitherto to establish uniform regulations on the subject, and the divergence of national legislation involves certain difficulties. It seems unlikely that an attempt at unification would be successful, and the Commission may consider that this item should not be retained.

He also stated that in his view a ship without a nationality should not be treated as a pirate unless it actually commits acts of piracy, although he doubted whether this subject was sufficiently important from the practical point of view to be worthy of study by the Commission. Finally, he doubted also whether the question of ships possessing two or more nationalities was sufficiently important to justify questioning governments on their practice in this connexion.

The two following paragraphs appear, under the heading "Nationality of Ships", in the Commission's report governing its second session in 1950 (A/1316):

185. The Commission considered that an attempt should be made to determine the general principles governing this matter in the various countries. It invited the special rapporteur to submit a further report on this subject at its next session.

186. With regard to the question of ships without a nationality and of ships possessing two or more nationalities, the Commission adopted the principle that every ship should have a flag and one flag only.

With regard to the nationality of ships, the special rapporteur in his second report (A/CN.4/42, page 7) put forward the following rules "as principles adopted by nearly all States and constituting the basis of international law on this matter":

1. More than one-half of the vessels should be owned by -

(a) Nationals or persons domiciled in the territory of the State to whom the flag belongs;

(b) A partnership or commandite company in which more than half the partners with personal liability are nationals or persons established in the territory of the State to whom the flag belongs;

(c) A national joint-stock company which has its head office in the territory of the State to whom the flag belongs.

2. The captain should possess the nationality of the State to whom the flag belongs.

At its third session in 1951, the Commission provisionally adopted the following text (see A/CN.4/SR.121, paragraphs 59-102; A/1858, paragraph 79; and A/CN.4/51, page 3):

In general, a State may fix the conditions on which it will permit a ship to be registered in its territory, and to fly its flag; yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognized by other States. These minimum requirements are:

The ownership of the vessel must, to the extent of 50 per cent, be vested in:

(a) nationals of or persons domiciled in the territory of the State;

(b) a partnership or commandite company in which more than half the partners with personal liability are nationals or persons domiciled in the territory of the State;

(c) a joint-stock company organized under the laws of the State and having its head office in its territory.

As for the special rapporteur's proposal that the captain of the ship should possess the nationality of the State to whom the flag belongs, the Commission took the view that such a rule would be too severe. Although it was desirable that the captain should possess the nationality of the State of the ship's flag, the fact that some States were at present short of qualified personnel should also be taken into consideration. (A/CN.4/SR.121, paragraphs 103-127)

The following articles and comments appear in the special rapporteur's sixth report (A/CN.4/79):

Article 7: A merchant ship on the high seas shall be subject solely to the jurisdiction of the flag State.

Comment: Every State has the right to exercise its authority over ships flying its flag. The absence of territorial sovereignty on the high seas makes it impossible to apply to a ship sailing on the high seas any law other than that of the State whose flag it flies. According to the most widely accepted legal interpretation, a ship on the high seas is considered to be part of the territory of the State under whose flag it sails. That is the theory of the territoriality of a vessel. This theory was widely supported in the past; several contemporary authors have defended it and it has been upheld by the Government of the United States. The Permanent Court of International Justice adopted that theory in the case of the Lotus. Nevertheless, most authors reject this theory and the Court has been criticized for having accepted the hypothesis of the assimilation of a ship to national territory. The British Government has always upheld the opinion expressed by Lord Stowell in 1804 that "the great fundamental principles of British maritime law is that ships on the high seas do not constitute a part of the territory of the State". According to these views, it is absolutely unnecessary to invoke the theory of territoriality in order to explain the juridical status of a ship. Action is taken "as though the ship constitutes the territory of the State whose flag she flies" but is not thus taken because the ship is the territory of the flag State (Gidel, Le droit international public de la mer III, pages 241 and 251).

The rapporteur considers that this controversy is somewhat academic, and that it is unnecessary for the International Law Commission to dwell on the point. It is sufficient to express the principle in the wording of the article suggested.

Article 8: The public vessels of all States may board and search on the high seas any ship not authorized to fly the flag of a State. Nevertheless, any such ship shall not be treated as a pirate unless it commits acts of piracy.

Comment: Certain authors compare the ship without a nationality to the pirate, who may be treated as a hostis humani generis. That view, however, is open to criticism. A ship without a nationality should not be treated as a pirate unless it actually commits acts of piracy. If that is not the case, public vessels are entitled to board and search the ship in question, bring it into one of their ports for certification, and refuse to admit it for commercial purposes, but may not treat it as a pirate.

Article 9: A ship which sails under the flags of two or more States may not claim, with respect to another State, any of the nationalities in question and shall be treated as though it were a ship without a nationality.

Comment: Certain authors consider that a ship sailing under two flags may not rely on either flag for protection. Others, who consider that a State has no right to issue a sea brief to a ship which would obtain a second nationality thereby, state that only the attribution of the second nationality is null and void. Some commercial treaties indeed contain the stipulation that, except in the case of a sale under a court order, ships of one of the parties cannot obtain the nationality of the other without producing a certificate of the withdrawal of flag. The special rapporteur prefers the first alternative.

Article 10: Each State may fix the conditions on which it will permit a ship to be registered in its territory and to fly its flag. Nevertheless, for the purposes of the recognition of its national character by other States, not less than 50 per cent of the ship must be owned by:

(a) nationals of or persons permanently resident in the territory of the State concerned; or

(b) a partnership or commandite company in which half the partners with personal liability are nationals or persons permanently resident in the territory of that State; or

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

Comment: The text of this article closely follows that adopted at the third session of the Commission, with only one dissenting vote (A/CN.4/SR.121, paragraphs 10 to 102). The special rapporteur has slightly modified the wording of the article. To the provision relating to persons "domiciled" in the territory of the State, he prefers a stipulation requiring the persons in question to be "permanently resident" in the territory. It seems preferable to insist on de facto residence in the territory, and not merely on a legal domicile.

The special rapporteur had proposed, as one of the conditions governing the right to fly its flag, that the master of the vessel should possess the nationality of the State concerned. He had pointed out that this practice was very widely accepted, particularly if the tonnage of the merchant marine of the countries which enforce the rule is compared with the world total. He had pointed out that the master's nationality was of the greatest importance in determining the national character of a ship, and that it might afford a certain guarantee for the enforcement on board of the laws of the flag State. The majority of the Commission, however, considered the rule too strict. While admitting that it was desirable for the master to be a national of the flag State, it felt it should make allowance for the fact that certain countries, at the present time, lacked sufficient personnel to be able to comply with that condition (A/CN.4/SR.121, paragraphs 103 to 127).
In 1955 (A/2934) the Commission adopted the following texts:

Article 4 (Status of ships): Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in these articles, they shall be subject to its exclusive jurisdiction on the high seas.

Article 5 (Right to a flag): Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:

1. Be the property of the State concerned; or
2. Be more than half owned by:
   (a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
   (b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
   (c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.

Article 6 (Ships sailing under two flags): A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to other States and may be assimilated by them to ships without a nationality.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

The Institute of International Law, at its meeting in Venice in 1896 which has been mentioned above, adopted the following draft rules:

SECTION I - ACQUISITION OF THE RIGHT TO THE FLAG OF A STATE

ARTICLE I. The ship should be inscribed on the register kept for this purpose by authorized officials, in conformity with the laws of the State.

ARTICLE 2. To be inscribed on this register, more than half the ship must be the property:

1. Of nationals; or
2. Of a company under a collective name or a commandite, of which more than half the members personally responsible are nationals; or
3. Of a national stock company (joint-stock or commandite), two-thirds at least of the directors of which are nationals; the same rule applies to associations and other legal persons owning ships.

ARTICLE 3. The concern (whether an individual ship-owner, a company or corporation) must have its headquarters in the State whose flag the ship must fly and in which it must be registered.

ARTICLE 4. Each State shall determine the conditions to be fulfilled in order to be appointed captain or first officer of a merchant ship: but the nationality of the captain or that of the members of the crew shall not be a condition of acquiring or forfeiting the right to the national flag.

SECTION II - FORFEITURE OF THE RIGHT TO THE FLAG OF A STATE

ARTICLE 5. Failure to comply with one of the conditions under which this right may be acquired does not entail forfeiture of this right until after the ship has been erased from the register. Such erasure is made at the request of the owners or of the management of the ship, or by the authority entrusted with the register, except as provided for by Articles 7 and 8 below.

ARTICLE 6. The owner or the management which shall have neglected to send the necessary notification to this authority shall be liable to a fine.

ARTICLE 7. If the change in ownership of a share in the ship causes the forfeiture of the right to the flag, the owners shall be granted a suitable length of time, in order to take the measures necessary for the ship to retain its former nationality, or to acquire another.

ARTICLE 8. If, after the expiration of this period, those interested have not taken the measures necessary to attain one of these two ends, the ship shall be erased from the register, and the person responsible for the loss of nationality or his heirs, if the loss of nationality is due to his death, shall be liable to a fine.

SECTION III. - TEMPORARY ACQUISITION OF THE RIGHT TO THE FLAG

ARTICLE 9. Temporary acquisition of the right to a flag occurs in two cases:

1. When a ship, built abroad, cannot definitely acquire the right to a flag until after its arrival in one of the ports of the owner's State;

2. When a ship changes owners while in a foreign port.

ARTICLE 10. In each of these two cases, the consuls and consular agents residing in the country in which the ship is, shall be charged with the giving of a provisional certificate, if the essential conditions imposed by law for acquiring the nationality of the ship be fulfilled; this certificate shall be valid only during a period to be determined by law.

In connexion with the question of the nationality of ships, it may be noted that, in the Nottebohm case (I.C.J. Reports 1955, p. 4), the International Court of Justice enunciated certain principles concerning the duty of one State to recognize the nationality legislation of another State. Although this case concerned the nationality of individuals - in particular, the question whether the Liechtenstein nationality conferred on Mr. Friedrich Nottebohm by means of a naturalization which took place in 1939 could be relied upon by Liechtenstein as against Guatemala in proceedings before the Court - the Court considered the matter of nationality in general terms. It is possible, therefore, that some of the principles laid down by the Court may be relevant to the question of the nationality of ships; in particular, to the question of the circumstances under which one State may or may not be obliged to recognize the national character of ships of other States. (The relevant passage in the Court's Judgement is at pages 20-23.)

## Immunity of warships

## Article 32

1956 draft

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.

Stages and problems in the preparation of the present draft

In his sixth report (A/CN.4/79) the special rapporteur proposed the following text as article 11:

> 1. Warships on the high seas shall in all circumstances enjoy complete immunity from the jurisdiction of any State other than the flag State.
>
> 2. The term "warship" means a vessel belonging to the naval forces of a State, under the command of an officer duly commissioned by the Government whose name occurs on the list of officers of the military fleet and the crew of which are under regular naval discipline.

In 1955 (A/2934) the Commission adopted the following text as article 7:

> 1. Warships on the high seas shall enjoy complete immunity from the jurisdiction of any State other than the flag State.
>
> 2. The term "warship" means a vessel belonging to the naval forces of a State, which is under the command of an officer duly commissioned by the Government whose name figures on the list of officers of the military fleet and the crew of which are under regular naval discipline.

The Commission explained that its definition of the term "warship" was based upon articles 3 and 4 of the Hague Convention (No. VII) of 18 October 1907 relative to the conversion of merchant ships into warships. The text of the Preamble and of articles 1 to 4 of this Convention is as follows:

His Majesty the German Emperor, King of Prussia; etc.:

Whereas it is desirable, in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;

Whereas, however, the contracting powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a war ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules;

Being desirous of concluding a convention to this effect, have appointed the following as their plenipotentiaries:

(Names of plenipotentiaries)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1. A merchant ship converted into a war ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

Article 2. Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

Article 3. The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Article 4. The crew must be subject to military discipline.

## Immunity of other government ships

## Article 33

### 1956 draft

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.

### Stages and problems in the preparation of the present draft

In his sixth report (A/CN.4/79) the special rapporteur proposed the following text as article 12:

> Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used exclusively on governmental and non-commercial service shall be deemed to be warships for all purposes connected with the exercise of powers on the high seas by a State other than the flag State.

The special rapporteur explained that the text was adapted from article 3 of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels signed at Brussels on 10 April 1926. The first three articles of this Convention read as follows:

> Article 1. Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.
>
> Article 2. For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately-owned merchant vessels and cargoes and of their owners.

Article 3. (1) The provisions of the two preceding articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.

Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessels, without that State being permitted to avail itself of its immunity:

1. In case of actions in respect of collision or other accidents of navigation;

2. In case of actions in respect of assistance, salvage and general average;

3. In case of actions in respect of repairs, supplies, or other contracts relating to the vessel.

(2) The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned.

(3) State-owned cargoes carried on board merchant vessels for governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings in rem.

Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under article 2.

In 1955 (A/2934) the Commission adopted the following text as article 8:

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

Explaining the departure of the text from that proposed by the special rapporteur, the Commission in its commentary upon article 8 stated the following:

> "Although aware of the objections to the granting of immunity to merchant ships used on Government service which led to the denial of this right in the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926, the Commission held that, as regards navigation on the high seas, there were no sufficient grounds for not granting to State ships used on commercial government service the same immunity as other State ships."

The Commission's intention of granting immunity to government ships engaged on commercial service as well as those engaged on non-commercial service has been made clearer still in the 1956 draft by inserting, after the words "government service", the words "whether commercial or non-commercial".

## Safety of navigation

### Article 34

1956 draft

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.

Stages and problems in the preparation of the present draft

In 1950 (A/1316, paragraphs 188-189) the Commission decided, in principle, to consider the questions of preventing collisions at sea and of safety at sea. Further, paragraph 81 of the Commission's report covering the work of its third session in 1951 (A/1858) states that:

> After approving the rapporteur's proposal of including, in the codification of the regime of the high seas, rules relating to the safety of life at sea, the Commission instructed the special rapporteur to continue his researches.

In his third report (A/CN.4/51 page 8) the special rapporteur suggested the following text:

> States are required to refrain from issuing regulations in contradiction with those agreed upon in concert by most of the other maritime States, to the extent that such contradiction might jeopardize safety of life at sea.

In his sixth report (A/CN.4/79) the special rapporteur proposed the following text as article 13:

> A State may not issue any regulations inconsistent with those jointly agreed upon by the majority of maritime States, if such inconsistency would jeopardize the safety of life at sea.

He also added the following comment:

At its second session, the Commission declared that it ascribed great importance to the international regulations for preventing collisions at sea, which constitute annex B of the Final Act of the London Conference of 1948. The special rapporteur was requested to study the question and to endeavour to deduce from these regulations principles which the commission might discuss (A/1316, paragraph 188).

The 1948 Conference drew up a Final Act which contains the following statement:

> "As a result of its deliberations... the Conference prepared and opened for signature and acceptance the International Convention for the Safety of Life at Sea, 1948, to replace the Convention of 1929... The Conference also had before it and used as a basis of discussion the present International Regulations for Preventing Collisions at Sea. The Conference considered it desirable to revise these Regulations and accordingly approved the International Regulations for Preventing Collisions at Sea, 1948, but decided not to annex the revised Regulations to the International Convention for the Safety of Life at Sea, 1948. The Conference invited the Government of the United Kingdom... when substantial unanimity has been reached as to the acceptance of the International Regulations for Preventing Collisions at Sea, 1948, to fix the date on and after which the International Regulations for Preventing Collisions at Sea, 1948, shall be applied by the Governments which have agreed to accept them."
>
> This date has been fixed as 1 January 1954.

In his second report (A/CN.4/42) the special rapporteur set forth certain principles which, in his opinion, flow from the International Regulations for Preventing Collisions at Sea. The Commission considered these during its third session (A/CN.4/SR.122, paragraphs 107 to 117 and A/CN.4/SR.123, paragraphs 7 to 60). Several members expressed the fear that the Commission might be exceeding its competence in discussing the technical questions involved. While admitting that it was desirable to consolidate the rules relating to the safety of life at sea, the Commission took the view that the matter was not within its province, and that its own work had to be co-ordinated with the work of the competent bodies already in existence or about to be created. According to certain members, however, it would be perfectly in keeping with the Commission's codifying work to draft a provision requiring States to refrain from issuing regulations

contrary to those agreed to by the other maritime States. In their view, such an obligation would be of real value, and would not ipso facto vest in the principal maritime Powers any exclusive right to regulate the policing of shipping and so to oblige the other States to adopt the regulations thus laid down. Nevertheless, the safety of life at sea should not be jeopardized by certain States which might issue regulations inconsistent with those agreed to by the majority of the other maritime States. In the special rapporteur's opinion these considerations justify the above draft article, which he submits to the Commission.

In the same report (A/CN.4/79) the special rapporteur proposed the following text as article 15:

Every State shall require its ships on the high seas to use the signals accepted by the majority of vessels engaged in international seafaring, wherever the use of different signals might endanger the safety of shipping.

He also added the following comment:

The establishment of the International Code of Signals was the result of an agreement, but it has not been incorporated in a convention between most of the maritime States. The International Code, prepared by a British Committee, was published by the Board of Trade in 1857 under the name "the Commercial Code of Signals for the Use of all Nations". After it had been revised by an Anglo-French commission, it became binding likewise on French vessels (1864). After consultation with other maritime Powers, new additions were published in 1900 and 1934.

The wording of the above article ensures the necessary uniformity in signals practice, without being excessively rigid in trivial cases, where non-compliance with the generally adopted rules does not constitute a threat to international shipping.

