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SECOND REPORT ON THE HIGH SEAS

by

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Rapporteur

CONTENTS

/1. Nationality of

1. Nationality of ships (paragraphs 185, 186)[1/]

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. 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.

Each State lays down the conditions governing the right of merchant ships to use its flag. There are no uniform rules. Pearce Higgins and Colombos rightly point out that "there are obvious disadvantages resulting from this divergence of practice, but it is not possible to suggest a set of rules of uniform application. The economic conditions and shipping policies in different countries must affect, to an important degree, the views which the respective Governments take as to the requirements of their mercantile marine."[2/]

It is questionable, however, whether States in fact enjoy absolute freedom to grant the right to fly their flags. 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. Under this rule, which assimilates them to individual nationals, ships may be supervised and controlled; the abuses to which the principle of the freedom of the seas may give rise are limited if the use of the high seas is granted only to ships which can prove possession of a nationality. Every ship, because it belongs to a certain State, is subjected to the control of the State whose flag it flies.[3/] The control and jurisdiction of the State can be exercised only if there are other relations between the ship and the State than those arising out of registration. For instance, it is extremely difficult for the authorities of the country to exercise any pressure on a shipowner who does not apply the law of the land on board his ships, if he is domiciled outside the country and merely represented there by an agent. If a ship flying the flag of a

/State,

1/ The figures given after the titles of the various parts of this report refer to paragraphs of the report of the International Law Commission covering its second session (1950), General Assembly, Official records, fifth session, supplement no. 12 (A/1316).

2/ Pearce Higgins and Colombos, The Freedom of the Seas, 1943, page 190.

3/ Cidel, Le Droit international public de la mer, I, 1942, page 73.

State, with a crew consisting of aliens, does not sail to or from the ports of that country, the national authorities have no opportunity of inspecting it or of satisfying themselves at regular intervals that the working conditions on board comply with the law of the land. The acknowledged freedom of a State to lay down the conditions on which it shall grant its nationality to ships is of necessity based on the concept that the national element with regard to a ship and the manner in which it is used have a wide variety of application, but that a certain minimum should be guaranteed in the general interests of all those who use the high seas. A comparison should be made with the nationality of persons. It is stated in Basis of Discussion No. 1 of the Preparatory Committee of the Hague Conference for the Codification of International Law of 1930, in connexion with the nationality of persons, that "questions as to its nationality are within the sovereign authority of each State. Any question as to the acquisition or loss by an individual of a particular nationality is to be decided in accordance with the laws of the State whose nationality is claimed or disputed. The legislation of each State must nevertheless take account of the principles generally recognized by States." In dealing with the attribution of a nationality to a ship one is likewise guided by certain principles that have been adopted by nearly all States. As Mr. Asser and Lord Reay wrote in 1896, "In order that the law of a State on this matter may be effective in any circumstances which may arise, it should not depart too far from the principles which have been adopted by the great majority of States and which may therefore be regarded as constituting the basis of the international law on the matter."[1/]

Absolute freedom in granting right to fly a flag would increase the tendency of other States to "look behind the flag"; this tendency is especially apparent in wartime, but also occurs in peace-time, as in the case of the I'm Alone. "In its Interim Report, the Commission considered the question whether they might inquire into the beneficial or ultimate ownership of the I'm Alone or of the shares of the corporation that owned the ship. The Commissioners asserted their competence to do so, and reverted to the issue in their Final Report: "We

/find as

1/ Asser-Reay report to the Institute of International Law, Venice, 1896, Year Book XV, page 57; see also Fleischmann, Das Werk vom Haag; Die Gerechtlichen Entscheidungen, 1917, I, page 414; Neumeyer, Internationales Verwaltungsrecht, 1926, page 90; Verdross, Volkerrecht, 1950, page 226.

find as a fact that, from September 1928 down to the date when she was sunk, the I'm Alone, a British ship of Canadian registry, was de facto owned, controlled, and at critical times managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned'. In these circumstances the Commission refused to grant compensation for the loss of the ship or of the cargo".[1/]

The Institute of International Law tried at its Venice session in 1896 to give some guidance and advice[2/] with regard to the grant of the right to fly a flag. The ship had to be listed in a special register, for which purpose more than half of it had to be owned by --

1. Nationals, or
2. A partnership or a simple commandite company in which more than half the partners with personal liability were nationals, or
3. A national joint-stock company in which not less than two-thirds of the members of the board of directors were nationals.

The enterprise must have its head office in the State whose flag the ship would fly or in which it was to be registered.

The nationality of the captain and crew should not, according to the Institute, be a condition for acquiring the right to fly a flag.[3/]

The Rapporteur has attempted to classify the provisions which various States have included in this branch of their legislation. In the first place, he has used the extremely valuable documentary material provided by the Secretariat and the information contained in the Comparative Study of national laws governing the granting of the right to fly a merchant flag, drawn up by the Permanent Committee on Ports and Maritime Navigation of the League of Nations in 1931. He regrets that he has been unable to obtain complete and absolutely up-to-date source material.

The Rapporteur would also like to point out that in classifying the various legal systems he has omitted the less important differences between them.

/The nationality

1/ Schwarzenberger, International Law, 1949, page 183.

2/ Fauchille, Traite de droit international, 1925, I, 2, page 902.

3/ Year-book XV, page 201.

The nationality of merchant vessels is governed by the following factors:

(a) The nationality of the owner;

(b) In the case of a partnership or commandite company, the nationality of the partners;

(c) In the case of a joint-stock company, the head office and the nationality of the board of directors;

(d) The nationality of the captain, officers and crew.

The origin of the vessel, in the sense of the place where it was built, formerly played a part in determining its nationality, but has tended gradually to lose importance in countries, such as France and the United States of America, which have incorporated it in their law.1/

On (a). Some legal systems lay down that the vessel must belong wholly to nationals:

Brazil, Egypt, Finland, Germany, Haiti, Japan, Mexico, Norway, Peru, Poland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America.

Certain countries require a vessel to belong either to nationals or to aliens domiciled in the national territory:

Chile (persons domiciled and practising a profession in the country), Colombia, Denmark, Ecuador, Netherlands, Spain, (2/3 nationals, 1/3 residents), Rumania (persons born in the country and residing there not less than eight months per year), Uruguay (individuals or legal persons inscribed in the Public Trade Register).

In other countries it is enough for some of the owners to possess the nationality of the country or to be domiciled there:

Belgium (1/2 nationals or aliens with one year's residence), France (1/2 resident nationals), Greece (1/2 nationals), Italy (3/4), Lebanon (1/2), Panama (all or some must be Panamanian citizens or aliens domiciled in the Republic with more than five years' residence), Sweden (2/3 nationals), Yugoslavia (2/3 nationals).

/On (b).

1/ Gidel, I, page 82; Meyek, Die Staatszugehörigkeit der Schiffe und Luftfahrzeuge, 1935, page 52; Riesov, The test of the nationality of a merchant vessel, 1937, page 14.

On (b). Certain systems of law lay down that in a partnership or a commandite company all partners with personal liability must be nationals:

Egypt, Finland (nationals resident in Finland), Germany, Japan, Poland, Portugal, Romania, Union of Soviet Socialist Republics.

