



CONTENTS

Agenda item 53:

Report of the International Law Commission on the work of its eighth session (*continued*):

- (a) Final report on the régime of the high seas, the régime of the territorial sea and related problems (*continued*) 83

Chairman: Mr. Karel PETRŽELKA
 (Czechoslovakia).

AGENDA ITEM 53

Report of the International Law Commission on the work of its eighth session (*continued*)

- (a) **Final report on the régime of the high seas, the régime of the territorial sea and related problems (A/3159, A/C.6/L.378, A/C.6/L.385 and Add.1 to 3) (*continued*)**

1. The CHAIRMAN regretted he had to inform the Committee that the Secretariat would be unable to supply a verbatim record of the debates. The available funds would be insufficient to cover the expense involved, and, in addition, the General Committee had decided to limit verbatim records to the First Committee and the Special Political Committee. The Secretariat could not extend the length of the summary record beyond twenty pages. If the Committee was not satisfied with the existing arrangements, there was no other course but to refer the matter to the General Assembly.

2. Mr. MELO LECAROS (Chile) very much regretted that the Secretariat was unable to meet the Committee's wishes, and he hoped that the General Assembly would reverse the decision under which verbatim records were compiled only for two main Committees at each session. It was essential that all the necessary documents should be made available to the conference of plenipotentiaries.

3. Mr. ABDESLAM (Tunisia) congratulated the International Law Commission and Mr. François, its Rapporteur, on the masterly work they had accomplished with regard to the law of the sea. He was grateful to them, in particular, for having made use of the specialized knowledge of biologists, geographers and geologists. As he had not so far had time to study the draft thoroughly, he would confine himself to certain general observations and would deal with various special aspects of the draft (A/3159, chap. II) at a later stage.

4. Tunisia was a maritime country of long standing, as was borne out by the establishment of the Phoenician trading posts, the foundation of Carthage and the relations between the Province of Africa and Rome. Today,

the type of life led by a large section of the Tunisian people was conditioned by the sea. The great importance which the Tunisian Government attached to the Commission's draft could therefore be readily appreciated.

5. The Commission had been right not to make any sharp distinction in its report between matters concerning codification and those concerning the progressive development of the law of the sea. While some parts of the law of the sea were of sufficiently long standing to lend themselves to codification, others were still controversial. The Commission, which was not a legislative organ, therefore deserved credit for having laid the groundwork for the future conference.

6. His Government unreservedly approved the principles underlying the draft articles relating to navigation, fishing and the conservation of the living resources of the high seas, but feared that the Commission had been too cautious in the application of those principles. In particular, the measures designed to ensure the conservation of the living resources of the sea should be more effective.

7. With regard to the continental shelf, the provisions of article 68 might easily become a source of discord despite the correctives contained in article 71, for, as was said in paragraph 4 of the commentary to section III of part II of the draft, the exploitation of the continental shelf would certainly affect the freedom of the high seas. Similarly, article 61, paragraph 2, and article 70, which dealt with the laying and maintenance of cables and pipelines, would lead to difficulties in the exploration and exploitation of the continental shelf.

8. Concerning the territorial sea, his delegation approved of the provisions of the draft regarding the sovereignty of the coastal State over its territorial waters, and felt that the Commission had done well to emphasize that important principle. On the other hand, the provisions relating to the breadth of the territorial sea were most disappointing. Apparently, the Commission had been unable even to prepare a solution for that centuries-old problem. The clash of interests was such that the Commission could not have acted differently. Perhaps the solution of the problem could be hastened through the conclusion of regional agreements.

9. With regard to the pollution of the high seas from the dumping of radioactive waste, the Commission had been too timid. That question, which was a pressing one and a source of anxiety for some countries, concerned the law of the sea and therefore came within the scope of the Commission's work despite whatever the United Kingdom representative might say.

10. Although his delegation unreservedly supported the principle of the peaceful settlement of disputes, it could not give its views on the provisions of the

draft relating to that question, since its attitude would be determined by the position its Government would adopt on compulsory arbitration.

11. He was generally in favour of a conference of plenipotentiaries and hoped that the conference would be prepared with sufficient care to ensure it every chance of success.

12. Mr. MELO LECAROS (Chile) congratulated the International Law Commission, Mr. François, its Rapporteur, and Mr. García Amador, its Chairman.

13. His delegation could not endorse all the Commission's conclusions, but in view of the complexity of the law of the sea, it felt that some disagreement was inevitable, especially as the problems dealt with were not exclusively juridical, but also technical, biological, economic and political. It welcomed the Commission's recommendation that an international conference of plenipotentiaries should be convened. The draft resolution (A/C.6/L.385) should, however, be amended to ensure that the conference could base its work not only on the Commission's report but also on all relevant precedents.