Various agreements on maritime signals were concluded under the auspices of the League of Nations, such as the Agreement concerning Maritime Signals, signed at Lisbon on 23 October 1930, the Agreement concerning Manned Light-ships not on their Stations, signed at Lisbon on 23 October 1930, and the Agreement for a Uniform System of Maritime Buoyage and rules annexed thereto,

signed at Geneva on 13 May 1936. It would not seem desirable that the code should deal with these matters expressly.

In 1955 (A/2934) the Commission adopted the following text as article 9 under the heading "Signals and rules for the prevention of collisions":

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

In adopting as a criterion of safety "regulations... concerning the safety of life at sea internationally accepted for the vessels forming the greater part of the tonnage of sea-going ships", the Commission explained that some of its members preferred to take as a test regulations accepted by "the majority of maritime States" or "the majority of vessels". But, the commentary went on, "the majority of the Commission ... was of the opinion that, in the matter of safety of human life at sea, the interest of each State may be judged by the number of persons on board its ships. Hence, the tonnage of the vessels appears to be the best criterion".

At its eighth session in 1956, however, as the Commission has explained, the more general expression "internationally accepted standards" was preferred.

At the same time the article was drafted so as to cover additional matters of importance with respect to safety at sea, such as the adequacy of the crew, labour conditions on ships and the construction, equipment and seaworthiness of ships.

The following I.L.O. Conventions relate to labour conditions on ships:[1/]

| No. | Title | Date of adoption |
|---|---|---|
| 7 | Minimum Age (Sea) | 9 July 1920 |
| 8 | Unemployment Indemnity (Shipwreck) | 9 July 1920 |
| 9 | Placing of Seamen | 10 July 1920 |
| 15 | Minimum Age (Trimmers and Stokers) | 11 November 1921 |

1/ For full details see The International Labour Code 1951, Volume I (Book IX - The International Seafarers' Code).

The following I.L.O. Conventions relate to labour conditions on ships: (cont'd)

| No. | Title | Date of adoption |
|---|---|---|
| 16 | Medical Examination of Young Persons (Sea) | 11 November 1921 |
| 22 | Seamen's Articles of Agreement | 24 June 1926 |
| 23 | Repatriation of Seamen | 23 June 1926 |
| 27 | Marking of Weight (Packages Transported by Vessels) | 21 June 1929 |
| 53 | Officers' Competency Certificates | 24 October 1936 |
| 54 | Holidays with Pay (Sea) | 24 October 1936 |
| 55 | Shipowners' Liability (Sick and Injured Seamen) | 24 October 1936 |
| 56 | Sickness Insurance (Sea) | 24 October 1936 |
| 57 | Hours of Work and Manning (Sea) | 24 October 1936 |
| 58 | Minimum Age (Sea)(Revised) | 24 October 1936 |
| 68 | Food and Catering (Ships' Crews) | 27 June 1946 |
| 69 | Certification of Ships' Cooks | 27 June 1946 |
| 70 | Social Security (Seafarers) | 28 June 1946 |
| 71 | Seafarers' Pensions | 28 June 1946 |
| 72 | Paid Vacations (Seafarers) | 28 June 1946 |
| 73 | Medical Examination (Seafarers) | 29 June 1946 |
| 74 | Certification of Able Seamen | 29 June 1946 |
| 75 | Accommodation of Crews | 29 June 1946 |
| 76 | Wages, Hours of Work and Manning (Sea) | 29 June 1946 |
| 91 | Paid Vacations (Seafarers)(Revised) | 18 June 1949 |
| 92 | Accommodation of Crews (Revised) | 18 June 1949 |
| 93 | Wages, Hours of Work and Manning (Sea) (Revised) | 18 June 1949 |

## Penal jurisdiction in matters of collision

### Article 35

1956 draft

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.

Stages and problems in the preparation of the present draft

In 1950 (A/1858, paragraph 187) the Commission decided to disregard, for the present, problems of private international law involved in the question of collision. But it also considered that it was important to determine which court was competent in criminal cases arising out of collision.

In his second report (A/CN.4/42, p.16) in 1951 the special rapporteur suggested the following text:

> In the event of a collision or other accident of navigation on the high seas, the master as well as any other person in the service of the ship wholly or partly responsible can only be prosecuted under penal or disciplinary proceedings before the courts of the State whose flag the ship was flying at the time of the collision or other accident of navigation. No arrest or detention of the vessel shall be ordered as a penal sanction by the authorities of a State other than that of the vessel's flag.

In his third report (A/CN.4/51, p.5) in 1952 the special rapporteur explained that, at the third session of the Commission in 1951, his proposal had given rise to a considerable debate in the Commission, with some members warmly supporting it and others feeling that the criticism which it implied of the

decision of the Permanent Court of International Justice in the Lotus case (P.C.I.J. Series A, No. 10) was not justified.[1] After carefully considering all the opinions that had been expressed, he felt he must reiterate his previous proposal.

In his fifth report (A/CN.4/69), which was specifically devoted to this question, the special rapporteur took into account the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation, which was signed by the representatives of twelve States in Brussels on 10 May 1952. The Preamble and articles 1 to 4 of this Convention read as follows:

> The High Contracting Parties, having recognised the advisability of establishing by agreement certain uniform rules relating to penal jurisdiction in matters of collisions or other incidents of navigation, have decided to conclude a Convention for this purpose and have thereto agreed as follows:
>
> Article 1. In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation.
>
> Article 2. In the case provided for in the preceding article, no arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying.

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1/ The debate is reported in A/CN.4/SR.121, paragraphs 128-151, and A/CN.4/SR.122, paragraphs 1-109. At its third session "the Commission decided that it was desirable to lay down a rule governing this subject, since the need for such a rule had become apparent" (A/1858, paragraph 80).

Article 3. Nothing contained in this Convention shall prevent any State from permitting its own authorities, in cases of collision or other incidents of navigation, to take any action in respect of certificates of competence or licences issued by that State, or to prosecute its own nationals for offences committed while on board a ship flying the flag of another State.

Article 4. This Convention does not apply to collisions or other incidents of navigation occurring within the limits of a port or in inland waters.

Furthermore the High Contracting Parties shall be at liberty at the time of signature, ratification or accession to the Convention, to reserve to themselves the right to take proceedings in respect of offences committed within their own territorial waters.

The special rapporteur commented on the work of the Brussels Conference as follows:

The Conference adopted as a starting-point the rule that the Convention should contain an exhaustive list of the authorities competent to deal with wrongful acts causing a collision, but it no longer maintained the rule previously propounded by the International Maritime Committee that such competence belongs solely to the judicial authorities of the country whose flag the colliding ship was flying at the time when the collision occurred. It was found during the Conference that certain States with a maritime tradition were extremely anxious to retain competence to "take criminal or disciplinary proceedings against their nationals for offences committed while they were on board a vessel flying another State's flag, or to take appropriate action in respect of certificates of competence or licences which they had issued." Article 3 of the Convention signed at Brussels does not, however, expressly confer these powers on the signatory States, but affirms that nothing contained in the Convention shall prevent any State from permitting its own authorities to take any action in respect of certificates of competence or licences issued by that State, or to prosecute its own nationals for offences committed while on board a ship flying the flag of another State. This additional provision answers

the requirements of the present situation, in which a considerable number of seamen work in the merchant marines of other nations with no long-standing maritime tradition. The officers concerned are certificated in their own countries, where they have received their professional training, and these countries have a real interest in maintaining a high level of proficiency among the persons to whom they have issued licences. For that reason these countries wish to retain competence to institute penal proceedings for offences committed while these officers are serving on board vessels flying foreign flags. This provision has therefore reappeared in the text of the Convention, although a similar provision was deleted during

the discussions in the International Maritime Committee at its Paris Conference in 1937.[1/]

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1/ At the meeting of the International Maritime Committee in Paris in 1937 the following text was submitted by M. Léopold Dor on behalf of the International Commission:

> In the event of a collision on the high seas, the Master, as well as any other person in the service of the ship, can only be prosecuted under penal or disciplinary proceedings before the courts of the State of which he is a national or of which the ship was flying the flag at the time of the collision.
>
> (Au cas d'abordage en haute mer, le capitaine, ainsi que toute autre personne au service du navire, ne pourra être poursuivi, à titre pénal ou disciplinaire, que devant les tribunaux de l'Etat dont il est ressortissant ou de celui dont le navire portait le pavillon au moment de l'abordage.)

French is original

The text finally adopted by the conference, however, read as follows:

> In the event of a collision or any other accident of navigation on the high seas, the Master, as well as any other person in the service of the ship, wholly or partly responsible, can only be prosecuted under penal or disciplinary proceedings, in respect of such collision, before the Courts of the State of which the ship was flying the flag at the time of the collision or other accident of navigation.
>
> (Au cas d'abordage ou de tout autre accident de navigation, en haute mer, le capitaine, ainsi que toute autre personne au service du navire qui est entièrement ou partiellement responsable, ne pourra être poursuivi, à titre pénal ou disciplinaire, que devant les Tribunaux de l'Etat dont le navire portait le pavillon au moment de l'abordage ou autre accident de navigation.)

French is original

(See Comité Maritime International, Bulletin No. . p. 67 and p. 298.)

Accordingly, the special rapporteur suggested the replacement of his previous text by one or other of the two following versions:

(a) In the event of a collision or other accident of navigation on the high seas, the master as well as any other person in the service of the ship wholly or partly responsible can only be prosecuted under penal or disciplinary proceedings before the courts of the State whose flag the ship was flying at the time of the collision or other accident of navigation, or before the courts of the State of which the person concerned is a national. No arrest or detention of the vessel shall be ordered as a penal sanction by the authorities of a State other than that of the vessel's flag.

(b) In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, proceedings may be instituted only before the judicial or administrative authorities of the State whose flag the ship was flying at the time of the collision or other incident of navigation, or of the State of which the persons concerned are nationals.

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

In his sixth report (A/CN.4/79) the special rapporteur proposed the latter of these versions as article 20. He also expressed the view that the fact that the Brussels Conference had been held was no reason why an article along these lines should not be included in the Commission's draft. He was of the opinion that the entry into force of a Convention on the subject concluded between maritime States which regularly take part in conferences on maritime law was not sufficient protection for seafarers against the dangers of penal proceedings which may be instituted against them by States which are not parties to such Conventions.

The special rapporteur went on to emphasize that the Brussels Conference had not only sought to regulate cases of collision on the high seas, but had considered that the regime established by the Convention should have as wide a scope as possible. In particular, provision was made for the application of the

Brussels Convention in the territorial sea, with the exception only of ports, roadsteads and inland waters (see article 4 of the Convention, above). Therefore, the special rapporteur suggested that the Commission might insert a provision worded as follows:

> If a collision or any other incident of navigation occurring in the territorial sea of a State concerns a sea-going ship and involves the penal or disciplinary responsibility of the master or of any other person in the service of the ship, proceedings may be instituted only before (i) the authorities of the State whose flag the ship was flying at the time of the collision or other incident of navigation; (ii) the authorities of the State of which the person concerned is a national; (iii) the authorities of the coastal State.
>
> No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those of the above-mentioned States.

The special rapporteur also suggested that the Commission might wish to consider the establishment of an organ which would hear appeals from the decisions of the authorities of the coastal State and which could be applied to if the State of which the unsuccessful defendant is a national should refuse to accept the court order.

In 1955 (A/2934) the Commission adopted the following text as article 10:

> 1. In the event of a collision or any other incident of navigation concerning a ship on the high seas and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship involved in the collision, proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship on which they were serving was flying the flag or of the State of which such persons are nationals.
>
> 2. No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying.

It should be noted that in paragraph 4 of its commentary upon article 20 (arrest on board a foreign ship) of the 1956 draft (A/3159), the Commission has expressed the view 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." But the Commission has also explained that, following the example of the 1930 conference, it has refrained from formulating specific rules on this subject, partly because in this very broad field certain limits must inevitably be set to its work, and partly because of the existence since 1952 of a convention on this subject, namely, the International Convention for the Unification of Certain Rules Relating to Jurisdiction in Matters of Collisions or Other Incidents of Navigation. This convention was signed at Brussels on 10 May 1952.

## Duty to render assistance

## Article 36

### 1956 draft

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.

### Stages and problems in the preparation of the present draft

The following paragraph appears in the report of the work of the Commission covering the work of its second session in 1950 (A/1316):

> 189. The Commission took the view that principles could be formulated, taking into account article 11 of the Brussels Convention of 23 September 1910 for the unification of certain rules relating to assistance and salvage at sea, which provided that after a collision the captain of each of the ships was bound to lend assistance to the other ship in so far as he could do so without serious danger to his ship, his passengers and his crew, and taking into account also article 8 of the Convention of 23 September 1910 for the unification of certain rules relating to collision, which provided that the captain of a ship was bound to render assistance to every person found in the sea in danger of his life, in so far as he could do so without serious danger to his ship, his passengers and his crew.

Article 11 of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules of Law with respect to Assistance and Salvage at Sea reads as follows:

Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.

The owner of the vessel incurs no liability by reason of contravention of the foregoing provision.

Article 8 of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules of Law with respect to Collisions between Vessels reads as follows:

After a collision, the master of each of the colliding vessels shall be obliged, as far as he can do so without serious danger to his vessel, his crew, and his passengers, to lend assistance to the other vessel, its crew, and its passengers.

He shall also be obliged, as far as possible, to make known to the other vessel the name and port of registry of his vessel, as well as the places from which it hails and to which it is bound.

The owner of the vessel shall not be responsible by reason of the violation alone of the foregoing provisions.

Accordingly, in his third report (A/CN.4/51, page 8), the special rapporteur proposed the following text:

The captain of a ship is bound to render assistance to everybody found in the sea in danger of his life in so far as he can do so without serious danger to his ship, his crew and his passengers. After a collision, the captain of each of the ships is bound to render assistance to the other ship, her crew and her passengers in so far as he can do so without serious danger to his ship, his crew and his passengers. Each state is bound to enact legislative provisions ensuring the application of these principles by captains of ships flying its flag.

In his sixth report (A/CN.4/79) the special rapporteur substituted the following text, as article 14:

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

In 1955 (A/2934) the Commission adopted this text as article 11.

The Commission has explained in its commentary that the 1956 text is based not only upon the articles of the two Brussels Conventions of 1910, which have been quoted above, but also upon Regulation 10 of Chapter V of the Regulations annexed to the International Convention on the Safety of Life at Sea, of 10 June 1948. This Regulation reads as follows:

Distress Messages - Procedure

(a) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.

(b) The master of a ship in distress, after consultation, so far as may be possible, with the masters of the ships which answer his call for assistance, has the right to requisition such one or more of those ships as he considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

(c) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation when he learns that one or more ships other than his own have been requisitioned and are complying with the requisition.

(d) The master of a ship shall be released from the obligation imposed by paragraph (a) of this Regulation, and, if his ship has been requisitioned, from the obligation imposed by paragraph (b) of this Regulation, if he is informed by the persons in distress or by the master of another ship which has reached such persons that assistance is no longer necessary.

(e) The provisions of this Regulation do not prejudice the International Convention for the unification of certain rules with regard to Assistance and Salvage at Sea, signed at Brussels on the 23rd September, 1910, particularly the obligation to render assistance imposed by Article 11 of that Convention.

## Slave trade

### Article 37

1956 draft

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.

Stages and problems in the preparation of the present draft

In 1950 (A/1316; paragraph 191) the Commission requested the special rapporteur to study treaty regulations in this field with a view to deriving therefrom a general principle applicable to all vessels which might engage in the slave trade.

In his second report (A/CN.4/42, pages 23 - 29) the special rapporteur went into this matter in considerable detail. He submitted a number of draft articles based on articles in the General Act of the Anti-Slavery Conference which was held at Brussels from 18 November 1889 to 2 July 1890 to bring about the suppression of the slave trade.[1/] The text of these draft articles is given below. (The roman figure in brackets indicates the number of the article in the General Act of Brussels on which the draft article was based).

Article 1 (XX). All States are required to co-operate for the more effective repression of the slave trade in the maritime zone in which it still exists.

Article 2 (XXI). This zone extends between the shores of the Indian Ocean (those of the Persian Gulf and of the Red Sea included), from Baluchistan to Cape Tangalane (Quilimane), and a conventional line which first follows the meridian from Tangalane till it intersects the 26th degree of South latitude and is then merged in this parallel,

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1/ (footnote on following page)

1/ (footnote from previous page)

On 10 September 1919 certain Powers, who were parties to the General Act of Berlin of 26 February 1885 (a treaty concerned with the development of commerce and civilization in certain regions of Africa, Chapter II of which consisted of a Declaration concerning the Slave Trade) and the General Act and Declaration of Brussels of 2 July 1890, concluded at Saint-Germain-en-Laye the Convention on the Revision of the General Act of Berlin of February 26, 1885, and of the General Act and the Declaration of Brussels of July 2, 1890. Under article 13 of this Convention, the General Act of Berlin and the General Act of Brussels were declared to be abrogated in so far as they were binding between the Powers who were parties to the new Convention. But, under article 11 of the new Convention, the Signatory Powers exercising sovereign rights or authority in African territories undertook to continue to watch over the preservation of the native populations, and to supervise the improvement of the conditions of their moral and material well-being. They undertook, in particular, to endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea. Also, article 3 of the Slavery Convention, signed at Geneva on 25 September 1926, reads as follows:

"The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

"The High Contracting Parties undertake to negotiate as soon as possible a general Convention with regard to the slave trade which will give them rights and impose upon them duties of the same nature as those provided for in the Convention of June 17th, 1925, relative to the International Trade in Arms (Articles 12, 20, 21, 22, 23, 24, and paragraphs 3, 4 and 5 of Section II of Annex II) with the necessary adaptations, it being understood that this general Convention will not place the ships (even of small tonnage) of any High Contracting Parties in a position different from that of the other High Contracting Parties.