A fraction is regarded as sufficient in certain countries:

France (50 per cent of the registered capital), Lebanon (the majority).

On (c). A joint-stock company must have its head office in the territory or be established in accordance with the law of the country:

Belgium, Brazil, Egypt, Greece, Mexico, Peru, Spain, United Kingdom, Uruguay, Yugoslavia.

Special conditions concerning boards of directors are also required by:

Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Poland, Portugual, Romania, Sweden, Union of Soviet Socialist Republics, United States of America.

On (d). The captain must possess the nationality of the country:

Argentina, Belgium, Brazil, Colombia, Denmark, Ecuador, Finland, Greece, Italy, Netherlands, Peru, Portugal, Spain, Sweden, Turkey, United Kingdom, United States of America, Uruguay, Yugoslavia.

Certain countries require all or some of the officers to possess the nationality of the country:

Belgium, Brazil, France, Greece, Haiti, Portugal, Romania, Turkey, United Kingdom, United States of America, Yugoslavia.

Some other countries are not concerned with the nationality of officers but require them to hold national diplomas, which leads to the same result in practice (Finland, Germany, Netherlands, Norway and others).

A proportion of the crew must possess the nationality of the country in-

Argentina (1/4), Brazil (2/3), Chile (1/3), Colombia (1/2), France (proportion fixed by order of the Minister in charge of the merchant marine), Greece (3/4), Haiti (1/2), Italy (2/3), Norway (1/2), Panama (1/4), Peru (3/5), Poland (3/4), Portugal (2/3), Romania (1/3), Spain (4/5), Sweden (2/3), United States of America (3/4), Yugoslavia (2/3).

Germany, the Netherlands, the United Kingdom, the United States of America and other countries are not concerned with the composition of the crew.

The International Law Commission might consider whether it can state 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 vessel 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.

/2. Penal

2. Penal jurisdiction in matters of collision (Paragraph 187)

The Commission thought it should disregard, for the time being, problems of international law raised by collision, but should determine which courts are competent to try criminal cases arising out of collision. It felt that, in view of the world-wide repercussions of the Lotus case, it was bound to deal with this matter. It asked the Rapporteur to study the subject and propose a solution to the Commission at its next session.

The need for drawing up uniform rules of competence for determining the penal consequences of a collision was clearly shown at the time of the collision between the Lotus and the Boz Kourt on 2 August 1926. Because a Turkish subject had lost his life in the accident, the officer of the watch on board the Lotus, who was of French nationality, was arrested by the Turkish authorities and sentenced by the Turkish criminal court to a term of imprisonment and a fine. The French Government protested and brought the dispute before the Permanent Court of International Justice at The Hague, which in its judgment of 7 September 1927 upheld the contention of the Turkish Government and decided by 7 votes to 5[1/] that no rule of international law concerning collision gave exclusive criminal jurisdiction to the State whose flag was flown by the offending ship if the collision involved ships belonging to different States.

This decision makes ships' officers liable to prosecution in a great variety of countries. Furthermore, if the captain is arrested, the ship itself is arrested for the purposes of local inquiry, and if he is imprisoned the ship is immobilized till arrangements have been made to replace him. Thus, quite apart from inconsistencies of judgment, the security of navigation and international trade is prejudiced (International Maritime Committee, Paris Conference, 1934, page X) The International Maritime Committee, at the request of the International Labour Office, worked out a draft convention which was intended to put an end to this situation. The question was first placed on the agenda of the

/Antwerp Conference

1/ The judgment was given by six judges for and six against, the President taking use of his casting vote. Judge John Bassett Moore, however, stated in a dissenting opinion that he agreed with that part of the Court's judgment which held that there was no rule of international law giving exclusive jurisdiction in such a matter to the country of the offending ship.

Antwerp Conference of 1930, which set up a sub-committee of which M. Leopold Dor was appointed rapporteur. This sub-committee submitted a preliminary draft to the Oslo Conference of 1933. The national associations sent in reports, and after discussion the question of the need for a convention was decided in the affirmative. A commission was appointed to prepare a draft convention. The draft, which consisted of eight articles, was worded as follows:

"Article 1. 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, in respect of such collision, before the courts of the State of which he is a citizen or of which the ship was flying the flag at the time of the collision.

"Article 2. The preceding provisions shall in no way prejudice the jurisdiction which may be vested in the judicature of the contracting States in respect of collisions occurring within the territorial waters of such States.

"Article 3. The preceding provisions shall in no way prejudice the rights which may be vested in the public authorities of the State whose port both vessels or either of them have made after the collision to order such means of investigation as they deem necessary.

"Article 4. In the case provided for in the preceding articles, no forfeiture or arrest of the vessel shall be ordered as a penal sanction by the local authorities.

"The latter, however, may detain the ship for the purpose of the necessary investigations, provided, however, that such vessel shall not be delayed for more than eight days from the date of arrival at the port where such investigations have been ordered.

"Article 5. The national legislation of the State whose penal or disciplinary courts have jurisdiction shall determine the courts or the authorities before which public or disciplinary action is to be taken and the procedure to which such action will be subject.

"Article 6. These provisions shall in no way impair the disciplinary powers of the administrative authorities of the State of which the master or the person in the service of the ship is a subject.

"Article 7.

"Article 7. In the event of a conflict of jurisdiction between the courts of various States, each of the States signing this convention shall be at liberty to submit the conflict to the Permanent Court of International Justice. The latter shall settle the conflict with due regard to the terms and the spirit of the convention and also to the general principles of international law.

"Article 8. This convention does not apply to vessels of war, nor to Government-owned ships exclusively employed on public service."

After hearing comments arising out of the examination of the draft, the Conference unanimously adopted the following resolution proposed by Mr. Louis Franck:

"This Conference records its unanimous approval of the principle that in cases of a collision upon the high seas no criminal or disciplinary proceedings arising out of such collision should be permissible against the captain or any other person in the service of the ship except in the courts of the State of which the captain or such other person is a national or of which his ship was flying the flag at the moment of collision, this being the principle expressed in Article 1 of the draft convention laid before the Conference;

"Before making any further pronouncement, the Conference instructs the Sub-Committee to make a report to the International Maritime Committee upon the various matters raised in discussion during the debate and in particular to take account of the desires expressed by several members to the effect that the whole responsibility for criminal and disciplinary action should in all cases of collision be left to the country to which the ship belongs;

"The Conference is further of the opinion that the Sub-Committee should in this investigation obtain the considered views of the competent authorities and organizations interested in the subject, and particularly of the organizations representing officers of the mercantile marine;

"The Conference thereupon passed to the next item on the agenda."