14. He would like to explain his country's position on the main problems of the law of the sea, and in doing so he would only incidentally refer to the draft submitted by the Commission.

15. The history of law showed that the principle of the territorial sea was a logical consequence of the fact that States had to supply certain well-defined needs. Leo, Emperor of Byzantium, had proclaimed the right to fish and to exploit the salt resources up to a certain distance from the coast. Several centuries later, Venice, and subsequently Genoa, Majorca and Marseilles had quarantined ships in order to protect themselves against the plague, cholera and yellow fever. At that time, the Italian States had claimed a territorial sea of 100 miles, a breadth corresponding to the distance which could be covered in two days' sailing. A child of necessity, the principle of the territorial sea had developed and had later been embodied in international law. From the beginning of the thirteenth century, it had been recognized that the coastal State enjoyed exclusive rights over a zone of the sea adjacent to its coasts. With the exception of treaties concluded by the Venetian doges, that zone had always been established by the sovereign and unilateral acts of States.

16. The rules relating to the breadth of the territorial sea had likewise always been fashioned by necessity—at first by the need for utilizing the resources of the sea, and later by the need for protection against the plague. Not until 1702 had Bynkershoek proposed for reasons of security that a uniform breadth should be adopted for the territorial sea, which he had fixed at three miles, the range of the artillery of that period. The proposal had been accepted by some States but had never acquired the universal character claimed for it. By its very nature, it was bound to be transitory. It would be absurd to fix the breadth of the territorial sea in relation to the range of modern weapons, but it would be equally absurd to relate it to a principle which has lost all meaning.

17. The Hague Conference of 1930 had marked the beginning of the decline of the three-mile principle. Of the thirty-seven participating States, only nine had supported the three-mile limit; ten had accepted it on

condition that the principle of the contiguous zone would also be adopted; sixteen had expressed the view that a territorial sea of three miles, with or without a contiguous zone, was insufficient; and two countries had refrained from expressing any opinion. Of the nine countries which had voted for the three-mile limit, three—the United States, Japan and the Netherlands—had supported the principle as a general rule but had asked that a greater breadth should be fixed for certain purposes. Thus, the adherents of the three-mile limit had in fact been only six, all of which were members of the British Empire. It should be added that when Napoleon had been at St. Helena, the United Kingdom had established a twenty-four-mile security zone around that island. In 1878, it had extended its territorial waters to such distance as was deemed necessary for the defence and security of Her Britannic Majesty's dominions.

18. As Mr. Gidel had observed, The Hague Conference of 1930 had marked the end of the three-mile limit as a rule of international law. Since then, it had subsisted only in the domestic legislation of the States which had adopted it or as a rule of conventional international law observed by those States which had expressly decided to observe it in their mutual relations.

19. Thus the President of the United States could not be reproached for having ordered on 5 September 1939, while that country was still at peace, that the sea should be patrolled up to a distance of 200 miles from the coast. Mr. Roosevelt had said in that connexion that the territorial waters of the United States extended as far as the interests of the country required, but that that distance did not necessarily coincide with the 200 miles patrolled by United States warships. That declaration, like the British proclamation referred to previously, had been justified by reasons of necessity.

20. The International Law Commission and the Inter-American Council of Jurists had recognized that the three-mile rule was no longer valid. Within the International Law Commission itself, nine different opinions had been expressed regarding the breadth of the territorial sea. The Commission had finally been obliged to recognize that international practice was not uniform. The Inter-American Council of Jurists had declared that the three-mile limit was insufficient and did not constitute a general rule of international law (A/CN.4/102, annex 1).

21. Before a new rule could be drawn up the consideration by which each State had been guided in fixing the limits of its own territorial sea must be examined. Once the other problems, such as conservation of the resources of the sea, had been resolved, the delimitation of the territorial sea would lose its importance, and an agreement would easily be arrived at.

22. Another fundamental question to be considered in connexion with the territorial sea was that of determining who was responsible for fixing its limits. Thus far all States without exception had fixed the breadth of their territorial sea themselves on the basis of their own criteria. If a juridical traditionalism was to be maintained, then that rule should continue to govern, but if the modern trends in law were to be followed, then a positive principle in that regard must be established.