"It is also understood that, before or after the coming into force of this general Convention, the High Contracting Parties are entirely free to conclude between themselves, without, however, derogating from the principles laid down in the preceding paragraph, such special agreements as, by reason of their peculiar situation, might appear to be suitable in order to bring about as soon as possible the complete disappearance of the slave trade."

then passes round the Island of Madagascar by the east, keeping 20 miles off the east and north shore, till it intersects the meridian at Cape Amber, from which point the limit of the zone is determined by an oblique line which extends to the coast of Baluchistan, passing 20 miles off Cape Ras-el-Hadd.

Article 3 (XXIII). The aforesaid right shall be limited to vessels of tonnage less than 500 tons.

Article 4 (XXV). The signatory States engage to adopt efficient methods to prevent the unlawful use of their flag and to prevent the transportation of slaves on vessels authorized to fly their colours.

Article 5 (XXVI). The signatory States engage to adopt all measures necessary to facilitate the speedy exchange of information calculated to lead to the discovery of persons taking part in operations connected with the slave trade.

Article 6 (XXVIII). Any slave who has taken refuge on board a ship of war bearing the flag of one of the signatory States shall be immediately and definitively set free. Such freedom, however, shall not withdraw him from the competent jurisdiction if he has been guilty of any crime or offence at common law.

Article 7 (XXX). The signatory States engage to exercise a strict surveillance over native vessels authorized to carry their flag in the zone mentioned in Article 2 and over the commercial operations carried on by such vessels.

Article 8 (XLII). When the officers in command of war vessels of any of the signatory States have reason to believe that a vessel whose tonnage is less than 500 tons, and which is found navigating in the above-named zone, is engaged in the slave trade or is guilty of the fraudulent use of a flag, they may examine the ship's papers.

The present article does not imply any change in the present position as regards jurisdiction in territorial waters.

Article 9 (XLIII). To this end, a boat commanded by a naval officer in uniform may be sent to board the suspected vessel after it has been hailed and informed of this intention.

The officer sent on board of the vessel which has been stopped shall act with all possible consideration and moderation.

Article 10 (XLIX). If, in performing the acts of supervision mentioned in the preceding articles, the officer in command of the warship is convinced that an act connected with the slave trade has been committed on board during the passage, or that irrefutable proofs exist against the captain, or fitter-out, for accusing him of fraudulent use of the flag, or fraud, or participation in the slave trade, he shall conduct the arrested vessel to the nearest port of the zone where there is a competent magistrate of the State whose flag has been used.

A suspected vessel may also be turned over to a warship of its own nation, if the latter consents to take charge of it.

Article 11 (LIII). If it shall be proved by the enquiry that the vessel has been illegally arrested, there shall be clear title to an indemnity in proportion to the damages suffered by the vessel through being taken out of its course.

The special rapporteur was of the view that the slave trade should not be regarded as an act of piracy. Although the League of Nations Temporary Committee on Slavery had considered that the slave trade should be regarded as an act of piracy,[1/] the special rapporteur pointed out that, if it were so regarded, any vessels suspected of the offence could be stopped by any warship and conducted to one of the latter's ports to be tried by the national courts. But part at least of the ground for internationalizing the crime of piracy is that the acts occur on the high seas, and in many cases there are no relations between the pirate and a given country. Whereas, in the case of the slave trade, this trade takes place between two given countries. Since both these countries are bound to co-operate in repressing the slave trade, internationalization - meaning that the vessel may be conducted to any port for trial by the local courts - did not seem to the special rapporteur to be appropriate.

The special rapporteur also expressed the view that the right of control over the slave trade should not be granted over the whole extent of the high seas, but only over a special zone, as provided for in the General Act of Brussels.

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1/ (footnote on following page)

1/ (footnote from previous page)

The following are extracts from the Report of the Temporary Slavery Commission adopted in the course of its Second Session, July 13th-25th, 1925. (League of Nations document, A.19.1925 VI).

"42...with a view to making the supervision of the Red Sea and its neighbouring waters more effective, the Commission considers it desirable that an invitation should be sent to the European Governments interested, and also to the Government of Egypt, with a view to the conclusion of an agreement allowing the ships carrying out such supervision to pursue and capture, even in territorial waters in the regions specified, ships suspected of carrying slaves...

47. In regard to waters other than the Red Sea and its neighbourhood where the trade may exist or be suspected to exist, the Commission believed that the Powers interested might usefully consider the possibility of adopting similar measures to those referred to above in paragraph 42.

48. Moreover, it has been suggested that the transport of slaves by sea be considered as an act of piracy. The Commission thinks that this suggestion might be brought to the attention of the Powers."

In the report presented by the Sixth Committee to the Assembly on 24 September 1926, it was explained that the British Government supported the suggestion that the transport of slaves by sea be treated in the Convention as piracy, and that the Sixth Committee took the same attitude towards the question from a moral point of view. But, owing to the difficulty of applying this proposal in law, no attempt had been made to incorporate it in the Convention. The report of the Sixth Committee continues as follows:

"The French Government proposes that, instead, the provisions of the Arms Traffic Convention dealing with maritime rights should be inserted in the Convention, with the necessary adaptations to make them applicable to slaves. Other delegations felt, however, that to make so considerable a change in the Convention would not be in consonance with their instructions. The Committee therefore decided to confine itself to the article in the Convention which refers to certain provisions of the Convention concerning the International Trade in Arms, gives greater elasticity as to the final arrangements to be made, and provides for the absolute equality of the signatory States. In particular, attention may be drawn to the third paragraph of Article 3, which provides for the conclusion of special agreements between the signatory Powers. These agreements will enable the parties concerned to make arrangements of greater stringency and stipulations better suited to local conditions than are possible in a general International Convention." (League of Nations document A.104. 1926. VI. For the text of article 3 of the Convention as it was finally drafted, see footnote 1/ on page 128.)

Finally, the special rapporteur considered the question whether the power of examining a ship's papers, as granted under Article XLII of the General Act of Brussels, is sufficient. This provision states that:

> When the officers in command of war-vessels of any of the signatory powers have reason to believe that a vessel whose tonnage is less than 500 tons, and which is found navigating in the above-named zone, is engaged in the slave-trade or is guilty of the fraudulent use of a flag, they may examine the ship's papers.
>
> The present article does not imply any change in the present state of things as regards jurisdiction in territorial waters.

Moreover, Article XLV of the General Act of Brussels provides that:

> The examination of the cargo or the search can only take place in the case of vessels sailing under the flag of one of the powers that have concluded or may hereafter conclude the special conventions provided for in Article XXII, and in accordance with the provisions of such conventions.

Having regard to these and other provisions[1/] the special rapporteur thought there would appear to be no justification for granting a right of search exceeding the limits laid down in these provisions.

The Commission considered the special rapporteur's proposals to be too detailed and in the Commission the following text was suggested for the rapporteur's consideration. (A/CN.4/SR.124, paragraph 74; see also A/CN.4/51, page 10)

> All States are required to co-operate for the more effective repression of the slave trade, particularly in areas in which it still exists, such as the shores of the Indian Ocean, including the Persian Gulf and the Red Sea and the coast of Africa.
>
> To this end the signatory States undertake to adopt efficient measures to prevent the unlawful use of their flag and to prevent the transport of slaves on vessels authorized to fly their colours.

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1/ Notably paragraph 5 of Annex II to the Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War of 17 June 1925, which provides that the commanding officer of the warship may stop the suspected vessel "in order to verify the nationality of the vessel by examining the document authorizing the flying of the flag, but no other document". See also article 3 of the Slavery Convention of 25 September 1926, the text of which is given in previous footnote.

In order to facilitate the repression of the trade on the high seas and to prevent the abuse of a State's flag, a right of approach is recognized under the same conditions as in the case of pursuit for piracy.

Any slave who has taken refuge on board a ship of war or a merchant vessel shall be ipso facto set free.

As the special rapporteur pointed out in his third report (A/CN.4/51, page 10) the purpose of this text was to combine in a single article the right of approach and the duties of States with regard to the repression of the slave trade. But the rapporteur felt that it would be better to make a clear distinction between these two subjects. Accordingly, he suggested the following text, so far as the slave trade was concerned (ibid., page 11).

1. All States are required to co-operate for the more effective repression of the slave trade. They undertake to adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and to prevent the unlawful use of their flag for that purpose.

2. Any slave who has taken refuge on board a ship of war or a merchant vessel shall be ipso facto set free.

In his sixth report (A/CN.4/79) he slightly modified the text to read as follows (article 22):

"All States are required to co-operate for the more effective repression of the slave trade on the high seas. They shall adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and the unlawful use of their flag. Any slave who takes refuge on board a warship or a merchant vessel shall ipso facto be set free."

In 1955 (A/2934) the Commission adopted the following text as article 12:

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

On 4 September 1956 the United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, meeting in Geneva, adopted the text of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

Articles 3 and 4 of this Convention (E/Conf. 24/20) read as follows:

Article 3 1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.

2. (a) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose.

(b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

3. The States Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

Article 4 Any slave who takes refuge on board any vessel of a State Party to this Convention shall ipso facto be free.

# Piracy

## Articles 38 - 45

(It is convenient to take these articles together)

1956 draft

Article 38: All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Article 39: Piracy consists in any of the following acts:

(1) Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or against persons or property on board such a ship;

(b) Against a ship, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

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

Article 40: The acts of piracy, as defined in article 39, committed by a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private vessel.

Article 41: A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 39. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 42: A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which the national character was originally derived.

Article 43: On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 44: Where the seizure of a ship or aircraft on suspicion of piracy has been 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.

Article 45: A seizure on account of piracy may only be carried out by warships or military aircraft.

Stages and problems in the preparation of the present draft

These articles were adopted by the Commission in substantially the same form as articles 13 to 20 of its 1955 draft (A/2934).

As the Commission has explained, its work 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.

The text of these articles (less commentary) is given below:

Article 1: As the terms are used in this convention:

1. The term "jurisdiction" means the jurisdiction of a State under international law as distinguished from municipal law.

2. The term "territorial jurisdiction" means the jurisdiction of a State under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a State over its ships outside its territory.

3. The term "territorial sea" means that part of the sea which is included in the territorial waters of a State.

4. The term "high sea" means that part of the sea which is not included in the territorial waters of any State.

5. The term "ship" means any water craft or air craft of whatever size.

Article 2: Every State has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

Article 3: Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

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

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

Article 4: 1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a State by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the State to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a State by descent from the high sea, as long as it continues under the same control.

Article 5: A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the State from which it was derived.

Article 6: In a place not within the territorial jurisdiction of another State, a State may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

Article 7: 1. In a place within the territorial jurisdiction of another State, a State may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a State within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any State, the pursuit may be continued into or over the territorial sea of another State and seizure may be made there, unless prohibited by the other State.

2. If a seizure is made within the territorial jurisdiction of another State in accordance with the provisions of paragraph 1 of this article, the State making the seizure shall give prompt notice to the other State, and shall tender possession of the ship and other things seized and the custody of persons seized.

3. If the tender provided for in paragraph 2 of this article is not accepted, the State making the seizure may proceed as if the seizure had been made on the high sea.

Article 8: If a pursuit is continued or a seizure is made within the territorial jurisdiction of another State in accordance with the provisions of paragraph 1 of Article 7, the State continuing the pursuit or making the seizure is liable to the other State for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

Article 9: If a seizure because of piracy is made by a State in violation of the jurisdiction of another State, the State making the seizure shall, upon the demand of the other State, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 10: If a ship seized on suspicion of piracy outside the territorial jurisdiction of the State making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the State making the seizure shall be liable to the State to which the ship belongs for any damage caused by the seizure.

Article 11: 1. In a place not within the territorial jurisdiction of any State, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy and possessed by pirates, it may be stopped and questioned to ascertain its character.
2. If the ship is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the State making the interference shall be liable to the State to which the ship belongs for any damage caused by the interference.

Article 12: A seizure because of piracy may be made only on behalf of a State, and only by a person who has been authorized to act on its behalf.

Article 13: 1. A State, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.
2. The law of the State must conform to the following principles:

(a) The interests of innocent persons are not affected by the piratical possession or use of property, not by seizure because of such possession or use.

(b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.

(c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.

Article 14: 1. A State which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the State which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.

3. The law of the State must, however, assure protection to accused aliens as follows:

(a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.

(b) The accused person must be given humane treatment during his confinement pending trial.

(c) No cruel and unusual punishment may be inflicted.

(d) No discrimination may be made against the nationals of any State.

4. A State may intercede diplomatically to assure this protection to one of its nationals who is accused in another State.

Article 15: A State may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another State.

Article 16: The provisions of this convention do not diminish a State's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

Article 17: 1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to such treaties inter se.

2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement inter se.

Article 18: The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.

Article 19: 1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties to the dispute providing for the settlement of international disputes.

2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute, be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Protocol of 16 December 1920 relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of 16 December 1920 to an arbitral tribunal constituted in accordance with the provisions of the Convention for the Pacific Settlement of International Disputes, signed at The Hague, 18 October 1907.

In 1926 the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (League of Nations Document C.196.M.70.1927, V, pages 116-119) reported on piracy as follows:

A. Piracy in International Law

I. According to international law, piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons. The pirate attacks merchant ships of any and every nation without making any distinction except in so far as will enable him to escape punishment for his misdeeds. He is a sea-robber, pillaging by force of arms, stealing or destroying the property of others and committing outrages of all kinds upon individuals.

Piracy has as its field of operation that vast domain which is termed "the high seas". It constitutes a crime against the security of commerce on the high seas, where alone it can be committed. The same acts committed in the territorial waters of a State do not come within the scope of international law, but fall within the competence of the local sovereign power.

When pirates choose as the scene of their acts of sea-robbery a place common to all men and when they attack all nations indiscriminately, their practices become harmful to the international community of all States. They become the enemies of the human race and place themselves outside the law of peaceful people.

Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification "for private ends". It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law.

By committing an act of piracy, the pirate and his vessel ipso facto lose the protection of the State whose flag they are otherwise entitled to fly. Persons engaged in the commission of such crimes obviously cannot have been authorized by any civilized State to do so. In this connexion we should note that the commission of the crime of piracy does not involve as a preliminary condition that the ship in question should not have the right to fly a recognized flag.

Every enterprise for the purpose of committing robbery at sea is not necessarily piratical in character. A wrecker, for instance, unlike a pirate, has a nationality, despite the fact that he is indirectly a menace to safety at sea. In like manner, a mere quarrel followed by acts of violence or depredations occurring between fishermen on the high sea ought not to be regarded as an act of piracy, since such acts do not constitute a menace to the international maritime commerce for the protection of whose security every civilized State is to some extent interested in intervening so far as its power permits.

A ship may clearly be a pirate ship even if it was not fitted out for that purpose or if it began its voyage without criminal intention. If a mutiny breaks out on board and the mutineers seize the vessel and use it to commit acts of piracy, the vessel ipso facto loses the original protection of its flag.

Acts of piracy can as a general rule only be committed by private vessels. A warship or public vessel can never, so long as it retains that character, be treated as a pirate. If such vessels commit acts of depredation or unjustifiable violence, the State whose flag they fly demands reparation from them and has to inflict suitable penalties upon the commander and crew and pay lawful damages to the victims of such acts. If the crew of a warship or other public vessel mutinies and sails the seas for its own purposes, the vessel ceases to be a public one, and the acts of violence which it commits are regarded as acts of piracy.

The case appears more difficult when there is a civil war and the regular Government's warships take the side of the rebels before the latter have been recognized as belligerents. The regular Government sometimes treats such ships as pirates, but foreign Powers ought not to do so unless these ships commit acts of violence against vessels belonging to the Powers in question. Third Powers, on the other hand, may consider such ships as pirates when they commit acts of violence and depredations upon vessels belonging to those Powers, unless the acts are inspired by purely political motives, in which case it would be exaggeratedly rigorous to treat the ships as declared enemies of the community of civilized States.

II. Before taking action against pirates, it must first be ascertained that they really are pirates. The mere fact of hoisting a flag does not prove the right to fly it; and, accordingly, if a vessel is suspected of piracy, other means have to be used to establish its nationality.

The two following principles are recognized both by law and in practice:

(1) Any warship has the right upon the high seas to stop and seize any vessel, under whatever flag it may be sailing, which has undoubtedly committed an act of piracy.

(2) If the vessel is only under suspicion, the warship is authorized to verify its true character. It must, however, use this right judiciously and with caution. The commander of the warship is responsible for any action taken. If, after inspection of the suspected vessel, the suspicion proves to have been unfounded, the captain of the suspected vessel is entitled to reparation or compensation, according to circumstances.

If, on the other hand, the suspicion of piracy is confirmed, the commander of the warship either himself proceeds to try the pirates (unless the arrest took place in the territorial waters of a third Power) or he brings them into the port of some country to be judged by a competent tribunal, and the fate of the vessel and its crew is determined by the domestic law of the country in question. The attacks of pirates are directed against the interests of maritime trade throughout the world, and pirates are therefore justiciable in every civilized country. The State which seizes the pirate vessel and arrests the crew is the obvious judge of the validity of the capture and the guilt of the parties concerned. It should by preference be accorded the right to investigate and to pass judgement in the case, unless the internal law or some international convention otherwise decides, or unless the case is that dealt with in the following paragraph.