/The international

The international committee to which the Oslo Conference had referred the question met in Paris in 1936. The committee was of the opinion that the discussion in Oslo had demonstrated the great difficulty of reaching agreement on a text as extensive as that of the draft. It was apparently recognized in most countries that in the event of a collision on the high seas the master could be prosecuted only in the courts of the State whose flag the vessel was flying at the time of the collision. In that respect there existed a sort of international practice. This practice was expressed in Article 1 of the draft. In the Committee's view, the adoption of this text by an international conference would achieve the goal aimed at also by the International Labour Office and would fully meet the wishes expressed both by shipowners and by professional organizations of seafaring men. The principle embodied in it would become international law and fill the gap which the Permanent Court of International Justice had revealed when it handed down its judgment in the Lotus case. Accordingly the committee proposed that the draft should be limited to Articles 1 and 8, the first paragraph of Article 4, however, being retained in order to prevent the molesting of a ship in a foreign port by police action or investigations in respect of a collision on the high seas. This article became Article 2 of the new draft, and Article 8 of the old draft appeared as Article 3 of the new.

The draft submitted to the Paris Conference was as follows:

"Article 1. 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 citizen or of which the ship was flying the flag at the time of the collision.

"Article 2. In the case provided for in the preceding article, no forfeiture, arrest or detention of the vessel shall be ordered as a penal sanction by the local authorities.

"Article 3. This convention does not apply to vessels of war, nor to Government-owned ships exclusively employed on public service."

The committee took pains to obtain the views and comments on the draft convention of the competent authorities interested in the question, and in particular those of the organizations representing officers of the merchant marine.

/The following

The following organizations gave an entirely favourable opinion:
Association internationale des officiers de la marine marchande, Antwerp.
Belgium: Union des officiers de la marine marchande belge, Antwerp.
Denmark: Den Alm. Dansk Skibsførerforening (Danish Shipmasters' Association),
Dansk Styrmandsforening (Danish Ship's Officers' Union).
Great Britain: Navigators' and Engineer Officers' Union,
The Mercantile Marine Service Association.
Italy: La Corporation des gens de mer du personnel de l'aeronautique.
Netherlands: Vereeniging van Nederlandsche Gezagvoerders en Stuurlieden ter Koopvaardij (Mercantile Marine Masters' and Officers' Union).
Yugoslavia: Mercantile Marine Captains' and Officers' Association.

The Paris Conference of the Maritime Committee decided to delete the third article as unnecessary, to alter the wording of the first article slightly, and to add an article on collisions in territorial waters. The last-named does not come within the scope of the present report. Following several amendments to this effect, the concurrent jurisdiction of the courts of the State of which the persons responsible was a citizen was deleted from Article 1. The text of the two articles unanimously adopted by the Paris Conference is as follows:

"Article 1. 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 of which the ship was flying the flag at the time of the collision or other accident of navigation.

"Article 2. In the case referred to in Article 1 no arrest or detention of the vessel, even for purposes of investigation, shall be ordered by authorities other than those of the vessel's flag."

The International Maritime Committee in 1937 requested the Belgian Government to convene a diplomatic conference in order to have the principle advocated in the resolution adopted by way of convention. For reasons having nothing to do with the merits of the proposal, the Belgian Government has not yet complied with this request.

/As far as

As far as the Rapporteur is aware, the Court's decision in the Lotus case has not encouraged other States to prosecute in respect of collisions on the high seas officers or members of the crews of ships sailing under a foreign flag.

The Rapporteur does not think he will be guilty of disrespect for the authority of the Court if he points out that, in view of the very slender majority supporting the judgment in the Lotus case, there remain certain doubts whether the judgment really represented the law existing at the time when it was given. Be that as it may, the Rapporteur considers that the criticisms aroused by that judgment[1/] and the result of the thorough studies to which the Court's decision gave rise justify the conclusion that the exercise of concurrent national jurisdictions in the event of a collision on the high seas no longer concords with present legal opinion in the maritime countries of the world. A regime not deriving from treaty obligations or customary law and based purely on general principles cannot rank as "international law" if it is generally recognized as impracticable. The reports and records of the International Maritime Committee leave, indeed, no doubt on this last point. Among the many authors who have criticized the Court's decision we will cite only the following.

Gidel, I, page 281:

"The solution is an impracticable one. In fact the Lotus case shows the advisability of governing competence in the matter of collision by definite rules (conventions or codification) and, perhaps better still, of giving jurisdiction in this matter to special courts."

Alb. de La Pradelle, La mer, V, page 330:

"In fact, where two ships of different nationalities collide we have to state which of the two laws represented by their flags shall apply. There is no doubt here: in criminal law, with which we are here concerned, and, in my opinion, even in civil law, it is the law of the ship which caused the collision".

/Charles de Visscher,

1/ "No arbitral award or judgment handed down by the Permanent Court of International Justice has aroused so many or such violent protests or given rise to so many arguments and comments as the judgment given on 7 September 1927 in the Lotus case", Maurice Travers, Revue de droit international, 1928, page 406.

Charles de Visscher, Revue de droit international, 1928, page 73 et seq.:

"A recent case submitted to the Permanent Court of International Justice which has received much publicity, that of the Lotus, has clearly shown up the gaps in positive international law and the difficulty which the highest international tribunal has found in determining the law to be applied. It would perhaps be hard to find in all the annals of international arbitration a judgment betraying such profound disagreement between the judges (73). The Court's ruling leads to consequences that show the weakness of its system and entail unfortunate practical results. The Court's decision has been subjected to immoderate criticism. Public opinion has not sufficiently taken into account the extreme complexity of the case. It is understandable, however, that the judgment should have aroused a certain amount of feeling in maritime circles (81). The case brought before the Court offered it a chance to give some guidance towards the solution of conflicts of criminal jurisdiction by basing its decision on precedents which in our opinion were clear enough. The Court missed that chance". (82)

Pearce Higgins, Recueil des cours, Académie de droit international, 1929, V, page 47; see also The Law of the Sea, 1943, page 203:

"In spite of the opinion of the majority of the judges in the Lotus case, we believe that the opinion expressed by Lord Finlay is more in accordance with the general practice of States in the matter: 'Criminal jurisdiction for negligence causing collision is in the courts of the country of the flag, provided that, if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the courts of his own country'".

Brierly, The Law of Nations, 1949, page 222:

"Lord Finlay's view accords with the understanding of maritime law which has generally been accepted hitherto, and maritime organizations have expressed their concern at the judgment".

Fischer W. Williams, Revue generale de droit international, 1928, page 369:

"The majority of the Court makes no mention of these practical considerations, which are far from being mere arguments ab inconvenienti. The point of view of the individual seems to have escaped them. In

/the majority's

the majority's reasoning everything is rigid and deductive... A mistake has certainly been made here, either in the premises or in the conclusion".

Stuyt, The General Principles of Law, 1946, page 130:

"The decision of the Court holding that in case of collision each State has a concurrent jurisdiction would, in doctrine as well as in practice, have consequences which are contrary to the international law system and maritime policy."

In these circumstances the Rapporteur proposes that the International Law Commission should adopt the following provision:

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.

/3. Safety of

3. Safety of Life at Sea (paragraphs 188,189)

The Commission ascribed great importance to the international regulations for preventing collisions at sea, which constituted 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 at its next session.

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 invites the Government of the United Kingdom to forward the International Regulations for Preventing Collisions at Sea, 1948, to the other Governments which have accepted the present International Regulations for Preventing Collisions at Sea, and also invites 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..." (Great Britain, Command Papers 7487-7519, Paper 7492, pages 6 and 8 of the English text).

This date has not yet been decided upon.