23. At the Conference of The Hague, the suggestion had been made by Sweden that in the absence of an international agreement, each State should be free to fix for itself, within reasonable limits, the extent of its territorial waters. That same argument had been put forward by the Chilean jurist Alvarez in his individual opinion on the Fisheries case.¹ He had said that the extreme diversity of geographical and economic conditions made it difficult to establish a uniform rule; that the breadth of the territorial sea should be fixed in a reasonable manner, taking into account, of course, those geographical and economic conditions; that the State should be capable of supervising its territorial sea and of fulfilling the obligations incumbent upon it in that area; and that the State should not infringe upon the acquired rights of other States, jeopardize the general interests or abuse its authority.

24. The representative of Chile summed up his conclusions regarding the territorial sea by saying that the three-mile principle had never been a general rule of international law; the breadth of its own territorial sea had always been fixed by the coastal State; the coastal State had always been guided by its own interests, necessity usually being the determining factor; and any rule of law varied according to the requirements of States and the degree of technical progress attained at a given time.

25. The principle of freedom of the seas had likewise undergone many vicissitudes. For four centuries it had been applied primarily to navigation and commerce in time of peace; it had been limited by such considerations as the territorial sea, the jurisdiction of the flag State and the rules governing piracy and the slave trade.

26. Ancient Rome had dominated the Mediterranean and had brought that entire sea under its jurisdiction. During the Middle Ages, in accordance with that same concept, certain States had claimed jurisdiction over areas of the high seas. Nevertheless, there had been a growing trend, especially in connexion with the suppression of piracy, to regard the sea as a means of communication among peoples. In that spirit Vitoria had proclaimed the *jus communicationis* as the basis of freedom of the seas. The doctrine of that era had been that the use of the sea in common was prejudicial to none and in consequence should not be restricted.

27. With the discovery of the New World, matters pertaining to the sea acquired special importance. According to the respective points of view, the navigators of that time had been regarded as pirates or privateers. Spain had maintained that trade with America was its prerogative, but England and Holland had disregarded that claim.

28. Edward III of England had demanded that all foreign ships should honour him as lord of the sea, yet Queen Elizabeth in her time had rejected the protests of the Spanish Government concerning the incursions of Drake in the Caribbean Sea on the ground that the use of the sea and the air was the common right of all.

29. At the beginning of the seventeenth century, Grotius had published his *Mare Liberum* defending the principle of freedom of the seas. That principle

had not been acceptable to England, and Selden had published his *Mare Clausum* in rebuttal, but as England's maritime supremacy had become assured, that country had little by little abandoned its former position. By 1672, when Pufendorf's work appeared, serious opposition to the principle of freedom of the seas had ceased. That principle had not, however, become either absolute or definitive, for the distinction between high seas, territorial sea, internal waters and adjacent zones was being established at that same time. Thus the doctrines of Grotius and Selden had proved not to be incompatible.

30. In 1918 President Wilson had made the principle of freedom of the seas the first of his Fourteen Points. Later President Roosevelt and Mr. Churchill had shown concern for that same principle in incorporating it in the Atlantic Charter.

31. The foregoing showed that the principle of freedom of the seas had been dictated by circumstances. That could not have been otherwise, for law always adapted itself to the existing conditions.

32. The International Law Commission had regarded freedom of fishing as one of the aspects of freedom of the high seas, but freedom of the high seas had traditionally meant only freedom of navigation. It might be asked whether, at the present time, it would not be more appropriate to recognize the right of the coastal State to ensure the conservation of the resources of the sea in a zone adjacent to its shores which would be established on the basis of scientific criteria.

33. The countries on the Pacific coast of South America had been charged with violating the principle of freedom of the seas by taking measures to protect the living resources of the sea, but that principle was infringed only if the sea was rendered unusable as a means of communication among peoples. The existence of the territorial sea was not contrary to the principle of freedom of the seas, for all ships had the right of innocent passage. The greater or lesser breadth of the territorial sea did not affect its juridical character. President Truman's Declaration of 1947 and the Declaration by Chile, Ecuador and Peru in 1952, both of which recognized the right of innocent passage of ships of all States, did not therefore violate the principle of freedom of the seas.

34. It was thus apparent that the so-called traditional principles of international law with regard to the high seas and freedom of the seas were valid only in so far as they concerned navigation, and that those principles had been modified as a result of the interests and needs of the various countries, both of which factors were valid today as they had been in the past.