May a warship pursue and arrest pirates in the territorial waters of a foreign Power without thereby violating the sovereign rights of that Power? Under normal circumstances, the sovereign of the territory alone has the right, in territorial waters, to protect national and international interests; but in the case of acts intended to safeguard international relations, it would appear reasonable to assume that the Government of the territory tacitly consents if it is not in a position to continue the pursuit successfully; otherwise, if the Coastal State could not take the necessary measures to carry through the pursuit in time, the result would be to facilitate the flight of the pirate and enable him to escape punishment. In such cases, however, the right to try for piracy devolves upon the State to which the territorial waters belong. It is the recognition due to its sovereignty. The right to pursue, attack and seize a pirate belongs to warships.

The effects of the capture, the consequences of the validity of the seizure, the right of recovery by the lawful owners and the reward to be given to the captors are questions which are governed by the law of the State having jurisdiction. Accordingly they are solved in a different manner by each State, either in its domestic legislation or in its special conventions. The following four conditions must as a rule be fulfilled in the exercise of the right of recovery and restitution of the goods stolen:

(1) The owner must lodge his claim within a year after sentence of capture has been passed;

(2) The claimant must vindicate his claim of ownership before the competent tribunals;

(3) The costs of recovery are fixed by such tribunals;

(4) The costs must be borne by the owner.

B. Piracy in Treaties and Special Laws of States

In addition to piracy by the law of nations, States have occasionally by treaty or in their internal law, established a piracy by analogy which has no claim to be universally recognized and must not be confused with true piracy; the assimilations in question can only create a sort of piracy under internal law and from the point of view of the countries which make them.

The acts dealt with are of a grave nature, it is true, but they do not constitute a danger to the shipping and commerce of all nations indiscriminately. Legislators are justified in taking strong measures in such cases, but the classification of such acts as piracy is a fact which only concerns the State whose laws contain provisions to that effect. From the international point of view, the acts come within the competence only of the country in which they are punishable. No country making a capture can cite them as the basis of a claim to international competence nor can they justify actual capture by a foreign State unless there is a convention which expressly provides otherwise.

We shall now examine the salient facts and the commonest of these analogous forms of piracy. In the first place, there is privateering.

1. The immediate object of privateering is the use of violence for purposes of gain, and this gives it a certain resemblance to piracy.

Although the object of the privateersman is to take the property of others, his acts are only committed against the national enemy of the country which has given him his letters of marque. This circumstance gives him a legal standing as regards nationality; at the same time it places responsibility upon the nation whose flag he flies, and thereby excludes any idea of piracy. Moreover, if a vessel so commissioned infringes the rights of other nations by acts of violence or irregularities which exceed the powers it holds, it cannot on that account be regarded as a pirate unless its intention is obviously piratical. In such a case, the State which commissioned it is responsible to other countries for any illegal acts it may commit, and has the right to try and punish.

2. Vessels have also been regarded as pirates when, their own countries remaining neutral, they received a commission from a foreign belligerent State and captured vessels belonging to a Power which, while an enemy of that State, was at peace with the vessel's own country.

This, too, is not piracy according to international law, but only according to domestic law of one or more States.

Certain writers hold that, as a result of the acts it commits, such a vessel is denationalized, and is not legitimately under the protection of any flag; such acts would thus be true acts of piracy according to

international law. This view, however, is mistaken; such a vessel is not denationalized. It is covered in respect of third Powers by the commission it has received. It has a respondent answerable to third Powers, namely, the State which commissioned it and which becomes liable for its acts. Lastly, it should be borne in mind that the vessel does not attack all merchant shipping indiscriminately; it merely captures the vessels of the Power at war with the State which commissioned it. It makes war upon a certain nation. It is not an enemy of the human race. This, then, cannot be said to be a case of piracy under international law, but such a vessel can certainly be classed as a pirate by the domestic law of an individual State.

3. Then, again, the sailors forming the crew of a merchantship are generally treated as pirates if they mutiny against the commander during a voyage, murder him and the other officers and seize the ship. But this too is piracy only under the domestic law of individual States.

4. Governments struggling to quell a rebellion have an incontestable right to describe as pirates, or to announce that they will treat as pirates, rebels who sail the seas for the purpose of seizing property belonging to subjects or citizens who have remained faithful to the duly established authorities. Rebellions are entirely a matter for the domestic law of the individual State, and a Government has every right to threaten to treat rebels as pirates, however widespread the rebellion may be.

Foreign Powers, however, are not obliged to accept this description or agree to such persons being treated as pirates.

C. Conclusions

The confusion of opinion on the subject of piracy is due to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual States. In our view, therefore, it would be preferable for the Committee to adopt a clear definition of piracy applicable to all States in virtue of international law in general. Accordingly, we have the honour to submit to the Committee the following draft.

The Sub-Committee then submitted the following "Draft Provisions for the Suppression of Piracy":

Article 1: Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

Article 2: It is not involved in the notion of piracy that the ship should not have the right to fly a recognized flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.

Article 3: Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses its public character.

Article 4: Where, during a civil war, warships of insurgents who are not recognized as belligerents are regarded by the regular Government as pirates, third Powers are not thereby obliged to treat them as such.

Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives.

Article 5: If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea.

On the condition that the affair shall be remitted for judgement to the competent authorities of the littoral State, a pursuit commenced on the high sea may be continued even within territorial waters unless the littoral State is in a position to continue such pursuit itself.

Article 6: Where suspicions of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

Article 7: Jurisdiction in piracy belongs to the State of the ship making the capture, except:

(a) in the case of pursuit mentioned in Article 5, paragraph 2;

(b) in the case where the domestic legislation or an international convention otherwise decides.

Article 8: The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the captors, are governed by the law of the State to which jurisdiction belongs.

The text of the preamble and of articles 1 to 3 of the Nyon Arrangement of 14 September 1937, referred to by the Commission in its commentary upon article 39, is as follows:

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of 22 April 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and

Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any participating

Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines;

In view thereof the undersigned, being authorized to this effect by their respective Governments, have met in conference at Nyon between the 9th and 14th September 1937, and have agreed upon the following provisions which shall enter immediately into force:

I. The Participating Powers will instruct their naval forces to take the action indicated in paragraph II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.

II. Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on 22 April 1930 and confirmed in the Protocol signed in London on 6 November 1936 shall be counter-attacked and, if possible, destroyed.

III. The instruction mentioned in the preceding paragraph shall extend to any submarine encountered in the vicinity of a position where a ship not belonging to either of the conflicting Spanish parties has recently been attacked in violation of the rules referred to in the preceding paragraph in circumstances which give valid grounds for the belief that the submarine was guilty of the attack.

## Right of visit

### Article 46

1956 draft

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, through 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.

Stages and problems in the preparation of the present draft

In his second report (A/CN.4/42, page 22) under the heading "The right of approach", the special rapporteur suggested the adoption of the following provision:

> Except where acts of interference are done under powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy. Should such suspicions prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to the stoppage.

Paragraph 82 of the Commission's report covering the work of its third session in 1951 (A/1858) reads as follows:

> The commission examined the right of warships to approach foreign merchant vessels on the high seas. The special rapporteur had recognized the right of approach only where a warship has serious grounds for believing that a foreign merchant vessel is engaged in piracy, or where acts of interference are justified under powers conferred by treaty. The general treaties on the slave trade permit the right of approach only in special zones and in respect of ships below a certain tonnage. The Commission considers that, in the interests of stamping out the slave trade, the right of approach should be put on the same footing as in the case of piracy, and hence should be permissible without regard to zone or tonnage.

In his third report (A/CN.4/51, page 9) the special rapporteur considered it best to make a clear distinction between the question of the right of approach and the question of the duties of States with regard to the repression of the slave trade (see under article 37). But, taking into account the Commission's view that, in the interests of stamping out the slave trade, the right of approach should be put on the same footing in the case of the slave trade as in the case of piracy, he submitted the following proposal:

> Except where acts of interference are done under powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy or in the slave trade. Should such suspicions prove to be unfounded and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to the stoppage.

With a slight drafting change the same text was submitted by the special rapporteur in his sixth report (A/CN.4/79) as article 21.

In 1955 (A/2934) the Commission adopted, as article 21, a text which is substantially the same as that approved a year later.

## Right of hot pursuit

### Article 47

1956 draft

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 inquiry 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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, pages 18-23), the special rapporteur devoted considerable attention to this question. He pointed out that, although the doctrine of the right of hot pursuit was accorded general support, there were certain questions relating to the extent of this right on which agreement was lacking. Such questions included the following: (i) At what moment can the pursuit be considered to have commenced? (ii) Must the patrol vessel giving the order also be within the territorial sea? (iii) Can the pursuit be commenced when the vessel is in the contiguous zone? and (iv) Can the pursuit be commenced in the case of the constructive presence of a vessel in the territorial sea (i.e. when the vessel, while itself outside the territorial sea, is causing offences to be committed therein by her own boats)?

The special rapporteur referred to certain earlier attempts to codify the law relating to hot pursuit. These included the following:

(a) Article 8 of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law at its Paris session in 1894:

> ... The littoral State has the right to continue on the high seas a pursuit commenced in territorial waters, and to arrest and pass judgement on a vessel which has committed an offence within its territorial waters.
>
> In case of capture on the high seas, however, the fact will be notified without delay to the State whose flag the vessel is flying. The pursuit shall be interrupted so soon as the vessel enters the territorial waters of its own country or of a third Power. The right of pursuit lapses

so soon as the vessel enters a port in its own country or in that of a third Power.

(b) Article 29 of the Regulations concerning the Legal Status of Ships and their Crews in Foreign Ports, adopted by the Institute of International Law at its session at The Hague in 1898:

> ... Misdemeanors committed on a merchant ship at sea shall not come under the cognizance of the authority of the port at which they land; but, in case of the flight of a ship to protect persons on board from actions against them because of acts committed in a port, it may be pursued on the high seas as provided in article 8, section 2, of the rules adopted by the Institute governing territorial waters (i.e. the section quoted in (a) above).

(c) Article 13 of the draft regulations relating to territorial waters in peace time, adopted by the Institute of International Law at its Stockholm session in 1928:

> A pursuit commenced by the littoral State for infraction of its laws and regulations in its territorial waters or in the additional area contiguous thereto referred to in the preceding Article may be continued on the high seas, and the littoral State shall have the power to arrest and pass judgement on the vessel pursued.
>
> The pursuit shall be interrupted so soon as the vessel enters the territorial waters of its own country or of a third Power.
>
> In case of capture outside territorial waters or the contiguous area, the fact shall be notified without delay to the State whose flag the captured vessel is flying.

(d) Article 12 of the draft Laws of Maritime Jurisdiction in Time of Peace, adopted by the International Law Association at its Vienna session in 1926:

> ... A State has the right to continue on the high seas a pursuit commenced within its territorial waters and to arrest and pass judgement upon any ship which has committed an offence within its waters. Notice of the seizure must be given immediately to the State whose flag the vessel is flying. Pursuit must not be continued within the territorial waters of another State, and

cannot be resumed after the ship has entered the port of another State.

(e) Article 10 of Project No.12 (Jurisdiction) for the codification of American international law, submitted to the International Commission of Jurists at Rio de Janeiro by the American Institute of International Law in 1927:

> Merchant vessels which violate the provisions of the present convention or the laws and regulations of an American Republic in regard to its territorial sea are subject to the jurisdiction of the said republic.
>
> Such republic has the right to continue, within the zone contiguous to its territorial sea, the pursuit of a vessel commenced within its territorial waters, and to bring the vessel before its courts.

(f) Article 11 of the Report of the Second Committee at the Conference for the Codification of International Law held at The Hague in March-April 1930:

> The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State begun when the foreign vessel is within the inland waters or territorial sea of the State may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.
>
> The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea, and has begun the pursuit by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the other vessel.
>
> A capture on the high sea shall be notified without delay to the State whose flag the captured vessel flies.

In his second report (A/CN.4/42, pages 43-44) the special rapporteur submitted the following:

> The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inland waters, the territorial sea or the zone adjacent to the territorial waters in which the coastal State exercises Customs control, may be continued outside those waters so long as the pursuit has not been interrupted.
>
> The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means that the pursued vessel or one of its boats is within the limits of the waters referred to in the first paragraph, and has commenced the pursuit by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the foreign vessel. It is not necessary that, when the foreign vessel receives the order to stop, the vessel giving the order should be within the waters indicated in the first paragraph.
>
> The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

If necessary, the Commission could add the following:

> A vessel arrested within the jurisdiction of a State and escorted to a port of that State for delivery to the competent authorities shall not be set at liberty solely on the ground that a portion of the high seas was crossed in the course of that voyage.

At its third session in 1951 (A/1858, paragraph 84; and A/CN.4/SR.125, paragraphs 37-76), the Commission adopted this proposal on a first reading. It specifically confirmed the view of the rapporteur that, although pursuit may be begun of a vessel which is itself lying outside the territorial sea but is causing offences to be committed in that sea by its own boats, pursuit may not be begun of a vessel lying outside the territorial sea which is causing offences to be committed in that sea with the aid of boats other than its own boats. The Commission also decided that a vessel, arrested in territorial waters

and taken to a port for examination, could not claim the right to be set free merely because the route from the place of capture to the port lay across the high seas.

Accordingly, in his third report (A/CN.4/51, page 15) the special rapporteur submitted the following proposal:

1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within its inland waters or territorial sea, may be continued outside the territorial sea so long as the pursuit has not been interrupted. It is not necessary that, when the foreign vessel in the territorial sea receives the order to stop, the vessel giving the order should also be within the territorial sea.

2. Where the foreign vessel is in an adjacent zone, pursuit may only begin if there is infringement of the interests for the protection of which the zone was established.

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

4. The pursuit shall only be deemed to have begun when the pursuing vessel has satisfied itself by bearings, sextant angles, or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea, and when pursuit has been commenced by giving the signal to stop. The order to stop shall be given at a distance which enables it to be seen or heard by the vessel.

5. A vessel arrested within the jurisdiction of a State and escorted to a port of that State for delivery to the competent authorities cannot claim the right to be set at liberty solely on the ground that a portion of the high seas was crossed in the course of that voyage.

In his sixth report (A/CN.4/79) the special rapporteur put forward the following text as article 29:

1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inland waters or the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign

vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any interest for the protection of which the said zone was established.

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

3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea. The commencement of the pursuit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State pending proceedings before the competent authorities shall not be authorized solely on the ground that a portion of the high seas was crossed by such vessel in the course of its voyage.

In 1955 (A/2934) the Commission adopted the following text as article 22:

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

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

3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the vessel pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The commencement of the pursuit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

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

As compared with the special rapporteur's draft, the Commission included a reference to the contiguous zone in the third paragraph. This paragraph was therefore brought more closely into line with the first paragraph.

It may also be noted that the pursuit of a foreign ship which is in the contiguous zone may be undertaken, provided that "there has been a violation of the rights for the protection of which the zone was established". (See articles 47 (1) and 66 (1) of the 1956 draft). The Commission stated, in paragraph 2 (a) of its commentary upon article 47, that - at any rate in the view of the majority of the Commission - "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".

In the 1956 draft the Commission added provisions regarding, hot pursuit by aircraft.

# Pollution of the high seas

## Article 48

### 1956 draft

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 sub-soil, 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.

### Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, pages 27-28) the special rapporteur referred to previous occasions on which it had been recognized that pollution of the sea by oil has serious drawbacks. Thus, on 8 June 1926, a preliminary conference of experts met at Washington at the invitation of the Government of the United States (Foreign Relations of the United States, 1926, Volume I, page 238). It drew up a draft convention which did not, however, meet with a favourable reception (Ibid., page 245). At its sixteenth ordinary session in 1934, the Assembly of the League of Nations stated that "the subject of the pollution of the sea is one suitable for solution by an international convention". (Official Journal of the League of Nations, Special Supplement No. 137, page 15, No. 4).

On 10 October 1936 the Council of the League of Nations decided to convene a conference to deal with the matter. (Minutes of the 84th Session of the Council of the League of Nations, page 1196). But the proposed conference did not meet. The special rapporteur expressed the view that the time might be opportune for a new attempt to draw up uniform regulations.

In his sixth report (A/CN.4/79, pages 31-32) the special rapporteur noted that, within the United Nations, the problem of pollution of the sea had been studied by the Transport and Communications Commission and by the Economic and Social Council; and also that the Government of the United Kingdom had decided to issue invitations to the major maritime Powers to attend an ad hoc diplomatic conference in London, and to invite the United Nations to be represented. As a result of the London Conference, the International Convention for the Prevention of Pollution of the Sea by Oil was prepared and opened for signature on 12 May 1954. This Convention, however, has not yet come into force.

In 1955 (A/2934) the Commission adopted the following text as article 23:

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

In 1956, the Commission, while emphasizing the serious consequences of the uncontrolled discharge of oil from ships, broadened the provisions of the article to include other kinds of pollution, such as that caused by leaks in pipelines, defects in installations for the exploitation of the seabed and its subsoil, and the dumping of radioactive waste.

SUB-SECTION B: FISHING

Right to fish; Conservation of the living resources of the high seas

Articles 49 - 59

(It is convenient to take these articles together)

1956 draft

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.

Article 50: As employed in the present articles, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Article 51: A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

Article 52:

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

Article 53:

1. If, subsequent to the adoption of the measures referred to in articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 54:

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

Article 55:

1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within a reasonable period of time.

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

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

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

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

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 56:

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

2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated by article 57.

Article 57:

1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the State or States on the one side of the dispute, and two members shall be named by the State or States contending to the contrary, but only one of the members nominated by each side may be a national of a State on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute. Failing agreement they shall, upon the request of any State party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture

Organization, from nationals of countries not parties to the dispute. If, within a period of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member or members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization from amongst well-qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

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

Article 58:

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 55. In other cases it shall apply these criteria according to the circumstances of each case.