The following principles, on which there seems to be no difference of opinion, may be obtained from the International Regulations for Preventing Collisions at Sea which constitute Annex B of the Final Act of the London Conference of 1948:

(Rule 1) 1. All vessels and seaplanes upon the high seas must carry internationally-recognized lights and shapes, in order that their presence and their activities may be recognized in all circumstances.

(Rule 15) 2. All power-driven and sailing vessels must carry internationally-prescribed methods of announcing their presence in fog, mists, falling snow or heavy rainstorms.

(Rule 16) 3. Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A power-driven vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

(Rule 17) 4. When two vessels are approaching one another so as to involve risk of collision, the internationally-recognized steering and sailing rules for preventing collision must be observed.

(Rule 27) 5. In obeying and construing the internationally-recognized rules for preventing collision, due regard should be had to all dangers of navigation and collision, and to any special circumstances, which may render a departure from the rules necessary in order to avoid immediate danger.

(Rule 28) 6. When vessels are in sight of one another, a power-driven vessel under way shall, in ordering its course, indicate that course by internationally-recognized signals on its whistle.

(Rule 31) 7. When a vessel or seaplane on the water is in distress and requires assistance from other vessels or from the shore, it must use the signals internationally recognized in this connexion.

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, and also article 8 of the Convention of the same date for the unification of certain rules relating to collisions between vessels. This article 8 reads as follows:

/"After a

"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."

The first paragraph of article 11 of the first-mentioned Convention reads as follows:

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

The following principle may be based on these two articles as a principle of international law:

"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 everybody 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 the first paragraph the words "even though an enemy", which were included in the text of the Brussels Convention, were deleted because the regulations on this subject drawn up by the International Law Commission referred exclusively to times of peace.

4. Right of Approach (190)

As the rapporteur pointed out in his report submitted to the Commission last year, the only police measure allowed in time of peace by international law is the right of approach, that is to say the right to ascertain the identity and nationality of the vessel, but not the right to check nationality by examination of ship's papers and not, a fortiori, the right of search.

British doctrine and practice, particularly in the first three-quarters of the nineteenth century, were aimed at establishing the legality, if not of boarding foreign merchant vessels, at any rate of the verification of the flag. The question has declined increasingly in importance. The growth of traffic has considerably reduced cases of piracy; and wireless telegraphy has almost eliminated the reasons for which formerly vessels were induced to make material contact with each other on the high seas.

/Today

Today agreement has almost been reached on the conditions in which the right of approach may be exercised. The following opinions may be quoted.

Dupuis, Recueil des Cours de l'Academie de Droit International, 1924, I, p.145:

"Verification of the flag, if undertaken both from reasonable doubt of the nationality of the vessel encountered and in the interest of safety of navigation, is not a violation of the jus gentium, nor an offence against a State whose vessel is entitled to fly the flag; nevertheless a warship has no right to inflict, even in justifiable error, damage by forcibly stopping a vessel which does not belong to the same State as itself; thus, if a warship stops a vessel of foreign nationality to verify the flag, reparation in the form of an indemnity is due for the wrong done by unjustified arrest."

Gidel, Le droit international public de la mer, I, page 299:

"The practice described by Ortolan about the middle of the nineteenth century may at the present time be regarded as constituting positive law: the general custom practised by all maritime services in their relations with each other is that when a merchant vessel encounters a warship at sea it should immediately hoist its flags. If the warship shows its colours, that is an intimation to the other vessel that it is required to make known the nation to which it belongs by displaying its own colours.

"When suspicions of piracy rest on the vessel encountered, the warship may push the right of inquiry further and despatch a boarding vessel. The accomplishment and results of this action, however, are the responsibility of the officer who orders it."

Judge Story in The Marianna Flora: (1826) Scott, II, page 1316:

"The party, in such cases, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages."

Pearce Higgins and Colombos, The Law of the Sea, 1943, page 47:

"The subject is also dealt with at length by Ortolan, whose conclusions do not differ materially from those on which the United States Supreme Court based its judgment in the case of the Marianna Flora. Any interference with a foreign vessel on the high seas is, apart from treaty, an act for which the State may have to answer; it is allowable only if there is reasonable ground for suspicion that the character of the ship is feigned."

/Smith,

Smith, the Law and Custom of the Sea, 1948, page 47:

"This right of approach (vérification du pavillon ou reconnaissance) is the only qualification under customary law of the general principle which forbids any interference in time of peace with ships of another nationality upon the high seas. Any other act of interference (apart from the repression of piracy) must be justified under powers conferred by treaty. Provided that the merchant vessel responds by showing her flag the captain of the warship is not justified in boarding her or taking any further action, unless there is reasonable ground for suspecting that she is engaged in piracy or some other improper activity."

Oppenheim, International Law, 7th edition, page 266:

"It is a universally-recognized customary rule of international law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious. Since a suspicious vessel may still be a pirate although she shows the flag, she may further be stopped and visited for the purpose of inspecting her papers and thereby verifying the flag. It is, however, quite obvious that this power belonging to men-of-war must not be abused, and that the home State is responsible for damages in case a man-of-war stops and visits a foreign merchantman without sufficient grounds of suspicion."

Note: "This power vested in men-of-war has given occasion to much dispute and discussion, but in fact nobody denies that in case of grave suspicion it does exist. See Twiss I, 193, Hall, 81, Fiore II, 732-736, Perels, 17, Taylor, 266, Fauchille, 483 (40)."

Fenwick, International Law, 3rd edition, page 324:

"In the effort to suppress piracy, the public vessels of a State have the right to stop and visit a suspicious vessel for the purpose of verifying her papers and the flag she is flying, subject, however, to payment of damages in case the suspicion proved to be unfounded."

/Fyde,

Hyde, International Law, 1945, I, page 1316:

"The contingency furnishing conditions necessary to justify such action would, however, appear to be unlikely to arise with any degree of frequency."

Certain authors have taken the view that the right of search is justifiable if there is reasonable ground for suspicion. Nevertheless, if damages were confined to cases where there were no such ground, the right to damages for arrest might well remain illusory. The better course seems that laid down by Judge Story: if the suspicion proves to be unfounded, the warship has to pay compensation, irrespective of whether reasonable grounds for thinking that the vessel was acting unlawfully existed or not. An exception can only be made to this rule if the ship which has been stopped has itself aroused suspicion by unjustifiable acts.

The following provision could therefore be adopted:

"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."

5. Slave Trade (Paragraph 191)

The Commission requested the 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.

The Secretariat made available to the rapporteur a collection of bilateral and multilateral treaties relating to the slave trade on the high seas. These included, in particular, treaties concluded since 1814 between the United Kingdom and a large number of States with a view to the repression of the slave trade. These documents are of great interest, but, in view of the task the International Law Commission has assumed, it should devote particular attention to 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, and to the multilateral conventions concluded thereafter.