35. In regard to the continental shelf, it was fortunate that the Commission, in article 67, had adopted as a criterion the possibility of exploitation, for modern techniques were making it ever more feasible to exploit resources lying more than 200 metres below sea level, in particular by means of subterranean tunnels. In 1916 the Russian Imperial Government had claimed several islands in the Far East by virtue of the argument that they were part of the Siberian continental shelf. On the other hand, there had been no mention of the concept of the continental shelf in the treaty concluded in 1942 between Venezuela and the United Kingdom for the purpose of apportioning between the two countries the oil-rich undersea area of the Gulf

¹ International Court of Justice, *Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 145.

of Paria, situated between Venezuela and Trinidad. In 1945 President Truman had declared that the Government of the United States regarded the natural resources of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States and subject to its jurisdiction and control. Subsequent to that declaration, various countries, particularly in the Western hemisphere, had claimed jurisdiction over the continental shelf, each in a manner corresponding to its particular situation. The only aim of President Truman's declaration and the Anglo-Venezuelan treaty had been to put the resources of the continental shelf at the disposal of the countries concerned. There had been no protest, and the International Law Commission had eventually endorsed the principle of the continental shelf. However, the régime of the superjacent waters was still a subject of controversy. Professor Scelle, who was not a proponent of the sovereignty of the State over the seabed and subsoil of the continental shelf, was of the opinion that if that sovereignty was recognized, the sovereignty of the coastal State over the superjacent waters would also have to be recognized. The old principle of verticality would thus be upheld; perhaps that solution would be the most logical and the most legally sound.

36. The problem of conservation of the resources of the sea had now become a pressing one. It was tragic to see large foreign fishing fleets exhausting resources necessary for the livelihood of the coastal populations. It was deplorable that the measures taken by the coastal States to safeguard those resources should have been so little understood. The large fishing enterprises which, with a few exceptions, belonged to countries where capitalism was highly developed, were not interested in the adoption of conservation measures. They sought only to increase their production in order to obtain the greatest possible profit. There were therefore two conflicting interests: the financial interest of the foreign capitalists and the interests of the coastal State, which were indissolubly linked with the common good of the people. It was to be hoped that the rules established by Chile, Ecuador and Peru would be endorsed by international law through the adoption of a formula similar to that adopted at Mexico by the Inter-American Council of Jurists, to the effect that coastal States had the right to adopt measures of conservation and supervision necessary for the protection of the living resources of the sea beyond territorial waters on condition that such measures did not discriminate against foreign fishermen. Such a provision fulfilled the requirements for a true rule of international law, for it was necessary, it was useful and it was realistic.

37. The new law, stated at Mexico under the title "Principles of Mexico on the juridical régime of the sea" (A/CN.4/102, annex 1), had been developed at both the national and inter-American levels.

38. Chile's position on that question had been set out in the Presidential declaration of 1947, which had proclaimed national sovereignty over the continental shelf, irrespective of the depth at which that shelf lay. It had also established the sovereignty of Chile over the adjacent waters, for the purpose of reserving, protecting and utilizing their natural resources, and had directed the Government to exercise particular supervision over fishing and maritime hunting. Where-

as the first point of the declaration established complete sovereignty over the continental shelf, the second point limited sovereignty to the conservation of the resources of the sea. In addition, the Chilean declaration fixed the breadth of the fishery protection zone at 200 miles and guaranteed freedom of navigation.

39. In the Declaration of Santiago of 1952, Chile, Ecuador and Peru had stated that it was the responsibility of Governments to prevent any exploitation of the resources of the sea which could be prejudicial to nations for which the sea constituted an irreplaceable means of subsistence. The three Governments had declared that, in view of the biological and geological factors affecting the conservation and development of the marine fauna and flora in the waters along their coasts, the former breadth of the territorial sea and of the contiguous zone was inadequate, and they had therefore proclaimed their sovereignty up to a minimum distance of 200 miles from the shore.

40. The sole object of the Presidential declaration of 1947 and the agreement with Ecuador and Peru had been to protect the marine resources of the South Pacific. At no time was it the intention of those Governments to encroach either on freedom of navigation or on the legitimate interests of other States, provided such other States respected the regulations designed to preserve the marine fauna. However, the attitude adopted by those three countries had been generally interpreted in an erroneous and even tendentious manner. The word "sovereignty" had been employed because there had at the time been no other word to justify the adoption of conservation measures. The distance of 200 miles was explained by the need to protect all the marine flora and fauna living in the Humboldt current, as all the various species depended on one another for their existence and have constituted a biological unit which had to be preserved. In its report, the International Law Commission had started from the premise that all States carrying on fishing were of equal status, and only by way of exception did it admit that the coastal State had a special interest in maintaining the productivity of the living resources in any part of the high seas adjacent to its territorial sea. That, however, was the wrong approach to the problem. The situation of a coastal State which depended for its livelihood on the resources of its coastal waters could not be compared with that of countries which were simply defending their financial interests.