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

Article 59: The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, page 23) the special rapporteur drew attention to the problem of protecting the products of the sea and briefly reviewed some of the international conventions concluded for that purpose.

Paragraph 193 of the Commission's report covering the work of its second session in 1950 (A/1316) reads as follows:

> The Commission requested the special rapporteur to study the problem of protecting the resources of the sea for the benefit of all mankind by the generalizing of measures laid down in bilateral or multilateral treaties. It was agreed that consultations might have to be held with other organizations, especially technical organizations, which dealt with the question of the protection of the resources of the sea.

In his second report (A/CN.4/42, pages 36-38) the special rapporteur explained that while the protection of the resources of the sea formed the subject of a large number of bilateral and multilateral conventions between States, legislation of this type had the great disadvantage that an agreement concluded between two or more interested States could become ineffective should one or more other States refuse to conform to it. To generalize the measures provided in these conventions by extending them to States not parties to the conventions themselves, and thus to endeavour to bind these States to agreements concluded inter alios, would not be compatible with sound legal principles. In any case the subject did not lend itself to general and uniform codification, in view of the variety of circumstances in which protection must be afforded in various parts of the world and in view of the different types of resources requiring protection.

The special rapporteur thought that in principle a coastal State is justified in enacting laws to protect the resources of the sea off its coasts; and that, in order to be effective, such legislation must sometimes be applicable over an area

wider than the territorial sea. But there was a tendency for such legislation not to offer sufficient guarantees to other States interested in the same waters and to discriminate in favour of the coastal State.

Confronted with this problem, the special rapporteur put forward the following proposal:

> Every coastal State shall be entitled to declare, in a zone 200 sea miles wide contiguous to its territorial waters, the restrictions necessary to protect the resources of the sea against extermination and to prevent the pollution of those waters by fuel oil.
>
> The coastal State shall endeavour to enact such rules in agreement with the other countries interested in the fisheries in those waters. The rules shall not discriminate in any way between the nationals and vessels of the various States, including the coastal State; they shall, in all respects other than protection of the resources of the sea and repression of pollution of the sea, observe the regime of the high seas.
>
> If a State considers that its interests have been unfairly injured by a restriction of the kind provided for in the first paragraph, and if the two States are unable to reach agreement on the subject, the dispute shall be submitted to the International Court of Justice.

He took care to explain that the zone which he envisaged was not at all the same thing as the contiguous zone (see under article 66) applied - as a few States applied it - for purposes of fishing rights. "The purpose", he said, "of establishing a contiguous zone for fisheries is to grant exclusive fishing rights in that zone to the coastal State, whereas the zone envisaged in our proposal is designed to protect the resources of the sea, and excludes any preferential treatment for the coastal State with respect to fishing rights. To prevent abuse, it would seem necessary to make recognition of the right to establish such protective zones conditional upon acceptance of the jurisdiction of the International Court of Justice in these matters."

In the same report the special rapporteur also favoured regulating sedentary fisheries independently of the resources of the sea in general.

In 1951 the Commission adopted the two following articles as articles 1 and 2 of Part II (Related Subjects) of its Draft Articles on the Continental Shelf and

Related Subjects (A/1858). These two articles were grouped together under the single heading of "Resources of the Sea".

Article 1: States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert; if the nationals of only one State are thus engaged in a given area, that State may take such measures in the area. If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area. In no circumstances, however, may an area be closed to nationals of other States wishing to engage in fishing activities.

Article 2: Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves.

The Commission also added the following comment:

1. The question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with.

2. Protection of marine fauna against extermination is called for in the interests of safeguarding the world's food supply. The States whose nationals carry on fishing in a particular area have therefore a special responsibility, and they should agree among them as to the regulations to be applied in that area. Where nationals of only one State are thus engaged in an area, the responsibility rests with that State. However, the exercise of the right to prescribe conservatory

measures should not exclude newcomers from participation in fishing in any area. Where a fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even though its nationals do not fish in the area.

3. This system might prove ineffective if the interested States were unable to reach agreement. The best way of overcoming the difficulty would be to set up a permanent body which, in the event of disagreement, would be competent to submit rules which the States would be required to observe in respect of fishing activities by their nationals in the waters in question. This matter would seem to lie within the general competence of the United Nations Food and Agriculture Organization.

4. The pollution of waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter (resolution 298 C (XI), of 12 July 1950).

5. The Commission discussed a proposal that a coastal State should be empowered to lay down conservatory regulations to be applied in a zone contiguous to its territorial waters, pending the establishment of the body referred to in paragraph 3. Such regulations would as far as possible have to be drawn up in agreement with the other States interested in the fishing grounds in question. They would make no distinction between the nationals of the various States, including the coastal State. Any disputes arising out of the application of the rules would have to be submitted to arbitration. The figure of 200 sea miles was suggested as the breadth of the zone. In view of the fact that there was an equality of votes concerning the desirability of this proposal, the Commission decided to mention it in its report without sponsoring it.

In 1953 (A/2456) the Commission adopted the following three articles on this question:

Article 1: A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3.

Article 2: In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.

Article 3: States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.

The Commission made it clear that it was adhering in substance to its previous proposals. These, it admitted, involved an element of "progressive development" of international law as well as of its codification. Thus the position under existing international law was, in general, as follows:

(i) The regulations issued by a State for the conservation of fisheries in any area of the high seas outside its territorial waters are binding only upon the nationals of that State;

(ii) If two or more States agree upon regulations affecting a particular area, the regulations are binding only upon the nationals of the States concerned;

(iii) In treaties concluded by States for the joint regulation of fisheries for the purpose of their protection against waste and extermination, the authority created for the purpose has, as a rule, only the power to make recommendations, as distinguished from the power to issue regulations binding upon the contracting parties and their nationals.

The Commission expressed the opinion that the existing law is deficient in the following respects:

(i) It provides no adequate protection of marine fauna against extermination;

(ii) The coastal State, or other States directly interested, are not sufficiently protected against wasteful and predatory exploitation of fisheries by foreign nationals. This constitutes an inducement to States, especially coastal States, to take unilateral - and probably illegal - action aimed at or resulting in the total exclusion of foreign nationals.

The Commission further explained that in view of article 3, it was no longer necessary to proceed with the proposal, put forward at its third session, to entrust the coastal State itself with the right to issue regulations of a non-discreminatory character binding upon foreign nationals in areas contiguous to its coast.

As the Commission has explained, articles 50 to 59 of the 1956 draft were to a large extent influenced by the work of the International Technical Conference on the Conservation of the Living Resources of the Sea which met in Rome from 18 April to 10 May 1955 (A/Conf.10/6).

The following paragraphs from the report of the Rome Conference are particularly relevant:

16. Conservation is essential in the development of a rational exploitation of the living resources of the seas. Consequently, conservation measures should be applied when scientific evidence shows that fishing activity adversely affects the magnitude and composition of the resources or that such effects are likely.

17. 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. At the same time, wherever possible, scientifically sound positive measures should be taken to improve the resources.

18. 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. When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast.[1/]

.....

74. The Conference notes with satisfaction conservation measures already carried out in certain regions and for certain species at the national and international level. International co-operation in research (including statistical investigation) and regulation in the conservation of living resources of the high seas is essential. The Conference considers that wherever necessary further conventions for these purposes should be negotiated.

75. The present system of international fishery regulation (conservation measures) is generally based on the geographical and biological distribution of the marine populations with which individual agreements are concerned. From the scientific and technical point of view this seems, in general, to be the best way to handle these problems. This system is based upon conventions signed by the nations concerned.

76. From the desire expressed during this Conference by all participating nations to co-operate in research, and from the guidance given by existing conventions, it appears that there are good prospects of establishing further conservation measures where and when necessary. Having regard to these considerations and the existing principles dealt with under Section V, "Principles of International Conservation Organizations," the

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1/ At its 19th plenary meeting on 5 May, the Conference decided, by a vote of 18 against 17, with 8 abstentions, to include this sentence in its report: see A/CONF.10/SR.19.

Conference considers that the following should be taken as the guiding principles in formulating conventions:

(a) A convention should cover either:

(i) One or more stocks of marine animals capable of separate identification and regulation; or

(ii) A defined area, taking into account scientific and technical factors, where, because of intermingling of stocks or for other reasons, research on and regulation of specific stocks as defined in (i) is impracticable;

(b) All States fishing the resource, and adjacent coastal States, should have opportunity of joining the convention and of participating in the consideration and discussion of regulatory measures;

(c) Conservation regulations introduced under a convention should be based on scientific research and investigation;

(d) All signatory States should so far as practicable participate directly or through the support of a joint research staff in scientific research and investigation carried out for purposes of the convention;

(e) All conventions should have clear rules regarding the rights and duties of member nations, and clear operating procedures;

(f) Conventions should clearly specify the kinds or types of measures which may be used in order to achieve their objectives;

(g) Conventions should provide for effective enforcement.

77. Nothing in these guiding principles is intended to limit the opportunity of States to make agreements on such other fishery matters as they may wish, or to limit the authority or responsibilities of a State to regulate its fisheries on the high seas when its nationals alone are involved.

78. The Conference considers that conventions, and the regulatory measures taken thereunder, should be adopted by agreement among all interested

countries. The Conference draws attention, however, to the problems arising from disagreements among States as to scientific and technical matters relating to fishery conservation. Such disagreements may arise as to:

(a) The need for conservation measures or the nature of any measures to be taken; and

(b) The need to prevent regulatory measures already adopted by one State or by agreement among certain States from being nullified by refusal on the part of other States, including those newly participating in the fishery concerned, to observe such measures.

79. A solution to such problems might be found through:

(a) Agreement among States to refer such disagreements to the findings of suitably qualified and impartial experts chosen for the special case by the parties concerned, with the subsequent transmittal of the findings, if necessary, for the approval of the parties concerned, and

(b) Agreement by all States fishing a stock of fish to accept the responsibility to co-operate with other States concerned in adequate programmes of conservation research and regulation.

80. The Conference recognizes that a problem is created when the intensive exploitation of offshore waters adjoining heavily fished inshore waters, by a new fishing operation initiated by another State, considerably effects the abundance of fish in the inshore waters. This conservation problem is taken care of when the entire area is included in a conservation system involving the concerned States, and is subject to conservation regulations adequate to maintain the maximum sustainable yield. However, when no such system exists, overfishing may occur before suitable arrangements and regulations can be developed. Opinion in the Conference was more or less evenly divided as to the responsibility of the coastal State under such circumstances to institute a conservation programme for the fisheries concerned, pending negotiations of suitable arrangements. This problem requires further study.

After the conclusion of the Rome Conference, Mr. García Amador, then Vice-Chairman of the Commission, who had represented the Cuban Government and acted as Deputy Chairman at the Conference, submitted to the Commission a series of draft articles, prefaced by a preamble, to replace the articles approved by the Commission in 1953. These draft articles, as amended by the Commission, are reproduced as an annex to Chapter II of the Commission's report on the work of its seventh session from 2 May to 8 July 1955 (A/2934). They were also identical with articles 25 to 33 of the provisional articles concerning the régime of the high seas contained in Chapter II of the same report. The preamble and articles read 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:

Article 1: A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

Article 2:

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

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

Article 3:

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

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

Article 4:

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

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

Article 5:

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

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

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

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

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

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

Article 6:

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

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

Article 7:

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

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

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

Article 8:

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

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

Article 9: The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

As the Commission has explained, these articles were adopted, with certain modifications, as articles 51 to 59 of the 1956 draft. Article 49 of the latter draft (corresponding to article 24 of the 1955 draft) merely confirms the principle of the right to fish on the high seas, subject to exceptions contained in treaties

or in other articles of the present draft. Article 50 of the 1956 draft defines the expression "conservation of the living resources of the high seas" which occurs from time to time in the ensuing articles and in the commentaries thereto. The definition is taken from paragraph 18 of the Report of the Rome Conference (see above).

## Fisheries conducted by means of equipment embedded in the floor of the sea

### Article 60

1956 draft

The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State, may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals. Such regulations will not, however, affect the general status of the areas as high seas.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, pages 31-32) the special rapporteur said that "Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say, species attached to the soil or irregular surfaces of the sea bed, or by reason of the equipment employed, for example, stakes driven into the sea bed". He thought that the problem could be dealt with in relation to the problem of the continental shelf.

In 1950 the Commission "requested the special rapporteur to study existing regulations governing sedentary fisheries and to report on his findings at the next session" (A/1316, paragraph 197)

In his second report (A/CN.4/42, pages 51-62) the special rapporteur drew attention to a number of sedentary fisheries which, although lying close to the shore, were outside territorial waters. He pointed out that these sedentary fisheries could be dealt with either (i) independently or (ii) as part of the régime of the continental shelf or (iii) as part of the régime of the resources of the high seas. If the régime of the continental shelf were applied to such fisheries, then the coastal State would be entitled to regulate them unilaterally and to reserve them for its own subjects. If, however, the régime of the resources of the high seas as proposed in his report were applied to these fisheries, then, although

the coastal State would be entitled to regulate them unilaterally, it would not be entitled to reserve them for its own subjects.

The conclusion which he reached, based on a study of the practice of States, was as follows:

> Beds where sedentary fishing is carried on have thus been regarded hitherto by littoral States as being occupied and constituting property. States have, however, taken care to give their rules a liberal interpretation in regard to subjects of other States, so that international difficulties have been avoided. If sedentary fisheries are to be regulated independently of the continental shelf, the situation now existing de facto will have to be retained and the present regime approved as a lex specialis lying outside the general regime based on the rules relating to the continental shelf and resources of the sea.

The special rapporteur therefore proposed that the following article be adopted:

> Sedentary fisheries characterized by the effective and continued use of a part of the high seas without any formal and repeated protests against such use having been made by other States, and particularly by such States as, by reason of their geographical situation, could have put forward objections of particular weight, shall be recognized to be lawful, provided that the rules governing them allow their use by fishing craft irrespective of nationality and are limited to maintaining order and conserving the beds in the best interests of the fisheries by means of duties fairly assessed and collected.

In 1951 (A/1858) the Commission adopted the following text as article 3 of Part II (Related Subjects) of its Draft Articles on the Continental Shelf and Related Subjects:[1/]

> The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas.

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1/ The "related subjects" were "Resources of the Sea" (articles 1 and 2), "Sedentary Fisheries" (article 3), and "Contiguous Zones" (article 4).

To this the Commission added the following commentary:

1. The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil, whereas, in the case of sedentary fisheries, the proposals refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g. stakes embedded in the sea-floor. This distinction justifies a division of the two problems.

2. Sedentary fisheries can give rise to legal difficulties only where such fisheries are situated beyond the outer limit of territorial waters.

3. Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal States as under their occupation and as forming part of their territory. Yet this has rarely given rise to complications. The Commission has avoided referring to such areas as "occupied" or "constituting property". It considers, however, that the special position of such areas justifies special rights being recognized as pertaining to coastal States whose nationals have been carrying on fishing there over a long period.

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 in respect of which they are recognized. Except for the regulation of sedentary fisheries, the waters covering the sea-bed where the fishing grounds are located remain subject to the régime of the high seas. The existing rules 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.

In his fourth report (A/CN.4/60) the special rapporteur decided to accept the suggestion that, where a coastal State had excluded non-nationals from participating in a sedentary fishery in the past, it should be entitled to do so in the future. Accordingly, he proposed the following text as article 3 (page 132):

> The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial sea, where such fisheries have long been maintained and conducted by nationals of that State. Where the coastal State has in the past permitted non-nationals

to participate in the fishing, it has no right to exclude them in the future. Such regulation, however, will not affect the general status of the areas as high seas. Sedentary fisheries must not result in substantial interference with navigation.

In 1953 (A/2456) the Commission, having made it clear in its commentary upon article 2 of its draft articles upon the continental shelf that the expression "natural resources" was intended to cover not merely "mineral resources" but also "the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea", decided that a separate article on sedentary fisheries was not necessary.

In his report to the eighth session of the Commission in 1956 (A/CN.4/97 (A/CN.4/97, pages 19-20) the special rapporteur pointed out that there was one aspect of the question which the Commission had overlooked. In 1951 (A/1858) the Commission had drafted an article on sedentary fisheries to include (i) fisheries regarded as sedentary because of the species caught and (ii) fisheries regarded as sedentary because of the equipment used, e.g., stakes embedded in the sea-floor. The first class of sedentary fisheries had since 1953 been regulated as part of the régime of the continental shelf, but the effect of the draft adopted by the Commission in that year (A/2456) had been to leave unregulated the second class. For the equipment used in these fisheries, even though embedded in the sea-floor, was not devoted to the exploration or exploitation of the natural resources of the continental shelf. Consequently the Commission's draft articles on the continental shelf had not covered fisheries of this nature.

In 1956 the Commission accepted the rapporteur's view and decided that it was still necessary to have an article regulating fisheries conducted by means of equipment embedded in the floor of the sea, because such fisheries did not come within the régime of the continental shelf (see article 68 of the 1956 draft).

## SUB-SECTION C: SUBMARINE CABLES AND PIPELINES

### Articles 61-65

(It is convenient to take these articles together. As regards the laying or maintenance of cables - and possibly pipelines - on the continental shelf see under article 70).

1956 draft

Article 61:

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

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

Article 62: Every State shall take the necessary legislative measures to provide that the breaking or injury of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine high-voltage power cable or pipeline, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

Article 63: Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

Article 64: Every State shall regulate trawling so as to ensure that all the fishing gear used shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

Article 65: Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, page 16) the special rapporteur referred to the Convention for the protection of submarine cables concluded at Paris on 14 March 1884, the provisions of which appeared to have been generally satisfactory. The main provisions of this Convention are the following:

Article I: The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties.