As the rapporteur has already noted in his 1950 report, the General Act of 1890, to which a large number of States were parties, deals with the slave trade both on land and on sea. The provisions relating to the traffic at sea are included in Chapter III. A suspect area is delimited. In this area, police measures are confined to vessels of a tonnage below 500 tons. The various governments undertake to adopt a series of measures calculated to prevent the abuse of their flags. Only verification of nationality by verification of ship's papers is allowed, and cruisers are not entitled to do more than that. Article XLV provides expressly as follows: "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...". Article XLIX provides as follows: "If, in performing the acts of supervision mentioned in the preceding articles, the officer in command of the cruiser 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 Power whose flag has been used." The French Chamber of Deputies refused to ratify this treaty, being of the opinion that the reciprocity provided for under it would be ineffective because of the alleged predominance of the British Navy over others. In those circumstances, it was feared that the major role played

/by the British

by the British Navy in the work of repression would actually serve to establish the maritime and commercial supremacy of Great Britain. France therefore ratified the treaty only with the reservation that its ratification should not extend to any of the articles dealing with verification of nationality. This matter would continue to be settled by the provisions and arrangements in force.

Article 11 of the Convention revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890, signed at Saint-Germain-en-Laye, September 10, 1919, by Belgium, the British Empire, France, Italy, Japan, Portugal and the United States of America (League of Nations Treaty Series, vol. VIII, 1922, pages 27 and 35), provides that the Signatory Powers exercising sovereign rights or authority in African territories will 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 will, in particular, endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea. Article 13 states that the General Act of Berlin and the General Act of Brussels of 1890 shall be considered as abrogated, in so far as they are binding between the Powers which are parties to the new Convention.

The Slavery Convention, signed at Geneva on 25 September 1926, contains the following articles:

"Article 3. 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 17 June, 1925 relative to the International Trade in Arms, with the necessary adaptations."

A Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War was signed at Geneva on 17 June 1925. It provides that when a warship belonging to one of the High Contracting Parties encounters, within the maritime zone but outside territorial waters, a presumed native vessel of under 500 tons burden, flying the flag of one of the High

/Contracting

Contracting Parties or flying no flag, and the Commanding Officer of the warship has good reason to believe that the said vessel is flying the flag of any High Contracting Party without being entitled to do so, or is illicitly conveying articles covered by the Convention, he may stop the vessel in order to verify its nationality by examining the document authorizing the flying of the flag, but no other document. Unless the right to fly the flag can be established, the vessel may be conducted to the nearest port in the maritime zone where there is a competent authority of the Power whose flag has been flown. If the authority entrusted with the enquiry decides that the detention and diversion of the vessel or other measures imposed upon her were irregular, he shall assess the amount of the compensation which he considers to be due.

In a resolution adopted on 13 May 1949 the United Nations General Assembly requested the Economic and Social Council to study the problem of slavery at its next session. The Council set up an Ad Hoc Committee on Slavery which drafted a questionnaire to be submitted to governments. One of the questions contained in this questionnaire was worded as follows: "Does the slave trade, as defined in Article 1 of the International Slavery Convention of 1926, exist in any of the territories subject to the control of your Government?" The Committee considered "that certain modifications of the International Slavery Convention of 1926 appeared to be necessary and that it might prove desirable to draft a new convention broader in scope or, alternatively, to draw up an instrument supplementary to the existing Convention". The Committee studied a proposal to the effect "that any such new instrument might include provisions under which the slave trade on the high seas would be treated as piracy under international law" (paragraph 29). It was the Committee's view, however, "that it must allow adequate time for the interpretation and evaluation of the information secured for a survey... before being able to make definite recommendations on measures to combat these evils" (paragraph 33). A further meeting of the Committee was called for April 1951.

The International Law Commission will have to consider whether it sees fit in the circumstances to formulate a number of general principles on the subject which might be supposed to have commended themselves to all States.

First, it may be asked whether the slave trade should be regarded as an act of piracy, as suggested earlier by the League of Nations Temporary Committee on Slavery.

/The rapporteur

The rapporteur considers that this question should be answered in the negative. If the slave trade were regarded as an act of piracy, any vessel 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. Part at least of the ground for internationalizing the crime of piracy is that the acts occur on the high seas and that in many cases there are no relations between the pirate and a given country. The slave trade, on the other hand, 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 -- does not appear appropriate.

Secondly, it will have to be decided whether the right of control should be granted over the whole extent of the high seas or only in a special zone, as provided for in the General Act. Inasmuch as the slave trade is only carried on in certain parts of the world, it would seem preferable to follow the 1890 example. Further consideration, however, should be given to the question whether the delimitation of the zone today should be that adopted in 1890. The rapporteur has no information concerning the areas in which the slave trade is still carried on.

A third question which arises is whether it is sufficient to recognize the right to examine a ship's papers. The General Act contains the following provision (Article XLV):

> "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."

Similarly, paragraph 5 of Annex IV to the 1925 Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War 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." In the circumstances there would appear to be no justification for granting a right of search exceeding the limits laid down in these conventions. With this in mind the rapporteur submits the following principles to the Commission as a basis of discussion:

/Article 1

Article 1

(See Article XX of the General Act)

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

(See Article 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, 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

(See Article XXIII)

The aforesaid right shall be limited to vessels of tonnage less than 500 tons.

Article 4

(See Article 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

(See Article XXVI)

The signatory States engage to adopt all measures necessary to

/facilitate

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
(See Article 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
(See Article 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
(See Article 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

Article 9
(See Article 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
(See Article 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
(See Article 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.

6. Submarine Telegraph Cables (Paragraph 192)

The Commission accepted the principle that all States are entitled to lay submarine telegraph and telephone cables on the high seas, and considered that the same principle should also apply to pipelines. The Commission requested the special rapporteur to include proposals to that effect in his report for the next session, and at the same time to examine the question of protective measures.

The right to lay pipelines in the high seas does not appear to give rise to difficulty; the same principle could be adopted as for telegraph cables. For the continental shelf, see page 63 of the report.

Thought was first given to the problem of protecting submarine cables in the second half of the eighteenth century.[1] Representatives of governments passed on the subject for the first time at the International Telegraph Conference at Rome in 1871; the question was also discussed at the Brussels Conference of 1874 on the regulation of the laws and customs of war.

In 1879 the Institut de Droit international adopted the following resolution with regard to a report by Rossult:

"It would be highly desirable if all States would by agreement declare that the destruction or injury of submarine cables on the high seas is an offence against the ius gentium, and establish precisely the criminality of the act and the penalties applicable thereto; on the latter point as great a degree of uniformity should be attained as is compatible with the variety of penal codes".

"The right to arrest persons guilty, or presumed to be guilty, of an offence might be granted to warships of all nations under conditions laid down by treaty, but the right to try such persons should be reserved to the national courts of the captured vessel."

In 1881 the Hague Conference on North Sea Fisheries expressed the "urgent wish that governments should take effective steps to prevent injury to submarine cables by fishermen".

/After preliminary

1/ For a detailed historical review, see Fauchille, I, part 2, paragraph 4329, and the Annuaire de l'Institut de droit international, 1927, I, page 172.

After preliminary conferences in 1881 and 1883, a conference was held in Paris in 1884 and resulted in a Convention for protection of submarine cables in time of peace which was signed by 26 States on 14 March. The Convention did not go as far as Renault's proposal, referred to above, especially with regard to the right to stop vessels and the institution of uniform penalties.