41. Rather than a legal conflict, a conflict of interests was involved, and hence the first step was to determine what were the legitimate interests which the law had to protect. The statement had been made in the Sixth Committee that it was hard to understand why countries having a vast territory should also lay claim to vast areas of the sea, whereas other and smaller countries were content with a sea area of limited extent. It would nevertheless be readily appreciated that even a small country having a large fishing fleet could be content with a territorial sea of limited extent since that country could in fact be master of the entire high seas. If an effort was made to favour the countries which were already in an advantageous position, to the detriment of other countries, it would be very difficult to reach agreement at the conference of plenipotentiaries. Agreement would only be possible if due account was taken of the legitimate interests of each country and if all prejudice was discarded.

42. Mr. KNOX (Denmark) congratulated the Commission on its excellent report, although the report did not necessarily constitute the last word on the problem.
43. Denmark had a very long coastline, and fishing played an important role in the economy of the country. Over one-third of its catch was taken far from Danish shores and one-half of the catch was exported. Denmark had an important mercantile marine and an extensive ship-building industry, which provided a livelihood for a considerable part of the population. The law of the sea was therefore of very real interest to Denmark, not only from the economic point of view but also from the political point of view, owing to the country's position at the entrance to the Baltic.
44. With regard to procedure, Denmark was one of the co-sponsors of the joint draft resolution (A/C.6/L.385) which proposed the convening of a conference of plenipotentiaries. The task of that conference would not be an easy one, and it had not yet proved possible to establish the extent of the common ground. However, in view of the apparently nearly unanimous wish to call a conference, it was to be hoped that States would realize that the achievement of positive results would be in the general interest and that they should bring to the conference a spirit of moderation, goodwill and mutual understanding. He believed that the experiment was warranted. On the other hand, he did not see the need to set up a preparatory committee, particularly since there must be no prejudging of the conclusions of the Conference, which would be attended by countries, such as Germany and Japan, which were not members of the United Nations. The views of the Secretariat might perhaps be sought on that point.
45. Regarding the substance of the problem, he would make only a few preliminary comments.
46. Denmark favoured the traditional three-mile breadth for the territorial sea, the only exception being a four-mile breadth for customs purposes. As a seafaring nation and a nation interested in fishing on the high seas, Denmark was a staunch supporter of the doctrine of the freedom of the seas. That freedom should not be encroached upon by exaggerated claims to ever-increasing breadths of territorial sea. His delegation believed that no State which respected international law was completely free to fix unilaterally the width of its territorial sea. That did not mean, however, that a country could not extend that zone within reasonable limits if such extension was justified by imperative reasons and the rights of other countries were not prejudiced. It was therefore logical that the matter should be referred to an international conference. In the interest of arriving at clear-cut solutions, it might be useful to apply the method of straight baselines in all cases where that was justified by special circumstances. In all fairness, however, the moderation shown by countries like Denmark should not be used against them. The Danish Government supported the view taken by the International Chamber of Shipping in its declaration of 22 April 1955 to the effect that agreement should be reached between Governments on a not too wide limit to the extent of the territorial sea. As coastal States had not only rights, but also certain obligations in their territorial sea, it would be well to specify that the territorial sea should not be less than three miles in breadth.
47. Rational exploitation and, consequently, rational conservation of the living resources of the sea were essential, but solutions to this question should perhaps be sought on a regional rather than a universal basis.
48. Merchant ships should be treated as such, whether privately-owned or in State ownership. Article 17, paragraph 4, should specify that the right of innocent passage applied only to passage in the proper sense of the word and not to other forms of navigation, and that passage of vessels should be restricted to those parts of the strait normally used for international navigation.
49. In paragraph 4 of the commentary on article 24, the International Law Commission had stated that the coastal State might not make the passage of warships through straits normally used for international navigation between two parts of the high seas subject to any previous authorization or notification. In the view of the Danish Government a notification would be a natural consequence, and indeed a proof, of innocent passage. It appeared perfectly legitimate that the coastal State should require, not that its authorization be sought, but that it should be given prior notification. Paragraph 4 of the commentary appeared to go further than the judgement in the Corfu Channel Case referred to in the commentary.
50. By virtue of the Treaty of 14 March 1857 on the Abolition of the Sound Dues, the Danish Government had taken upon itself the obligation to preserve and maintain the buoys, beacons and the like which served and facilitated navigation in the Kattegat, the Sound and the Belts. In order to accomplish tasks of that nature, the coastal State should be enabled to exert the necessary authority over those parts of the high seas to which its responsibility extended and to exert that authority in respect not only of its own nationals but also of nationals of other countries. There should be some means of enforcing regulations which prohibited rubbish, cargo, ashes and the like from being thrown overboard in places where it might reduce the depth of the fairway and endanger navigation. Likewise, the experience gained since the last war had shown that the coastal State should be in a position to subject the salvaging of wrecks to a special authorization in order to ensure that the salvage contractor did not prejudice the safety of navigation. A coastal State which by international agreement had to ensure the safety of navigation in fairways outside the territorial seas should be entitled to issue any regulation which might be required and to enforce such regulations in respect both of its nationals and of foreigners. Article 66 on the so-called contiguous zone did not cover the cases which the Danish Government had in mind.
51. If divergent interests could not at the present juncture be reconciled, a solution might, for example, lie in the establishment of appropriate mediation or arbitration bodies.
52. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that for the time being he would confine himself to general observations, reserving the right to define his delegation's position later.
53. The International Law Commission deserved the tributes which many of the representatives had paid it and which the Ukrainian delegation had pleasure in echoing. Many of the Commission's draft articles (A/3159, chap. II) offered progressive solutions in