Article II: The breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication, shall be a punishable offence, but the punishment inflicted shall be no bar to a civil action for damages.

This provision shall not apply to ruptures or injuries when the parties guilty thereof have become so simply with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such ruptures or injuries.

Article III: The High Contracting Parties agree to insist, as far as possible, when they shall authorize the landing of a submarine cable, upon suitable conditions of safety, both as regards the track of the cable and its dimensions.

Article IV: The owner of a cable who, by the laying or repairing of that cable, shall cause the breaking or injury of another cable, shall be required to pay the cost of the repairs which such breaking or injury shall have rendered necessary, but such payment shall not bar the enforcement, if there be ground therefor, of article II of this Convention.

Article VII: Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or any other implement used in fishing, in order to avoid injuring a submarine cable, shall be indemnified by the owner of the cable.

In order to be entitled to such indemnity, one must prepare, whenever possible, immediately after the accident, in proof thereof, a statement supported by the testimony of the men belonging to the crew; and the captain of the vessel must, within twenty-four hours after arriving at the first port of temporary entry, make his declaration to the competent authorities. The latter shall give notice thereof to the consular authorities of the nation to which the owner of the cable belongs.

Article VIII: The courts competent to take cognizance of infractions of this convention shall be those of the country to which the vessel on board of which the infraction has been committed belongs.

It is, moreover, understood that, in cases in which the provision contained in the foregoing paragraph cannot be carried out, the repression of violations of this convention shall take place, in each of the contracting States, in the case of its subjects or citizens, in accordance with the general rules of penal competence established by the special laws of those States, or by international treaties.

Article X: Evidence of violations of this convention may be obtained by all methods of securing proof that are allowed by the laws of the country of the court before which a case has been brought.

When the officers commanding the vessels of war or the vessels specially commissioned for that purpose, of one of the High Contracting Parties, shall have reason to believe that an infraction of the measures provided for by this Convention has been committed by a vessel other than a vessel of war, they may require the captain or master to exhibit the official documents furnishing evidence of the nationality of the said vessel. Summary mention of such exhibition shall at once be made on the documents exhibited.

Reports may, moreover, be prepared by the said officers, whatever may be the nationality of the inculpated vessel. These reports shall be drawn up in the form and in the language in use in the country to which the officer drawing them up belongs; they may be used as evidence in the country in which they shall be invoked, and according to the laws of such country. The accused parties and the witnesses shall have the right to add or to cause to be added thereto, in their own language, any explanations that they may deem proper; these declarations shall be duly signed.

Article XI: Proceedings and trial in cases of infractions of the provisions of this Convention shall always take place as summarily as the laws and regulations in force will permit.

At its second session in 1950 the Commission agreed on the principle that all States were entitled to lay submarine telegraph and telephone cables on the high seas and considered that the same principles should also apply to pipelines (A/1316, paragraph 192).

In his second report (A/CN.4/42, pages 30-35) the special rapporteur recommended that the principles of the 1884 Convention be applied to pipelines. He referred also to the difficulty of enforcing the provisions of the 1884 Convention.

He mentioned, for instance, that an international conference met to study the problem afresh in London in 1913 because damage to submarine cables by fishermen had become so common. This conference adopted a number of resolutions. Resolution I laid down regulations governing the construction of implements used in fishing; Resolution II stated that it was desirable for each of the States concerned to have arrangements for inspecting vessels of its nationality for faulty construction of such implements; Resolution III simplified the procedure for the submission of

claims for indemnification for the "sacrifice", as defined in article VII of the 1884 Convention, of implements used in fishing; Resolution IV recommended the education of seamen with a view to reducing the risks.

The special rapporteur referred also to a number of occasions on which the problem of protecting cables had come before the Institute of International Law. Significantly, in 1927, at its Lausanne conference, the Institute adopted unanimously three resolutions, but found that the question dealt with in a fourth resolution was so difficult that it decided to delete the resolution. The three resolutions adopted recommended all States (i) to agree to ratify the regulations laid down by the London Conference in 1913 and supplementing effectively those laid down by the Paris Conference of 1884; (ii) to urge persons owning or holding concessions in respect of submarine cables to simplify as far as possible and unify the formalities required for compensation for gear or equipment voluntarily destroyed or abandoned by fishermen or seamen in order to avoid injuring submarine cables; and (iii) to agree to achieve uniformity in the repression of offences and quasi-offences committed with respect to submarine cables. The fourth resolution, which proved so difficult that it had to be abandoned, was originally drafted as follows: "It is necessary that a wider basis should be found for the determination of competence in regard to offences and quasi-offences affecting cables, by recognizing as competent both the courts of the nationality of the offender and the courts of the port nearest to the scene of the offence or to the place of destination of the vessel".

The special rapporteur concluded his second report by submitting seven draft articles, based upon articles II, IV, VII, VIII and X of the 1884 Convention and upon Resolution I of the London Conference of 1913. The text of the relevant articles has been given above: the full text of Resolution I of the London Conference of 1913 is as follows:

> It is in the interests of both the fishing industry and the submarine telegraphic cable service that all implements used in trawling should be constructed in such a way and kept in such a condition that the danger of fouling submarine cables on the sea-bed is reduced to the minimum.

At the third session of the Commission (see A/1858, paragraph 83; paragraphs 95-105; and A/CN.4/SR.124, A/CN.4/SR.125, paragraphs 7-36), the view was expressed that these regulations were too detailed and that the special rapporteur should deal with the subject in a general way without going into details.

Accordingly, in his third report (A/CN.4/51, pages 11-12) the special rapporteur submitted the following four draft articles only:

Article 1. All States may lay telegraphic cables and pipelines on the bed of the high seas.

Article 2. The breaking or injury of a submarine cable outside of the territorial waters, done wilfully or through culpable negligence and resulting in the total or partial interruption or embarassment of telegraphic or telephonic communication, or of a submarine pipeline, shall be a punishable offence. This provision shall not apply to ruptures or injuries when the parties guilty thereof have become so simply with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such ruptures or injuries.

Article 3. The owner of a cable or a pipeline outside of the territorial waters who, by the laying or repairing of that cable or pipeline, shall cause the breaking or injury of another cable or pipeline, shall be required to pay the cost of the repairs which such breaking or injury shall have rendered necessary.

Article 4. All fishing gear used in trawling shall be so constructed and so maintained as to reduce to the minimum the danger of fouling submarine cables or pipelines on the sea bed.

In his sixth report (A/CN.4/79) the special rapporteur submitted the following articles:

Article 16:

1. All States may lay telegraph or telephone cables and pipelines on the bed of the high seas.

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

Article 17: The breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communication, or in the breaking or injury of a submarine pipeline in like circumstances, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid the break or injury.

Article 18: If the owner of a cable or pipeline beneath the high seas in laying or repairing that cable or pipeline causes a break in or injury to another cable or pipeline he shall be required to pay the cost of the repairs which such breaking or injury has rendered necessary.

Article 19: All fishing gear used in trawling shall be so constructed and so maintained as to reduce to the minimum the danger of fouling submarine cables or pipelines on the sea-bed.

The special rapporteur explained that, in drafting the second paragraph of article 16, he had relied upon the report of the International Law Commission covering the work of its fifth session. In this report (A/2456) the Commission had adopted eight draft articles on the continental shelf, of which article 5 read:

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 prevent the establishment or maintenance of submarine cables.

In 1955 (A/2934) the Commission adopted the following texts as Articles 34-38:

Article 34:

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

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

Article 35: Every State shall take the necessary legislative measures to provide that the breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communications, or the breaking or injuring of a submarine pipeline in like circumstances, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such break or injury.

Article 36: Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

Article 37: Every State shall regulate trawling so as to ensure that all fishing gear shall be so constructed and maintained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

Article 38: Every State shall take the necessary legislative measures to ensure that the owners of vessels who can prove that they have sacrificed an anchor, a net or any other fishing gear in order to avoid injuring a submarine cable shall be indemnified by the owner of the cable.

It is to be noted that in 1956 the Commission decided that, in principle, the protection given under the 1884 Convention to telegraph cables, later extended by interpretation to telephone cables and by the Commission itself to pipelines, should be extended still further to cover high-voltage power cables.

## SECTION II: CONTIGUOUS ZONE

### Article 66

1956 draft

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.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, pages 28-31) the special rapporteur considered the question of the contiguous zone in connexion with the question of the breadth of the territorial sea. He pointed out that the Preparatory Committee of the 1930 Codification Conference had suggested the following scheme:

(i) limitation, in principle, of the breadth of the territorial sea to three miles;

(ii) recognition of the claim of certain States specifically mentioned to a territorial sea of greater breadth;

(iii) acceptance of the principle of a contiguous zone extending not more than twelve miles from the coast.

This scheme, however, had not proved acceptable in 1930, largely because some States feared that the recognition of certain rights of control in the contiguous zone would result, in the long run, in the confusion of that zone with the territorial sea.

The special rapporteur also explained that the question of the contiguous zone was not unrelated to the question of the continental shelf. For, if agreement were reached on the principle that the coastal State had certain rights over the resources of the continental shelf, the discussion would not be ended, since

probably claims would be put forward for the establishment of a contiguous zone for other purposes and in other places. Expecially would such claims be put forward by States to whom nature had denied a continental shelf.

In 1950 the Commission "took the view that a littoral State might exercise such control as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application" (A/1316, paragraph 195).

In his second report (A/CN.4/42, page 51) the special rapporteur suggested the following text:

> On the high seas adjacent to its territorial waters the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its customs or sanitary regulations by foreign ships. Such control may not be exercised more than twelve miles from the coast.

With one exception this draft followed the text of Basis of Discussion No. 5 proposed by the Preparatory Committee of the 1930 Codification Conference. The single exception was that, whereas the Preparatory Committee was ready to recognize the right of the coastal State to exercise in the contiguous zone "the control necessary to prevent, within its territory or territorial waters, the infringement of its customs or sanitary regulations or interference with its security by foreign ships", the special rapporteur of the International Law Commission was not willing to grant the coastal State rights in the contiguous zone as regards "interference with its security by foreign ships".

In the special rapporteur's view, "it would be impossible to dispute the right of States to institute a contiguous zone for customs purposes. The only doubtful point remaining is the extent of that zone. With a view to ensuring as far as possible the necessary degree of uniformity in this matter, the Commission might fix the extent of the zone at twelve miles seaward from the coast, as proposed by the Preparatory Committee of the Codification Conference".

The special rapporteur went on to explain that the number of States claiming a contiguous zone for sanitary purposes was very small; indeed that, according to data supplied by the Secretariat, Venezuela was the only State claiming such a

zone. Nevertheless, in view of the close relationship between customs and sanitary measures, he thought that a contiguous zone could be admitted for both purposes.

But the special rapporteur was not prepared to recognize contiguous zones for the purposes of security or fishing. A few States claimed contiguous zones for security purposes, but the tendency to claim a zone for this purpose was less marked than in the case of customs control. Neither the Hague Codification Conference in 1930 nor the International Law Commission in its discussions so far had pronounced in favour of a contiguous zone for security purposes. As for fishing, although some States claimed a contiguous zone, it was clear that the recognition of a contiguous zone for purposes of fishing rights would be hotly disputed. In the special rapporteur's view, the question was closely related to the problem of the protection of the resources of the high seas. A satisfactory solution of the latter problem would perhaps make it possible to discard claims concerning fishing rights in a contiguous zone, and also diminish the tendency to extend the territorial sea for the purpose of protecting fishing rights.

In 1951 (A/1858) in Part II (Related Subjects) of its Draft Articles on the Continental Shelf and Related Subjects, the Commission adopted the following text as article 4:

> On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs, fiscal or sanitary regulations. Such control may not be exercised more than twelve miles from the coast.

In 1953 (A/2456), after the comments of the Governments had been obtained, the Commission substituted the following text:

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

The Commission explained that it would be more precise to state that the contiguous zone should extend for twelve miles "from the base line from which

the width of the territorial sea" than simply for twelve miles "from the coast". Also paragraph 111 of the Commission's report reads 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 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.

In his 1956 report (A/CN.4/97, page 14) the special rapporteur referred again to the question of security. He repeated his view that it seemed unnecessary, and even undesirable, to mention any special right connected with security among the rights which the coastal State could exercise in the contiguous zone. He thought, however, that this question should not preclude agreement since, in the majority of cases, the exercise of customs control would afford a sufficient safeguard to the coastal State. As to defence measures against an imminent and direct threat to its security, it was clear that a coastal State had an inherent right to take certain protective measures both within the contiguous zone and also outside it.

It should be noted also that, in 1956, the Commission removed matters of immigration and emigration from the list of matters which the coastal State could control in the contiguous zone. The Commission decided that such control could be exercised in the actual territory of the coastal State.

Equivalent 1930 draft

See the report of the Second Committee of the Conference for the Codification of International Law held at The Hague in March-April 1930, cited under article 3 above.

## SECTION III: CONTINENTAL SHELF

### Articles 67 and 68

### (Definition of the "continental shelf" and statement of the rights of the coastal State over the continental shelf)

1956 draft

Article 67: For the purpose of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

Article 68: The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

Stages and problems in the preparation of the present draft

In his first report (A/CN.4/17, pages 34-41) the special rapporteur traced the development of the doctrine of the continental shelf and summarized some of the problems to which this development has given rise. He concluded that "The greatest uncertainty still exists as to the exact scope of the concept of the 'continental shelf' and the extent of the portions of the high seas in respect of which the rights in question are claimed". Consequently, in these conditions, he thought that it was "impossible... to adopt the viewpoint that international law already at the present time recognizes as a rule of customary law that sovereignty or control and jurisdiction over the continental shelf belong, ipso facto, or by virtue of theoretical occupation alone, to the riparian State". Even so, he thought that the present situation disclosed a real need to restrict the principle of the freedom of the seas.

In the special rapporteur's opinion, the best solution would be "to allot the continental shelf to the riparian State, on the condition that such allotment

is accompanied, at the outset, by a precise definition of the rights and duties of the various States in these areas". He next considered the question whether the grant of special rights in respect of the mineral resources of the subsoil as well as marine resources should be made conditional upon the existence of a continental shelf. He pointed out that this would lead to discrimination against those States which did not have a continental shelf or whose continental shelf did not stretch beyond the limits of their territorial waters. It could indeed be argued that such States would be in no better a position even if the grant of special rights in respect of these mineral and marine resources were made independent of the existence of a continental shelf. For, beyond a depth of 200 metres, which was approximately the depth at which there occurred the slope in the sea-floor that had given rise to the idea of the continental shelf, it was impossible at the present stage of technical development to exploit from the surface the mineral resources of the subsoil. Moreover, this depth was also the depth which marked the extreme limit of the optimum biological conditions both for plants and for the animal species used for human consumption. Nevertheless, because an element of unjustifiable inequality was involved, the special rapporteur wondered whether it would not be better to discard the idea of the continental shelf altogether and to grant States special rights in sea zones beyond their territorial waters to a specific distance.

The Commission considered these questions at its second session in 1950, and paragraph 198 of its report covering the work of this session (A/1316) reads as follows:

> The Commission recognized the great importance, from the economic and social as well as from the juridical points of view, of the exploitation of the sea-bed and subsoil of the continental shelf. Methods existed whereby submarine resources might be exploited for the benefit of mankind. Legal concepts should not impede this development. One member of the Commission expressed the view that the exploitation of the products of the continental shelf might be entrusted to the international community; the other members considered that there were insurmountable difficulties in the way of such internationalization. The Commission took the view that a littoral

State could exercise control and jurisdiction over the sea-bed and subsoil of the submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources there. The area over which such a right of control and jurisdiction might be exercised should be limited; but, where the depth of the waters permitted exploitation, it should not necessarily depend on the existence of a continental shelf. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the right in question were made dependent on the existence of such a shelf.

In other words, while the Commission was not prepared to grant to coastal States rights over the sea-bed and subsoil except where there was a possibility of exploitation, it preferred to make the possibility of exploitation the criterion for the granting of such rights rather than the mere existence of a continental shelf in a geological sense.

In his second report (A/CN.4/42, page 69) the special rapporteur put forward the two following draft articles:

Article 1: The continental shelf is constituted legally by the bed and the subsoil of the submarine regions situated off the coast where the depth of the water does not exceed 200 metres.

Article 2: The continental shelf outside territorial waters is subject to the exercise by the coastal State of a right of control and jurisdiction for the purposes of its exploration and exploitation.

He explained that, in his view, it would be advantageous to fix the limit of the continental shelf at the 200 metre line. All discussion of the exact geological-geographical definition of the continental shelf would then be avoided, and the coastal State would know precisely what its rights were.

At its third session in 1951 (A/1858) the Commission, in Part I (Continental Shelf) of its Draft Articles on the Continental Shelf and Related Subjects, adopted articles 1 and 2 as follows:

Article 1: As here used, the term "continental shelf" refers to the sea-bed 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 sea-bed and subsoil.

Article 2: The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources.

Commenting on article 1, the Commission was careful to explain that its use of the term "continental shelf" departed from the geological concept of the term. With regard to the question of the 200 metre limit the Commission commented as follows:

6. The Commission considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters. It seems 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 resources of the sea-bed 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 capable of being exploited 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 in article 1. The Commission points out that it is not intended in any way to restrict exploitation of the subsoil of the sea by means of tunnels driven from the main land.

7. The Commission considered the possibility of fixing both minimum and maximum limits for the continental shelf in terms of distance from the coast. It could find no practical need for either, and it preferred to confine itself to the limit laid down in article 1.