The Convention came into force on 1 May 1884 and was ratified by the following States: Argentina, Austria-Hungary, Belgium, Brazil, Costa-Rica, Denmark, Dominican Republic, France, Germany, Greece, Guatemala, Italy, Netherlands, Norway, Portugal, Romania, Russia, El Salvador, Serbia, Spain, Sweden, Turkey, United Kingdom, United States of America and Uruguay.

The Convention was signed, but not ratified, by Colombia and Persia.

The following States acceded to the Convention: Czechoslovakia, Japan, Morocco, the Netherlands on behalf of the Netherlands East Indies, Curacao and Surinam; Poland, Tunisia and the United Kingdom on behalf of Canada, Cape Colony, Natal, Newfoundland, New Zealand, New South Wales, Tasmania, South West Australia, Queensland, South Australia and Victoria.

The following are the main provisions of the Convention. Article II states that the breaking or injury of a submarine cable done wilfully[1] or through culpable negligence shall be a punishable offence unless the persons guilty thereof have become so simply with the legitimate object of saving their lives or their vessels. Article V contains rules for the protection of vessels engaged in laying or repairing cables. Article VII provides that owners of vessels who 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. Under Article VIII the courts competent to take cognizance of infractions of the Convention are those of the country to which the vessel on board of which the infraction has been committed belongs. Under Article X officers commanding vessels of war or vessels specially commissioned for that purpose may prepare reports when they have reason to believe that an infraction has been committed. Under Article XII the High Contracting Parties engage to take or to propose to their respective legislative bodies the measures necessary to secure the execution of the Convention, and especially to cause the punishment of such persons as may violate the provisions of certain articles of the Convention.

/In 1902

1/ An interpretation of the word "wilfully" was given in a declaration dated 21 May 1896.

In 1902 the Institut de Droit international again studied the question of submarine cables; since however only the wartime aspect of the problem was dealt with on that occasion, the discussions lie outside the scope of this report.

In 1913 a conference was convened in London on the initiative of the British Government. Cases of damage to submarine cables by fishermen had become very common, so that it was desirable to study the problem afresh. The principal European maritime Powers were represented at the Conference: Belgium, Denmark, Germany, France, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. The Conference adopted a number of resolutions[1], the principal contents of which are as follows: Resolution I lays down the regulations governing the construction of implements used in fishing. Resolution II states that it is desirable for each of the States concerned to have arrangements for inspecting vessels of its nationality for faulty construction of such implements. Resolution III simplifies 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 recommends the education of seamen with a view to reducing the risks. Resolution V deals with the exchange of technical information.

The Conference then adopted a number of recommendations relating, inter alia, to the construction and maintenance of trawling signals.

At the end of the Conference one of the representatives proposed the insertion of the words "and telephonic" after the word "telegraphic" in the resolutions. The Conference did not deem this necessary, since it considered that whenever reference was made to telegraphic cables, the term applied as a matter of course also to telephonic cables.

In 1925 the International Telegraphic Conference in Paris "expressed the opinion that the governments concerned should do their utmost to arrange for the strict application of the resolutions of the Conference of London in 1913".[2]

/In 1927 .

1/ See Cmd. 7079, 1913.

2/ See Hackworth, Digest of International Law, Vol. IV, para.349, page 246.

In 1927 the problem was again discussed by the Institut de Droit international at its conference in Lausanne. According to Mr. F.K. Coudert's report[1], fishermen or seamen would often cut a cable they had brought to the surface rather than sacrifice an anchor or fishing implement and have to comply with the necessary formalities in order to obtain compensation for the gear sacrificed.

In accordance with this report the Institut unanimously adopted the following three resolutions:

"1. The Institut recommends that all States should 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.

"2. The Institut recommends that all States should 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.

"3. The Institut recommends that all States should agree to achieve, in the repression of offences or quasi-offences committed with respect to submarine cables, the uniformity recommended in 1879 by Professor Renault."

The report by Mr. Coudert -- whose place had been taken during the discussion by Mr. Basdevant -- contained yet a fourth resolution:

"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."

It was first of all pointed out that the words "it is necessary" would be too peremptory; it was therefore decided to discard them and also to change the wording of resolutions 1, 2 and 3 so as to make each resolution begin with the words "The Institut recommends". It was later considered that the question dealt with in the fourth resolution was extremely difficult, and the Conference accordingly decided by a unanimous vote to delete that resolution.[2]

/Submarine

1/ Annuaire 1927, Vol.I, p.177.

2/ Annuaire 1927, Vol.III, pp.296-299.

Submarine cables were also referred to in the general resolutions concerning navigation on the high seas which were adopted at the same session. Two of these resolutions were worded as follows:1/

"1. The Institut de droit international declares that the following principles derive from the concept of the freedom of the seas: 1. Freedom of navigation on the high seas, under the exclusive control (in the absence of any convention to the contrary) of the flag State; 2. Freedom to fish in the high seas, subject to the same conditions; 3. Freedom to lay submarine cables in the high seas; 4. Freedom of flight above the high seas.

"2. Considering that it would be appropriate to increase the guarantees of security of navigation for fishermen and the protection of submarine cables by requiring: 1. warships and merchant vessels to avoid certain routes; 2. submersible vessels of both kinds to sail only on the surface in certain specified areas, the Institut brings these questions to the notice of governments and recommends that the London Convention of 20 January 1914 should be supplemented on these lines."

Although several of the provisions of the 1884 Convention and of the resolutions of the Institut de droit international can only be incorporated in special conventions between the States concerned, the rapporteur considers that certain of the provisions relating to peace time could be borrowed for incorporation in the regulations to be adopted by the Conference: these provisions could be extended to cover pipelines. The rapporteur ventures to propose the following provisions as a basis of discussion:

Article 1.

All States may lay telegraphic cables and pipelines.

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 embarrassment of telegraphic or telephonic communication, or of a submarine pipeline, shall be a punishable offence. This provision

/shall not

1/ Annuaire 1927, Vol.III, p.339.

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.

(See Article II of the 1884 Convention).

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.

(See Article IV of the Convention).

Article 4

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 or pipeline, shall be indemnified by the owner of the cable or pipeline.

(See Article VII of the Convention).

Article 5

The courts competent to take cognizance of infractions of these rules shall be those of the country to which the vessel on board of which the infraction has been committed belongs.

(See Article VIII of the Convention).

Article 6

When the officers commanding a vessel of war shall have reason to believe that an infraction of these rules 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.

(See Article X of the Convention).

Article 7

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.

(See resolution I of the Institut de droit international, 1913).

7. Resources of the sea (Paragraph 193).

The Commission requested the 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.

The protection of the resources of the sea forms the subject of a large number of conventions between the states concerned; a brief review of these regulations is contained in the report which the rapporteur had the honour to submit to the Commission in 1950. Legislation of this type has the great disadvantage that an agreement concluded between two or more interested States may become ineffective should one or more other States refuse to conform to it. To generalize the measures provided in bilateral or multilateral treaties by extending them to States which were not parties to those treaties, and would thus be bound by agreements concluded inter alios, would not seem to be compatible with general legal principles. Moreover, the subject does not lend itself to general and uniform codification, in view of the variety of circumstances in which protection must be afforded in the various parts of the world, and in view of the different types of resources requiring protection.