line with the principles and purposes of the Charter. Article 1, for example, recognized the sovereignty of the State over the territorial sea—one of the fundamental principles of international law. The principle of the sovereign rights of the coastal State was similarly affirmed in the articles relating to the continental shelf and the conservation of the living resources of the sea. Likewise article 27 met with his delegation's approval. The articles mentioned should be endorsed by all States anxious to promote the progressive development of the law of the sea.

54. Some of the draft articles were, however, incompatible with the rules of international law, and could not be accepted. As several delegations had already stressed, article 22 was unacceptable as it stood. In maritime affairs certain safeguards were necessary which all States should respect. It was an accepted principle of international law that ships were subject exclusively to the jurisdiction of the flag State. The Commission, in assimilating government ships operated for commercial purposes to private ships, had refused to admit that principle, and on that point had followed the rules of the Brussels Convention of 1926, which, far from reflecting the general practice of States, represented a departure from one of the fundamental principles of international law: that a State, being sovereign in law, could in no case be assimilated to a private person. Only sixteen States had signed that Convention, and some of them had never ratified it. It was surely not possible to speak of a "preponderant practice" when delegation after delegation had insisted, during the current debate, that government ships were not assimilable to private ships. It would suffice to cite various precedents in illustration. In 1921, the English Court of Appeal, in the case of *Compañía Mercantil Argentina v. United States Shipping Board*, had rejected the plea that government ships used for commercial purposes were not entitled to the immunities enjoyed by other government ships. In the same year a Hamburg court had similarly ruled, in the case of the *Ice King*, that international law did not differentiate between government ships, whether operated for commercial purposes or not. The same line was taken by the Attorney-General of the United States in the case of the Chilean vessel *Moipo*. In 1938, a French court of appeal had ruled in the case of the Soviet ship *Pokrovsky* that foreign States enjoyed immunity of jurisdiction in France, and that a government-owned ship was not liable to seizure.

55. The International Law Commission was also wrong in limiting the concept of piracy to acts committed by private ships or aircraft. Piracy, in the traditional sense, had almost entirely disappeared, and the term should be applied henceforward to any illegal act of violence or depredation committed on the high seas, even if instigated or encouraged by a State. The definition which might still have been valid in the nineteenth century had ceased to be valid. The States signatories of the Nyon Agreement had realized that the submarines guilty of aggression had not been private ships and had concealed their real nationality. Oppenheim² had said that ships could be regarded as pirate ships even if the acts committed by them were not prompted by the desire for gain. Similarly, accord-

ing to Lauterpacht,³ a ship could be treated as a pirate ship if it acted in violation of the law, even though acting under the orders of a recognized Government. Hyde,⁴ too, had expressed the view that a pirate ship was not exonerated from liability by reason of its State-ownership.

56. International practice supported those writers. In 1877, the Peruvian ironclad *Huascar* had been declared piratical by the British Admiralty. At the Washington Conference in 1922, it had been decided that any submarine which contravened the provisions of international law could be declared a pirate and arraigned before the courts of a State, even if it had acted in accordance with orders received. Similarly, President Roosevelt, in issuing orders to fire at sight on Axis submarines in 1939, had described the measure as being in defence against piratical attacks.

57. The acts committed during the past few years in the China seas also illustrated the necessity of taking steps in the interests of peace to combat piracy, as being a flagrant violation of the freedom and safety of the high seas. For that purpose, the expression "act of piracy" should be deemed to include every act of violence or depredation committed on the high seas or in the superjacent air-space regardless of whether the ship or aircraft committing the act was privately owned or State-owned.

58. Mr. PERERA (Ceylon) paid a tribute to the International Law Commission, whose report was the fruit of eight years' sustained work.