8. It was noted that claims have been made up to as much as 200 miles; but as a general rule the depth of the waters at that distance from the coast does not admit of the exploitation of the natural resources of the subsoil. In the opinion of the Commission, fishing activities and the conservation of the resources of the sea should be dealt with separately from the continental shelf.

Commenting on article 2, the Commission said it accepted the idea that the coastal State could exercise control and jurisdiction over the continental shelf, "with the proviso that such control and jurisdiction shall be exercised solely for the purpose stated. The article excludes control and jurisdiction independently of the natural resources of the sea-bed and subsoil." The Commission thought that internationalization of the continental shelf was not practical in present circumstances, but that, provided certain safeguards were observed, exploitation of the continental shelf by individual coastal States would not necessarily damage international interests such as shipping.

The Commission stated that it would serve no useful purpose to refer to the sea-bed and subsoil of the submarine areas in question as res nullius, capable of being acquired by the first occupier. Indeed "that conception might lead to chaos, and it would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which submarine areas are contiguous." The Commission emphasized its views still further in the following paragraphs of its commentary:

5. The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor should recourse be had to a fictional occupation. The right of the coastal State under article 2 is also independent of any formal assertion of that right by the State.

6. The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2. Though numerous

proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community.

7. Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.

In his fourth report (A/CN.4/60, pages 103-105) the special rapporteur, referring to the comments of a number of Governments and experts, stated once again that he would prefer the adoption of a specific depth-limit for the continental shelf. He also suggested the replacement in article 2 of the term "natural resources" by the term "mineral resources". He pointed out that, in adopting the term "natural resources", the Commission had not intended the term to cover fish living in the sea, even species which live on the bottom for a certain length of time. Nor had it meant to cover sedentary fisheries, since it had provided separately for them /Article 3 of Part II (Related Subjects) of the Draft Articles on the Continental Shelf and Related Subjects adopted by the International Law Commission at its third session in 1951 (A/1858)/.

The special rapporteur drew attention to the fact that the absence of any reference to sovereignty in article 2 had been criticized by a number of Governments. In order to meet this objection, whilst at the same time maintaining the Commission's object of granting the coastal State rights "exclusively for exploration and exploitation purposes" (paragraph 7 of the commentary on article 2, above), the special rapporteur suggested that a meeting ground might perhaps be found in the use of the phrase "sovereign rights of control and jurisdiction". Accordingly, the special rapporteur suggested revising articles 1 and 2 as follows (see A/CN.4/60, pages 122-124):

Article 1: As here used, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast,

but outside the area of the territorial sea to a depth of 200 metres.

Article 2: The continental shelf is subject to the exercise by the coastal State of sovereign rights of control and jurisdiction for the purpose of exploring it and exploiting its mineral resources.

In 1953 (A/2456) the Commission accepted the principle of these amendments, as regards the 200 metre depth-limit and as regards the term "sovereign rights", but not as regards the substitution of "mineral resources" for "natural resources". It actually revised the two articles concerned as follows:

Article 1: As used in these articles, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

Article 2: The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

The Commission explained that it had adopted the 200 metre limit because the text previously adopted did not satisfy the requirement of certainty and might give rise to disputes. The actual figure of 200 metres had been chosen because it was at this depth that the continental shelf, in the geological sense, generally came to an end. Moreover, the figure was not arbitrary because it took into account the practical possibilities, so far as they could be foreseen at present, of exploration and exploitation.

With regard to the nature of the rights of the coastal State over the continental shelf, the Commission commented as follows:

68. While article 2, as provisionally formulated in 1951, 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". The formulation thus adopted takes into account the views of those members of the Commission who attached importance to maintaining the language of the original draft and

those who considered that the expression "rights of sovereignty" should be adopted. In adopting the article in its present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely safeguarding the principle of the full freedom of the superjacent sea and the airspace above it.

69. 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 the exploitation of the natural resources of the continental shelf. These rights comprise full control and jurisdiction and the right to reserve exploitation and exploration for the coastal State or its nationals. Such rights include jurisdiction in connexion with suppresion of crime.

70. The Commission decided, after considerable discussion, to retain the term "natural resources" as distinguished from the more limited term "mineral resources". In its previous draft the Commission only considered mineral resources, and certain 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 outside the scope of the régime adopted and that this aim could be achieved by using the term "natural resources". It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there. Nor do these rights cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the subsoil.

71. Neither, in the view of the Commission, can the exclusive rights of the coastal State be exercised in a manner inconsistent with existing rights of nationals of other States with regard to sedentary fisheries. Any interference with such rights, when unavoidably

necessitated by the requirements of exploration and exploitation of natural resources, is subject to rules of international law ensuring respect of the rights of aliens. However, apart from the case of such existing rights, the sovereign rights of the coastal State over its continental shelf cover also sedentary fisheries. It may be added that this was the reason why the Commission did not think it necessary to retain, among the articles devoted to the resources of the sea, an article on sedentary fisheries. The Commission envisaged the possibility that shallow areas rendering possible the exploitation of sedentary fisheries may exist outside the continental shelf. However, that possibility was considered to be at present too theoretical to necessitate separate treatment.

In 1956 it was decided, as the Commission has explained, to retain the reference to the 200 metre depth-limit in the article defining the continental shelf, but not to make this figure a rigid maximum. Thus, in the present draft, "the term 'continental shelf' is used as referring to the seabed and subsoil of the submarine areas of the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms),[1/] or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas". The expressions "sovereign rights" and "natural resources" have both been retained in the 1956 draft.

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1/ Actually 100 fathoms (600 feet) = 182.9 metres:
200 metres = 109.3 fathoms.

## Article 69

(Rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or airspace.)

### 1956 draft

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.

### Stages and problems in the preparation of the present draft

In 1950 (A/1316, paragraph 200) the Commission decided that there could be no question of the coastal State exercising a right of control and jurisdiction over waters that were outside the limit of territorial waters, even though these waters might also happen to be above the sea-bed of the continental shelf. Such waters, it said, remained under the régime of the high seas, and the exercise in them of navigation and fishing rights might be impaired only in so far as was strictly necessary for the exploitation of the sea-bed and subsoil.

In his second report (A/CN.4/42, page 69) the special rapporteur proposed the following two articles:

Article 4: The waters covering the continental shelf outside the territorial waters remain within the régime of the high seas.

Article 5: The air above the waters covering the continental shelf outside territorial waters remains within the régime of the free air.

In 1951 (A/1858) the Commission adopted the following texts:

Article 3: The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.

Article 4: The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the airspace above the superjacent waters.

In 1953 (A/2456) the Commission slightly revised these texts to read as follows:

Article 3: The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas.

Article 4: The rights of the coastal State over the continental shelf do not affect the legal status of the airspace above the superjacent waters.

In 1956 it was decided to merge these two texts into a single article.

## Article 70

(Submarine cables on the continental shelf)

1956 draft

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.

Stages and problems in the preparation of the present draft

In his second report (A/CN.4/42, page 69) the special rapporteur proposed the following text as article 3:

> The recognition of the control and jurisdiction of the coastal State over the sea-bed and subsoil outside territorial waters does not affect the existing international law with regard to the laying and operation of cables or pipelines on the sea-bed, subject, however, to the right of the coastal State to take reasonable measures in connexion with the exploration and exploitation of the resources of the continental shelf.

In 1951 (A/1858) the Commission adopted the following text as article 5:

> Subject to the right of a coastal State to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf may not exclude the establishment or maintenance of submarine cables.

The Commission also added the following commentary:

1. It must be recognized that, in exercising control and jurisdiction under article 2, a coastal State may adopt measures reasonably connected with the exploration and exploitation of the subsoil, but it may not exclude the laying of submarine cables by non-nationals.

2. The Commission considered whether this provision should be extended to pipelines. If it were decided to lay pipelines on the continental shelf of another country, the question would be complicated by the fact that pumping stations would have to be installed at certain points, and these might hamper

the exploitation of the sub-soil more than cables. Since the question does not appear to have any practical importance at the present time, and there is no certainty that it will ever arise, it was not thought necessary to insert a special provision to this effect.

In 1953 (A/2456) the Commission slightly revised the text of article 5 as follows:

> 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 prevent the establishment or maintenance of submarine cables.

The Commission maintained the view that it was not yet necessary to provide rules for the laying of pipelines.

In 1956 the Commission maintained the substance of the 1953 text. It also indicated in its commentary that, in principle at any rate, the same rules should apply to pipelines.

## Article 71

(Installations on the continental shelf)

1956 draft

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.

Stages and problems in the preparation of the present draft

In 1950 (A/1316, paragraph 200) the Commission expressed the view that for works and installations established in the waters of the high seas for working the sea-bed and subsoil of the continental shelf, special security zones might be set up, but that these should not be classed as territorial waters.

In his second report (A/CN.4/42, pages 69-70) the special rapporteur proposed the following texts as articles 6, 7 and 8.

> Article 6: The exploration and exploitation of the sea-bed and subsoil of the continental shelf outside the territorial waters is permissible only in so far as it does not substantially interfere with shipping and fisheries, e.g. in so far as it does not constitute an obstruction of traffic routes, a pollution of fishing waters or their disturbance by seismic operations.

Article 7: The coastal State which exercises jurisdiction and control over the sea-bed and subsoil of the continental shelf outside territorial waters may with a view to the exploration and exploitation of the resources of such sea-bed and subsoil, construct such permanent or non-permanent installations as comply with the principle expressed in /article/ 6 above, provided:

(a) that interested parties (e.g. governments shipping and fishing interests, airlines, etc.) must be duly notified in advance of the intended construction of such installations, and

(b) that such installations must be equipped with efficient warning apparatus (lights, sound signals, radar, buoys, etc.).

Article 8: The coastal State which is erecting or has erected any installation of the description referred to in /article/ 7 above, being an installation which reaches above sea-level, should be entitled to exercise over a limited portion of the waters above the continental shelf such control and jurisdiction as is required for the protection of such installation, but no such installation should of itself be considered as an "island" or an "elevation of the sea-bed" within the meaning of international law. Such limited portions of the high seas above the continental shelf should be referred to as "safety zones". Each safety zone should normally be defined by a circle with a radius of 500 metres around the installation in question.

In 1951 (A/1858) the Commission adopted the following text as article 6:

(1) The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. Due notice must be given of any installation constructed, and due means of warning of the presence of such installations must be maintained.

(2) Such installations shall not have the status of islands for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be established around such installations, where the measures necessary for their protection may be taken.

It also added the following commentary:

1. It is evident that navigation and fishing on the high seas may be hampered to some extent by the presence of installations required for the exploration and exploitation of the subsoil. The possibility of interference with

navigation and fishing on the high seas could only be entirely avoided if the subsoil could be exploited by means of installations situated on the coast or in territorial waters; in most cases, however, such exploitation would not be practicable. Navigation and fishing must be considered as primary interests, so that the exploitation of the subsoil could not be permitted if it resulted in substantial interference with them. For example, in narrow channels essential for navigation, the claims of navigation should have priority over those of exploitation.

2. 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. Wherever possible, notification should be given in advance. In any case, the installations should be equipped with warning devices (lights, audible signals, radar, buoys, etc.).

3. The responsibility for giving notification and warning, referred to in the last sentence of paragraph (1) of this article, is not restricted to installations set up on regular sea lanes. It is a general duty devolving on States regardless of the place where such installations are situated.

4. While an installation could not be regarded as an island or elevation of the sea-bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling it. The Commission felt that a radius of 500 metres would generally be sufficient, though it was not considered advisable to specify any definite figure.

In 1953 (A/2456) the Commission adopted the following text as article 6:

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 fish production.

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 to 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 due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation.

## Article 72

(Delimitation of the continental shelf)

1956 draft

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 baseline from which the breadth of the territorial sea of each of the two countries is measured.

Stages and problems in the preparation of the present draft

Paragraph 199 of the Commission's report covering the work of its second session in 1950 (A/1316) reads as follows:

> The Commission agreed that, where two or more neighbouring States were interested in the submarine area of the continental shelf outside their territorial waters, boundaries should be delimited. It should not be possible for States to penetrate into the region attributable to another State for purposes of control and jurisdiction.

In his second report (A/CN.4/42, page 70) the special rapporteur proposed the following text as article 9:

> If two or more States are interested in the same continental shelf outside the territorial waters, the limits of the part of the shelf belonging to each should be fixed by agreement between them. In the absence of agreement the demarcation between the continental shelves of two neighbouring States should be constituted by the prolongation of the line separating the

territorial waters, and the demarcation between the continental shelves of two States separated by the sea should be constituted by the median line between the two coasts.

He also added the following note:

It seems reasonable to accept, as demarcation line between the continental shelves of two neighbouring States, the prolongation of the line of demarcation of the territorial waters. The Permanent Court of Arbitration, in its award of 23 October 1909 relating to the sea frontiers between Norway and Sweden (Bruns, Fontes Juris Gentium, Ständiger Schiedshof, page 49), adopted for that purpose a line perpendicular to the coast drawn from the point at which the frontier between the two territories reached the sea. The prolongation of this line could be adopted as the frontier between the continental shelves. As the line of demarcation of the continental shelf common to two States separated by the sea, the median line between the two coasts might be adopted, by analogy with the line of demarcation between territorial waters in straits. The States concerned could, when necessary, delimit their continental shelves in some different manner by agreement.

In 1951 (A/1858) the Commission adopted the following text as article 7:

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to have the boundaries fixed by arbitration.

It also added the following commentary:

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries. It is proposed therefore that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration ex aequo et bono. The term "arbitration" is used in the widest sense, and includes possible recourse to the International Court of Justice.

2. Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.

In his fourth report (A/CN.4/60, page 112) the special rapporteur commented as follows:

> "As was to be anticipated, article 7 did not meet with general approval /by the governments commenting on the article/. The Commission itself was aware of the incomplete and tentative nature of this article, but it believed that it is not yet possible to lay down rules to be applied by States for delimitation of the continental shelf. It did not blink the fact that this vagueness might lead to difficulties, but did not feel capable of proposing a more satisfactory system."

He thought, however, that the problem of delimitation would be best dealt with from two angles: (i) the boundaries of adjacent continental shelves and (ii) the boundaries of opposite continental shelves. With regard to the first problem he thought it would be impossible to propose fixed rules so long as the question of the delimitation of the territorial sea between two adjacent States remained unsettled. With regard to the second problem, he said that the Commission had already pointed out that the boundary line between opposite continental shelves generally coincided with the median line between the two coasts. But in some cases the configuration of the coasts might be such as to make it difficult to draw any median line. In those cases there seemed to be no possibility of laying down rules which would solve the difficulties once and for all.

In view of the objections raised by many governments to the proposal of arbitration ex aequo et bono the special rapporteur suggested (ibid., page 114) that the last two sentences of the first paragraph of the comments might be amended to read as follows:

> If agreement cannot be reached and a prompt solution is needed, the interested States should seek a solution of the problem in accordance with the rules agreed between them for the peaceful settlement of disputes. If the dispute is not submitted to judicial or arbitral settlement, it should be dealt with by conciliation procedure.

He proposed (ibid., page 129) that the article and commentary be amended to read as follows:

Two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. Failing agreement, the parties are under the obligation to submit the dispute to conciliation procedure.

1. Where the same continental shelf is contiguous to the territories of two or more adjacent States, the drawing of boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial seas of the interested States, and no general rule exists for such boundaries.

In the comments on the draft submitted to governments the Commission had proposed that States should be under an obligation to submit disputes arising in this connexion to arbitration ex aequo et bono. In view of the objections to this proposal advanced by several governments the Commission has amended it. If agreement cannot be reached and a prompt solution is needed, the interested States should seek a solution of the problem in accordance with the rules agreed between them for the peaceful settlement of disputes. If the dispute is not submitted to judicial or arbitral settlement, it should be dealt with by conciliation procedure.

2. Where the territories of two States are separated by an arm of the sea, the boundary between their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.

In 1953 (A/2456) the Commission adopted the following text as article 7:

1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special

circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

The Commission explained that, in making these proposals, it had derived some guidance from the proposals of the Committee of Experts on the delimitation of territorial waters (A/CN.4/61/Add.1). The Commission also said that, having included a general arbitration clause for disputes about the continental shelf as article 8 of its draft articles, it did not think that any special provision for disputes over delimitation of the continental shelf was necessary.

On the question of the delimitation of the territorial sea of two adjacent States, see article 14 above.

## Article 73

(Disputes concerning the continental shelf)

### 1956 draft

Any disputes that may arise between States concerning the interpretation or application of articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

### Stages and problems in the preparation of the present draft

The origin of this provision lies in the proposal of the Commission in 1951 that disputes about the delimitation of the continental shelf should be settled by arbitration (see under article 72). The Commission suggested in 1951 that such disputes should be submitted to arbitration ex aequo et bono, although it was made clear that the term "arbitration" was to be understood in the widest sense, and that recourse to the International Court of Justice was not to be excluded. (Commentary upon article 7 of Part I of the Draft Articles on the Continental Shelf and Related Subjects adopted by the Commission at its third session in 1951 - see A/1858.)

In his fourth report (A/CN.4/60, page 114) the special rapporteur, noting that many Governments had objected to the proposal of arbitration ex aequo et bono and still concerning himself specifically with disputes about the delimitation of the continental shelf, suggested that the Commission should remove the proposal of arbitration ex aequo et bono from the commentary, and insert the following two sentences instead:

> "If agreement cannot be reached and a prompt solution is needed, the interested States should seek a solution of the problem in accordance with the rules agreed between them for the peaceful settlement of disputes. If the dispute is not submitted to judicial or arbitral settlements, it should be dealt with by conciliation procedure."