It cannot be disputed that the coastal State is pre-eminently justified in enacting laws to protect the resources of the adjacent sea; nor can it be disputed that, to be effective, such legislation should be applicable over an area wider than its territorial waters. One of the obstacles to the acceptance by other States of the legislation enacted for that purpose by the coastal State is the fact that such unilateral legislation by the coastal State with respect to a portion of the high seas does not offer sufficient guarantees: it does not in practice always take into account the general interest of all who use those waters, and it sometimes favours intolerably the special interests of the coastal State. If the laws enacted by the coastal State really did guarantee that they were designed only in the general interest and did not discriminate against other flags, there would be much less difficulty in making their provisions binding upon all flags.

The rapporteur requests the Commission to consider the adoption of the following regulations:

/"Every

"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."

The rapporteur wishes to emphasize that in his view a very clear distinction should be made between the establishment of a protective zone such as that envisaged above, and, the recognition of a contiguous zone for purposes of fishing rights (see page 70). The purpose 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.

Two hundred miles is the distance referred to in a number of proclamations relating to the "continental shelf" which provide inter alia, for the protection of the resources of the sea. On this basis it would perhaps be possible to reach agreement on the establishment of the regime of the continental shelf, which is outlined on page 69 of this report and would be confined to the bed and sub-soil of the submarine areas.

/It should

It should be noted that a zone of considerable extent had been envisaged previously by the conference of experts which met at Washington on 8 June 1926 to study pollution of the sea. The Conference recommended that a system of areas should be established on the coasts of maritime countries, and on recognized fishing grounds, within which no oil or oily mixtures, which constitute a nuisance, should be discharged. Each country could determine what the width of the areas off its own coasts should be in the light of climatic, hydrographical and biological conditions on the said coasts, such as prevailing winds, currents and the extent of its fishing grounds. The general rule in the case of coasts bordering the open sea was that the width of the area should not exceed 50 nautical miles but that in exceptional cases, where the peculiar configuration of the coast or other special circumstances rendered such a course necessary, the width might be extended to 150 nautical miles (Article I (a)).

The rapporteur considers that sedentary fisheries form a special subject, the regulation of which should be independent of that of the resources of the sea in general.

8. Right of Pursuit (paragraph 194)

The Commission instructed the Rapporteur to draft proposals concerning the right of pursuit, with due regard to the results of the Codification Conference held at The Hague in 1930. In the final Act of the Conference the right of pursuit forms the subject of Article 11 of the Annex to the resolution on the territorial sea. Article 11 is worded as follows:

"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." 1/

Generally speaking, this article embodies principles which are not disputed in international law. It contains only a few debatable points which should be noted:

1. At what moment can the pursuit be deemed to have begun?

It appears from the Observations on this Article in the Report of the Second Commission of the Conference for the Codification of International Law that the point was raised: at what precise moment may pursuit be deemed to have begun? "If a patrol vessel receives a wireless message informing it that an offence has been committed and sets out without having seen the offending vessel, can it be said that pursuit has already begun? The conclusion reached was that it

/cannot.

1/ Acts of the Conference for the Codification of International Law. League of Nations, C 351.M.145.1930 V-Volume I-Plenary meetings, page 169 C.

cannot. Pursuit cannot be deemed to have begun until the pursuing vessel has ascertained for itself the actual presence of a foreign vessel in the territorial sea and has, by means of any recognized signal, given it the order to stop. It was thought that, to avoid abuses, an order transmitted by wireless should not be regarded as sufficient, since there were no limits to the distance from which such an order might be given".

Pearce Higgins considers that this provision "places an increased burden on the pursuing vessel" and cannot be regarded as "a recognition of existing law".1/ Glenville Williams notes that "the Courts of the United States do not insist upon a visible or audible signal to stop".2/ It must, however, be noted that the very wide jurisdiction claimed by these authorities cannot be regarded as generally accepted.

2. Must the patrol vessel giving the order also be within the territorial sea?

The Hague Conference replied to this question in the negative. The "Observations" on this point state the following:

> "When the foreign vessel in the territorial sea receives the order to stop, the vessel giving the order need not necessarily be in that sea also. This case arises in practice in connexion with patrol vessels which, in order to police the fisheries, cruise along the coast at a little distance outside the limits of the territorial sea. In such case, when the pursuit commences, it will be sufficient if the offending vessel (or its boats, if the infringement is being committed by their means) is within the territorial sea".

In the absence of any criticism of this point, the text of the article could be supplemented along these lines.

3. Can the pursuit be commenced when the vessel is already in the "adjacent zone"?

The regulations of the Institute of International Law, approved at Stockholm in 1928, expressly recognized this right. At the Hague Conference it was not possible to reach agreement on this point. Article 9 of the Treaty of Helsingfors of 19 August 1925 is worded as follows:

/ "If a vessel

1/ Pearce Higgins and Colombos page 105
2/ Page 96.

"If a vessel suspected of engaging in contraband traffic is discovered in the enlarged zone hereinbefore described, and escapes out of this zone, the authorities of the country exercising control over the zone in question may pursue the vessel beyond such zone into the open sea and exercise the same rights in respect of it as if it had been seized within the zone."1/

On more than one occasion (The Vinces, The Pescawha, The Newton Bay) the American Federal Courts have held that the right of pursuit, where the pursuit has begun in the zone defined by the Liquor Treaties, may be read into the Treaties.2/

In The I'm Alone (1929) the United States Government argued as follows:

"In the estimation of this Government, the correct principle underlying the doctrine of hot pursuit is that if the arrest would have been valid when the vessel was first hailed, but was made impossible through the illegal action of the pursued vessel in failing to stop when ordered to do so, then hot pursuit is justified and the 'locus' of the arrest and the distance of the pursuit are immaterial provided:

"(1) that it is without the territorial waters of any other State;

"(2) that the pursuit has been hot and continuous". 3/

The Canadian Government disputed this contention:

"The first article of the convention expressed the firm intention of the High Contracting Parties to uphold the principle that the three-mile zone constituted the proper limit of territorial waters. The provisions as to search and seizure beyond the three-mile limit were explicit exceptions to that recognized principle. They did not extend the territorial limits of the United States nor confer any general jurisdiction. The very fact that the rights conferred were of a novel character appears to be a conclusive reason submitted that if any such extension had been contemplated it would have been effected by explicit agreement, as was done in the Treaty of Helsingfors of 19 August 1925 between the Baltic States."4/

The arbiters made no statement on this point.

Assuming the

1/ League of Nations Treaty Series, volume 42, page 81
2/ Glanville Williams, British Yearbook of International Law, 1939, page 92.
3/ Hackworth, II, page 705.
4/ Ibid., page 706.

Assuming the adoption of a zone adjacent to territorial waters in which the coastal State may take the necessary control measures to prevent violations of the Customslaws and regulations, it would appear logical to recognize that the pursuit may be commenced while the vessel is within that zone.