59. The discussion had brought out the following points: the inadequacy of the three-mile rule; the changing criteria applied in determining sovereignty and jurisdiction over territorial waters; the need to minimize, if not eliminate, the divergencies existing between maritime and non-maritime States; and the need to frame a convention capable of stilling controversy for all time.

60. International practice in the matter of the high seas and the territorial sea had throughout history varied considerably. The 1930 Conference, which had been called to compose differences of opinion, had failed to settle the question of territorial waters. There seemed to be agreement among States that the breadth of the territorial sea could not be less than three miles. Some of them regarded that minimum as a maximum, while others stipulated a breadth of four or six miles. Fulton,⁵ in 1911, had argued that just as the three-mile rule was obsolete in time of war, so it was inadequate in the matter of the protection and conservation of marine resources. It was strange that jurists should not have re-examined the original grounds on which the three-mile rule had been accepted.

61. The position seemed to be that the following principles could be taken as a basis for codification: the breadth of the territorial sea was normally measured from the low-water line along the coast; the baseline on coasts which were deeply indented or had islands in their immediate vicinity consisted of straight lines drawn in accordance with the double-radius rule;

³ H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947).

⁴ C. C. Hyde, *International Law, chiefly as interpreted and applied by the U.S.A.*, 2nd rev. ed. (Boston, Little, Brown & Co., 1947).

⁵ T. W. Fulton, *The Sovereignty of the Sea* (Edinburgh, W. Blackwood and Sons, 1911).

² L. Oppenheim, *International Law*, Vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht (ed.) (London, Longmans, 1948), p. 561.

the tendency was to accept the normal breadth of the territorial sea as three nautical miles from the baseline; claims by particular States to a breadth of more than three miles could be admitted where they had acquired rights based on long usage and provided that the other States were in agreement; all States had sovereign rights over their territorial waters; no State could exercise jurisdiction over foreign ships on the basis of those rights outside territorial waters; any State was entitled, up to a reasonable distance outside its territorial waters, such distance to be defined and notified, to adopt the necessary security measures with respect to foreign ships approaching its coast for unlawful purposes.

62. The Ceylonese delegation attached particular weight to the question of the continental shelf, first mentioned in 1916 in a note communicated by Russia to the other Powers. The Ceylonese Government had referred to it indirectly in 1925 in its pearl fisheries ordinance.

63. The distinction drawn by legal authorities between the seabed and the subsoil of the continental shelf was completely artificial. On the other hand, it would be wrong to depart from generally accepted rules on the pretext of promoting the development of international law, for that would be a retrograde step, not progressive development. Historical and scientific developments had to be taken into account. State practice had varied on the question of the continental shelf. The Treaty of 1942 between the United Kingdom and Venezuela was a precedent, but the real starting point had been President Truman's Proclamation of 1945. It could be deduced from everything that had happened since, that the key problem raised by all States was that of the freedom of the high seas. Some of the Latin American countries had claimed that their enactments concerning the continental shelf were based on a rule of customary law flowing from the Presidential Proclamation of 1945, but the United States itself had not admitted that contention. It was difficult to talk of custom when the measures adopted by certain States departed from established practice.

64. There was admittedly a conflict between the right to occupy the seabed and exploit its resources and the right to freedom of the seas. The question in each particular case was whether those rights were complementary or mutually exclusive. A State urging observance of the freedom of the seas was pleading an established right, and hence the onus of proof rested on the State seeking to exploit the resources of the continental shelf. That was the view taken by the International Law Association at its Brussels Conference in 1950. The title to the continental shelf with its resources depended, as in the case of land, on effective occupation. Mere proclamations or unilateral declarations were not enough; there must also be effective occupation or exploitation. The International Law Commission, however, recognized the coastal State's right to exploit mineral resources regardless of the existence of the continental shelf. Certain States might take advantage of that concept to claim vast areas for themselves. Selden's *Mare Clausum* was no longer valid in the modern world.

65. The terms of draft article 28 of the draft could be accepted without reservation.

66. The Ceylonese delegation, one of the sponsors of the draft resolution (A/C.6/L.385), hoped that the

proposed conference would meet next year. The preparatory committee should start work immediately, concentrating on the International Law Commission's draft and leaving other points to be worked out on the basis of a questionnaire to be sent to the participating countries. The conference, which should also be attended by non-member States, should not rest content with discussing broad principles: States should be able to agree on a general convention, accompanied by reservations if necessary.