In 1953 (A/2456) the Commission adopted the following text as article 8 of its draft articles:

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

The Commission explained that this was a general arbitration clause intended to cover, in addition to disputes concerned with the delimitation of the continental shelves of neighbouring States, "all disputes arising out of the exploration or the exploitation of the continental shelf". The Commission indicated that, in its view, "there are compelling reasons which render essential a clause of this nature".

Annex A

Articles concerning the Law of the Sea, prepared by the International Law Commission, together with a list of references to the meetings of the Commission where the matters dealt with in the articles concerned were principally discussed.

| Article | Meeting |
|---|---|
| 1 | 164 - 165 - 252 - 253 - 277 - 278 - 281 - 295 - 324 - 328 - 361 |
| 2 | 164 - 165 - 172 - 253 - 277 - 295 - 324 - 328 - 361 |
| 3 | 65 - 164 - 165 - 166 - 167 - 168 - 169 - 253 - 281 - 295 - 308 - 309 - 310 - 311 - 312 - 313 - 314 - 315 - 316 - 324 - 328 - 361 - 362 - 363 |
| 4 | 164 - 169 - 170 - 254 - 255 - 256 - 257 - 258 - 277 - 278 - 281 - 316 - 324 - 328 - 364 |
| 5 | 164 - 169 - 170 - 254 - 255 - 256 - 357 - 258 - 277 - 278 - 281 - 316 - 317 - 319 - 324 - 328 - 335 - 364 - 365 |
| 6 | 258 - 259 - 277 - 278 - 316 - 324 - 328 - 365 |
| 7 | 164 - 172 - 317 - 318 - 319 - 324 - 328 - 329 - 365 - 366 |
| 8 | 259 - 260 - 277 - 278 - 295 - 324 - 329 - 365 |
| 9 | 259 - 277 - 278 - 295 - 324 - 329 - 365 |
| 10 | 164 - 259 - 260 - 277 - 278 - 319 - 324 - 329 - 365 |
| 11 | 260 - 261 - 277 - 279 - 319 - 324 - 329 - 365 |
| 12 | 164 - 261 - 262 - 263 - 271 - 277 - 278 - 279 - 319 - 320 - 324 - 329 - 366 - 380 |
| 13 | 319 - 320 - 324 - 329 - 366 - 380 |
| 14 | 164 - 170 - 171 - 172 - 262 - 277 - 279 - 281 - 320 - 324 - 329 - 366 - 380 |
| 15 | 164 - 262 - 277 - 279 - 281 - 299 - 324 - 329 - 366 - 380 - |
| 16 | 164 - 262 - 263 - 264 - 277 - 279 - 299 - 324 - 329 - 366 - 380 |
| 17 | 164 - 264 - 265 - 277 - 279 - 299 - 324 - 329 - 366 - 380 |
| 18 | 164 - 265 - 277 - 279 - 299 - 324 - 329 - 367 - 380 |
| 19 | 164 - 272 - 277 - 299 - 306 - 325 - 329 - 367 - 380 |
| 20 | 164 - 272 - 277 - 279 - 281 - 299 - 306 - 325 - 329 - 367 - 380 |
| 21 | 164 - 272 - 277 - 279 - 299 - 306 - 325 - 329 - 367 - 380 |

| Article | Meeting |
|---|---|
| 22 | 164 - 277 - 279 - 299 - 306 - 325 - 329 - 367 - 380 |
| 23 | 164 - 272 - 277 - 299 - 306 - 325 - 329 - 367 - 380 |
| 24 | 164 - 272 - 273 - 277 - 279 - 299 - 281 - 306 - 307 - 308 - 325 - 329 - 367 - 380 |
| 25 | 164 - 273 - 277 - 279 - 299 - 308 - 325 - 329 - 368 - 380 |
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| 27 | 63 - 64 - 283 - 284 - 320 - 326 - 329 - 335 - 339 - 340 |
| 28 | 284 - 326 - 341 |
| 29 - 31 | 64 - 121 - 133 - 284 - 285 - 293 - 294 - 320 - 321 - 326 - 341 - 347 - 348 - 380 |
| 32 | 284 - 288 - 321 - 326 - 341 - 342 |
| 33 | 64 - 285 - 288 - 321 - 326 - 342 |
| 34 | 64 - 66 - 122 - 123 - 133 - 285 - 294 - 321 - 326 - 342 - 347 - 348 |
| 35 | 64 - 121 - 122 - 133 - 286 - 321 - 326 - 343 |
| 36 | 64 - 66 - 122 - 123 - 133 - 285 - 286 - 294 - 321 - 326 - 343 |
| 37 | 65 - 123 - 124 - 133 - 288 - 289 - 290 - 321 - 326 - 343 |
| 38 - 45 | 124 - 133 - 290 - 291 - 292 - 293 - 321 - 326 - 330 - 343 |
| 46 | 64 - 65 - 123 - 124 - 133 - 286 - 288 - 289 - 321 - 326 - 343 |
| 47 | 65 - 125 - 133 - 291 - 321 - 327 - 343 - 344 - 345 - 349 |
| 48 | 132 - 133 - 291 - 321 - 327 - 345 - 346 |
| 49 - 59 | 65 - 117 - 118 - 119 - 132 - 206 - 207 - 208 - 209 - 210 - 236 - 237 - 291 - 296 - 297 - 298 - 300 - 301 - 302 - 303 - 304 - 305 - 306 - 321 - 327 - 336 - 337 - 338 - 350 - 351 - 352 - 353 - 354 - 355 - 356 - 357 |
| 60 | 66 - 114 - 119 - 120 - 132 - 207 - 208 - 209 - 234 - 235 - 291 |
| 61 - 65 | 65 - 124 - 125 - 285 - 286 - 321 - 327 - 346 |
| 66 | 65 - 69 - 117 - 118 - 120 - 121 - 125 - 132 - 210 - 237 - 239 - 291 - 348 - 349 - 364 |
| 67 - 68 | 66 - 67 - 68 - 69 - 113 - 114 - 117 - 118 - 119 - 120 - 123 - 130 - 131 - 132 - 195 - 196 - 197 - 198 - 199 - 200 - 206 - 207 - 208 - 209 - 210 - 215 - 233 - 234 - 235 - 236 - 238 - 291 - 357 - 358 - 359 - 380 |

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| 69 | 67 - 68 - 69 - 114 - 131 - 198 - 199 - 359 |
| 70 | 114 - 115 - 131 - 200 - 285 - 286 - 360 |
| 71 | 66 - 69 - 115 - 131 - 198 - 200 - 201 - 202 - 205 - 236 - 238 - 360 |
| 72 | 115 - 116 - 131 - 132 - 201 - 204 - 205 - 234 - 236 - 360 |
| 73 | 116 - 117 - 131 - 132 - 201 - 202 - 203 - 204 - 205 - 234 - 236 - 238 - 360 - 361 |

Annex B

Articles concerning the Law of the Sea, prepared by the International Law Commission, together with a list of references to the documents in which were made the comments of Governments on the draft and provisional articles adopted by the Commission at its successive sessions.

## Article 1

| Country | Documents |
|---|---|
| China | A/CN.4/99, pp. 18-19 |
| Denmark | A/CN.4/99/Add.9, p. 3 |
| Dominican Republic | A/CN.4/99, p. 21 |
| India | A/2934, p. 30; A/CN.4/99, p. 26 |
| Israel | A/CN.4/99/Add.1, pp. 27-28 |
| Mexico | A/2934, pp. 30-31 |
| Norway | A/CN.4/99/Add.1, p. 50 |
| Sweden | A/2934, p. 37 |
| Union of South Africa | A/2934, p. 40 |
| United Kingdom | A/2934, p. 41; A/CN.4/99/Add.1, p. 61 |
| Yugoslavia | A/2934, p. 47; A/CN.4/99/Add.1, p. 96 |

## Article 2

| Country | Documents |
|---|---|
| China | A/CN.4/99, pp. 18-19 |
| Dominican Republic | A/CN.4/99, p. 21 |
| Israel | A/CN.4/99/Add.1, pp. 27-28 |
| Mexico | A/2934, pp. 30-31 |
| Netherlands | A/2934, p. 34 |
| Sweden | A/2934, p. 37 |
| Turkey | A/CN.4/99, pp. 39-40 |
| United Kingdom | A/2934, p. 41; A/CN.4/99/Add.1, p. 61 |
| Yugoslavia | A/2934, p. 47 |

## Article 3

| Country | Documents |
|---|---|
| Belgium | A/2934, p. 25; A/CN.4/99, pp. 10-11 |
| Cambodia | A/CN.4/99/Add.2, p. 3 |
| China | A/CN.4/99, p. 18 |
| Denmark | A/CN.4/99/Add.9, pp. 3-4 |
| Dominican Republic | A/CN.4/99, p. 21 |
| Ecuador | A/CN.4/L.63 |
| Egypt | A/2934, p. 27 |
| El Salvador | A/2934, p. 27 |
| Haiti | A/2934, p. 28 |
| Iceland | A/2934, pp. 29-30; A/CN.4/99/Add.2, pp. 5-10 |
| India | A/2934, p. 30; A/CN.4/99, p. 26 |
| Israel | A/CN.4/99/Add.1, pp. 17-21 and p. 29. |
| Italy | A/CN.4/99/Add.8, p. 5 |
| Lebanon | A/CN.4/99.Add.2, p. 11 |
| Mexico | A/2934, pp. 30-33 |
| Netherlands | A/2934, pp. 33-34; A/CN.4/99/Add.1, p. 44 |
| Norway | A/2934, p. 35; A/CN.4/99/Add.1, p. 50 |
| Philippines | A/2934, p. 37; A/CN.4/99/p. 29 |
| Sweden | A/2934, pp. 37-38; A/CN.4/99, pp. 31-33 |
| Turkey | A/CN.4/99, p. 40 |
| Union of South Africa | A/2934, p. 40; A/CN.4/99, p. 46 |
| United Kingdom | A/2934, pp. 41-43; A/CN.4/99/Add.1,pp.61-63 |
| United States of America | A/2934, pp. 45-46; A/CN.4/99/Add.1, p. 82 |
| Yugoslavia | A/2934, p. 47; A/CN.4/99/Add.1, pp. 97-98 |

## Article 4

| Country | Documents |
|---|---|
| Iceland | A/2934, p. 28; A/CN.4/99/Add.2, p. 4 |
| India | A/2934, p. 30 |
| Norway | A/2934, pp. 35-36 |
| Sweden | A/2934, pp. 38-39 |
| Union of South Africa | A/2934, p. 40; A/CN.4/99, p. 46 |
| United Kingdom | A/2934. pp. 43-44; A/CN.4/99/Add.1, pp. 63-65 |
| Yugoslavia | A/2934, p. 47 |

## Article 5

| Country | Documents |
|---|---|
| Belgium | A/CN.4/99, p. 11 |
| Denmark | A/CN.4/99/Add.9, pp. 4-5 |
| Egypt | A/2934, p. 27 |
| Haiti | A/2934, p. 28 |
| Iceland | A/2934, pp. 28-29; A/CN.4/99/Add.2, p. 4 |
| India | A/2934, p. 30; A/CN.4/99, p. 26 |
| Mexico | A/2934, p. 31 |
| Netherlands | A/2934, p. 34 |
| Norway | A/2934, p. 36; A/CN.4/99/Add.1, p. 50 |
| Sweden | A/2934, pp. 38-39; A/CN.4/99, pp. 33-35 |
| Union of South Africa | A/2934, p. 40; A/CN.4/99, p. 46 |
| United Kingdom | A/2934, pp. 43-44; A/CN.4/99/Add.1, pp. 63-65 |
| United States of America | A/2934, p. 46; A/CN.4/99/Add.1, pp. 82-83 |
| Yugoslavia | A/2934, p. 47; A/CN.4/99/Add.1, p. 99 |

## Article 6

| Country | Documents |
|---|---|
| Mexico | A/2934, p. 31 |
| United Kingdom | A/2934, p. 44 |
| Yugoslavia | A/2934, p. 47 |

## Article 7

| Country | Documents |
|---|---|
| Belgium | A/CN.4/71, p. 6; A/CN.4/99, p. 11 |
| Brazil | A/CN.4/99, p. 14 |
| China | A/CN.4/99, p. 18 |
| Denmark | A/CN.4/99/Add.9, pp. 4-5 |
| Dominican Republic | A/CN.4/99, p. 22 |
| Egypt | A/2934, p. 27 |
| Iceland | A/2934, p. 29; A/CN.4/99/Add.2, p. 5 |
| India | A/2934, p. 30 |
| Israel | A/CN.4/99/Add.1, pp. 29-30 |
| Norway | A/CN.4/99/Add.1, p. 51 |
| Sweden | A/2934, pp. 38-39; A/CN.4/99, pp. 35-36 |
| Turkey | A/CN.4/99, p. 40 |
| Union of South Africa | A/CN.4/99, pp. 46-47 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, pp. 65-66 |
| United States of America | A/CN.4/99/Add.1, pp. 83-84 |
| Yugoslavia | A/2934, pp. 47-48; A/CN.4/99/Add.1, p. 99 |

## Article 8

| Country | Documents |
|---|---|
| India | A/CN.4/99/Add.3 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, p. 66 |
| Yugoslavia | A/2934, p. 48 |

## Article 9

| Country | Documents |
|---|---|
| Brazil | A/2934, p. 26; A/CN.4/99, p. 14 |
| India | A/CN.4/99/Add.3 |
| Netherlands | A/2934, p. 34 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, p. 66 |
| Yugoslavia | A/2934, p. 48 |

## Article 10

| Country | Documents |
|---|---|
| Brazil | A/CN.4/99, p. 15 |
| Denmark | A/CN.4/99/Add.9, p. 5 |
| Iceland | A/2934, p. 29 |
| India | A/2934, p. 30 |
| Union of South Africa | A/2934, p. 40; A/CN.4/99, pp. 47-48 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, p. 66 |
| Yugoslavia | A/2934, p. 48 |

## Article 11

| Country | Documents |
|---|---|
| Belgium | A/2934, p. 25 |
| Brazil | A/2934, p. 26; A/CN.4/99, p. 15 |
| Haiti | A/2934, p. 28 |
| Netherlands | A/2934, p. 34 |
| Norway | A/2934, p. 36 |
| Union of South Africa | A/2934, p. 40; A/CN.4/99, p. 48 |
| United Kindgom | A/2934, p. 44; A/CN.4/99/Add.1, p. 66 |
| Yugoslavia | A/2934, p. 48 |

Article 12

| Country | Documents |
|---|---|
| Denmark | A/CN.4/99/Add.9, p. 5 |
| India | A/2934, p. 30 |
| Israel | A/CN.4/99/Add.1, pp. 21-22 and p. 30 |
| Netherlands | A/2934, p. 34; A/CN.4/99/Add.1, p. 45 |
| Norway | A/2934, pp. 35-36; A/CN.4/99/Add.1, p. 51 |
| Sweden | A/2934, p. 39 |
| Turkey | A/CN.4/99, p. 40 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, pp. 66-67 |
| Yugoslavia | A/2934, p. 48; A/CN.4/99/Add.1, p. 99 |

Article 13

| Country | Documents |
|---|---|
| Belgium | A/CN.4/99, p. 11 |
| India | A/2934, p. 30; A/CN.4/99/Add.3 |
| Netherlands | A/CN.4/99/Add.1, p. 45 |
| United Kingdom | A/2934, p. 44; A/CN.4/99/Add.1, p. 66 |
| Yugoslavia | A/2934, p. 48 |

Article 14

| Country | Documents |
|---|---|
| Belgium | A/CN.4/71, pp. 4-8; A/2934, pp. 25-26; A/CN.4/99, p. 11 |
| Burma | A/CN.4/71, p. 8 |
| Denmark | A/CN.4/71, p. 9 |
| Dominican Republic | A/CN.4/71, p. 9 |
| El Salvador | A/CN.4/71, p. 10 |
| Netherlands | A/CN.4/71, pp. 11-12; A/2934, p. 34 |
| Norway | A/CN.4/71, pp. 13-15; A/CN.4/99/Add.1, p. 51 |
| United Kingdom | A/CN.4/71, pp. 15-18; A/2934, p. 44 |

Article 14 (continued)

| Country | Documents |
|---|---|
| United States of America | A/CN.4/71, pp. 18-23 |
| Yugoslavia | A/CN.4/71, p. 23; A/2934, p. 48; A/CN.4/99/Add.1, p. 99 |

Article 15

| Country | Documents |
|---|---|
| India | A/CN.4/99, p. 27 |
| Israel | A/CN.4/99/Add.1, pp. 30-31 |
| Netherlands | A/2934, p. 34; A/CN.4/99/Add.1, p. 45 |
| Norway | A/2934, p. 36; A/CN.4/99/Add.1, p. 51 |
| Union of South Africa | A/CN.4/99, p. 48 |
| United Kingdom | A/2934, pp. 44-45; A/CN.4/99/Add.1, p. 68 |
| Yugoslavia | A/2934, p. 48; A/CN.4/99/Add.1, pp. 100-101 |

Article 16

| Country | Documents |
|---|---|
| Denmark | A/CN.4/99/Add.9, pp. 6-8 |
| Israel | A/CN.4/99/Add.1, pp. 30-31 |
| Netherlands | A/2934, p. 34; A/CN.4/99/Add.1, p. 45 |
| Union of South Africa | A/2934, p. 40 |
| United Kingdom | A/2934, pp. 44-45; A/CN.4/99/Add.1, p. 68 |
| United States of America | A/2934, p. 46 |
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