67. Mr. MORRISSEY (Ireland) joined in the tribute to the International Law Commission and its Special Rapporteur; they had made an energetic effort not only to codify existing rules of law but also to formulate new ideas. The consensus in the Sixth Committee seemed to be that the General Assembly should convene an international conference of plenipotentiaries. The Irish delegation reserved the right to submit more detailed comments later, and for the moment would confine its remarks to certain articles of particular interest to Ireland (articles 3, 5 and 7) and the articles dealing with the conservation of the living resources of the high seas.

68. A large part of Ireland's population depended for a livelihood on the resources of the sea. The Irish Constitution stipulated that the territorial sea was part of the national territory, but had never delimited its breadth. In its reply to the general questionnaire circulated in connexion with the 1930 Codification Conference held at The Hague, Ireland had stated that it had not yet acquired sufficient experience in that field to be able to formulate any general principles. In April 1956, the Irish Government had informed the Secretary-General that it had not had time to make a detailed study of the draft articles and wished to reserve its position, particularly with respect to chapter II.

69. The International Law Commission had not settled the question of the breadth of the territorial sea; it had recognized that there was no rule of international law governing the delimitation of the territorial sea, and that view had been confirmed by the statements made during the debate. The three-mile rule had been conceived when conditions were entirely different from those prevailing in modern times. The rule certainly seemed to be losing ground.

70. The system of delimiting the territorial sea by means of envelopes of arcs of circles was a first departure from the three-mile rule. The system, approved by the International Court of Justice, of measuring the territorial sea from straight baselines was another departure from that rule, since it also had the effect of extending the territorial sea.

71. The reason why the International Law Commission had not taken a decision on the delimitation of the territorial sea was no doubt that it regarded its function to be that of enunciating universally recognized rules of law. Out of thirty-seven representatives who had spoken in the course of the debate, only five had definitely supported the three-mile rule. From the commentary on article 3 it was possible to deduce that a State could, without violating international law, fix the breadth of its territorial sea between three and twelve miles, but that extension would only be valid *vis-à-vis* such other States as did not object to it. In so far as paragraph 4 of the commentary purported to interpret the judgement of the International Court

of Justice in the Anglo-Norwegian Fisheries case,⁶ that interpretation was open to question. No international body could approve encroachments on the freedom of the high seas. The extension of the territorial sea was an act of such gravity that it was better to inquire whether there were not some other means of satisfying the needs of the coastal State.

72. For that reason the Irish delegation had studied the draft articles relating to the conservation of the living resources of the high seas with particular care. He thought that perhaps the articles did not go far enough. The special interest of the coastal State was recognized, but, as the representative of Mexico had pointed out (490th meeting, para. 1), the coastal State, because of the restrictions imposed on it, might find it more difficult to apply conservation measures than to extend the breadth of its territorial sea. The necessity of prior agreements, the risks of long and costly arbitration proceedings, would not encourage it to renounce a claim to an extension of its territorial sea.

73. The Canadian delegation had suggested setting different breadths for the territorial sea and for the zone in which the coastal State exercised exclusive fishery rights (493rd meeting, para. 53). That idea deserved close examination.

74. He approved of the terms of draft article 5, which confirmed the rule laid down by the International Court of Justice. Paragraph 3 of that article, which contained new ideas on the subject of internal waters, might create some difficulties.

75. The Irish delegation regretted that the International Law Commission had departed from the decision taken at its seventh session to allow a twenty-five mile closing line for bays (A/2934, p. 17). A coastal

State should be allowed a fair latitude in fixing the closing line of bays that were not historic bays. In the terms of the draft, an indentation was not considered a bay unless its area was equal to or greater than that of the semi-circle drawn between the points marking the mouth of the indentation. A more equitable method would be to place the centre of the circle at a point on the seaward side of the closing line.

76. The Irish delegation was in favour of convening an international conference of plenipotentiaries as the only way to solve the various problems at issue. However, one should not be under any illusions about the prospects of success of such a conference, particularly in the matter of the breadth of the territorial sea. If the States were not prepared to compromise, the conference might meet the same fate that befell that of 1930.

77. He considered it unnecessary to set up a preparatory committee. Never had such careful preparations been made for any conference. The International Law Commission had spent eight years on the study of the law of the sea, and many Governments had sent in comments. The Secretariat was perfectly capable of carrying out the preliminary work, as was proved by the excellent reference guide (A/C.6/L.378) which it had prepared.

78. For the same reasons, it seemed unnecessary to send out a preliminary questionnaire to Governments. The Irish delegation agreed with the representative of Iceland (494th meeting, para. 12) that the question was urgent and that the conference, which should be held in Europe, ought to meet as soon as possible, but it did not seem possible to hold it before the spring of 1958.

The meeting rose at 6 p.m.

⁶ *I.C.J. Reports 1951*, p. 116.