4. Can the pursuit be commenced in the case of the constructive presence of a vessel in territorial waters?

This applies to cases where the vessel itself lies outside territorial waters but causes offences to be committed therein by her own boats (the Araunah case).[1] American jurisprudence has also recognized "constructive presence" on several occasions, particularly in connexion with liquor smuggling (The Grace and Ruby).[2]

Article 11 of the rules drawn up by the Hague Conference in 1930 provides that:

> "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."[3]

No clear reply was given by the Hague Conference to the question as to what should be done in cases where vessels, anchoring outside territorial waters, use not their own but other boats to commit offences in the territorial sea.

The case presented itself in "The Henry L.Marshall" (1921), where the liquor was taken from a British vessel by small boats not belonging to the vessel and not even partially manned by men from her crew.[4] The American Circuit Court of Appeals affirmed the forfeiture of the schooner. The British Government protested against this extension of the conception of "constructive presence". On November 9, 1922, an American Treasury Order was issued to the effect that "all foreign vessels seized for unloading cargoes beyond the three-mile limit" should be released where there was no evidence that the vessels "were communicating with the shore by means of their boats or equipment."[5] It was also held in "The Marjorie E. Bachman" (1924) that it was not sufficient to bring a foreign vessel constructively within American territory that, while on the high seas,

/she trades

1/ Pearce Higgins and Colombos, page 107
2/ Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 1927, p.242.
3/ Acts of the Conference, Vol. I, page 69.
4/ Jessup, page 247.

she trades with independent small boats which put out to her from shore". "The doctrine of constructive presence, being a mere fiction of the law, should be applied with caution".1/ A number of authorities, however, consider that even if the vessel uses not its own but other boats to commit offences in foreign waters, its guilt is nevertheless established.2/ The Rapporteur feels that this opinion has not received enough support to entitle it to appear in the text to be adopted by the Commission.

An unusual case involving the right of pursuit occurred in 1947 in Indonesia (The Martin Behrman). The question there was whether a vessel, arrested in territorial waters and taken to a port for examination, could claim the right to be set at liberty if the route to that port was across the high seas. No definite answer has yet been given to this question.

If in virtue of the right of pursuit a vessel may be arrested on the high seas and taken across the high seas to a port in the territory of the captor State, the Rapporteur fails to understand why a captured vessel should be set at liberty if, after being arrested in waters subject to the jurisdiction of a captor State, it has to cross a portion of the high seas in order to be taken to another port in the territory of that State.

The Commission will have to decide whether it wishes to make a statement on this subject.

The Rapporteur submits the following article to the Commission as a basis for discussion:

"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

1/ Jessup, page 334.
2/ Massin. La poursuite en droit maritime, 1937, page 65; Hugues, A.J., 1924, page 232.

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."

9. Contiguous zones (paragraphs 195, 196)

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.

The Commission requested the Rapporteur to assemble the fullest possible documentary material on claims made by States and on the measures adopted by them with regard to their contiguous zones, such material to include information as to the various limits laid down by States.

The Secretariat has assembled fairly full documentary material on this subject. After studying this material, the Rapporteur has the following observations to make.

On page 34 of its report the Preparatory Committee of the Hague Codification Conference (1930) pointed ~~pointed~~ out:

"Most States agree, to a greater or lesser extent, that exercise of particular specified rights by the coastal State outside its territorial waters, i.e., on the high seas, can be accepted as legitimate -- at any rate, as a compromise and as the result of a convention on the subject. It seems possible to reach agreement on the matter in respect of customs and sanitary police measures and protection of the territory against dange

/which may

which may threaten it from the presence of particular ships. The rights in question do not exclude the exercise by other Powers of their rights on the high seas. On the other hand, the Government replies do not make it possible to expect that agreement could be secured for an extension beyond the limits of territorial waters of exclusive rights of the coastal State in regard to fisheries.

"Taking as a basis the precedents furnished by various treaties, the exercise of the special rights in question might be restricted to twelve miles measured from the coast."

The Preparatory Committee proposed the following Basis of Discussion (No. 5):

"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 or interference with its security by foreign ships.

"Such control may not be exercised more than twelve miles from the coast."

The Codification Conference gave a great deal of attention to this subject. The report of the Second Committee contains the following observations:

"The fixing of the breadth (i.e. of the territorial sea) at three miles was opposed by those States which maintain that there is not 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 recognise 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

to enforce its Customs regulations over a belt of sea extending twelve miles out from the coast. It need scarcely 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 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

"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 unnecessary to recognize special rights in the contiguous zone in the matter of sanitary regulations.

"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".

At the present time the various authorities recognize that nothing in international law prohibits States from exercising various types of protective or preventive jurisdiction in the waters beyond the territorial sea, without there being any question of extending the limits of the latter.1/ The rigid application of the principle of the freedom of the seas is open to criticism, as failing to protect important interests of the State against the unscrupulous exercise of a legal right.2/ "Great Britain has always resisted the doctrine of the Contiguous Zone, though some of the powers which we claimed in the Hovering Acts of the last century for the protection of the Customs are difficult to reconcile with this attitude, and the Privy Council has referred to the Zone as having been long recognized for such purposes as police, revenue, public health and fisheries."3/ It cannot be denied that the problem of the extent of the territorial sea and that of the "contiguous zones" are to a certain extent interconnected. Without going into the first problem in detail, it is perhaps desirable to recall briefly the present position with regard to the extent of the territorial sea.4/ A considerable number of States still adopt the three-mile limit, but the possibility of maintaining this point of view is being doubted in many quarters. "The irresistible tide of economic, political and social interest", states Joseph Walter Bingham, 5/ "is running against the Anglo-American three-mile doctrine.

/It is

1/ Hyde, I, page 461; Jessup, page 461.
2/ Oppenheim, I, page 453.
3/ Brierly, The Law of Nations, 1949, page 165.
4/ See, inter alios, Florio: Il mare territoriale, 1947.
5/ Proceedings of the American Society of International Law, 1940, page 62. For the defence of the three-mile limit, see Jessup, page 64, and the same author in American Journal of International Law, 1939, page 129.

It is deemed". Edwin Borchard considers that "Logically there is no apparent reason why the United States should adhere indefinitely to the three-mile rule. It is believed that it handicaps rather than benefits the United States".[1/]
In its report of 3 April 1941 the Inter-American Neutrality Committee stated that "The Uruguayan proposal to extend territorial waters to 25 miles is excessive, not only because such an extension is unnecessary as a general rule, but also because it would create duties of sovereignty for the American States which it would be difficult to fulfil; that in accordance with the existing needs of the States the undersigned consider that a general rule extending territorial waters to twelve miles would be sufficient".[2/]

An extent of four miles is claimed by Finland, Iceland, Norway and Sweden.

A large number of States have adopted six miles as the extent of their territorial waters. These are: Brazil, Bulgaria, Colombia, Greece, Iran, Italy, Lebanon, Portugal, Romania, Spain, Syria and Yugoslavia.

Mexico has fixed the extent at nine miles.

An extent of twelve miles is claimed by the USSR and Guatemala.

Chile claims an extent of fifty kilometres (1948). The 1950 Constitution of El Salvador contains the provision that Salvadorean territory includes the adjacent sea to a distance of 200 miles, including the air above that sea, the subsoil and the continental shelf. Apparently no distinction is made between territorial sea and continental shelf.

The Rapporteur proposes to revert later in this report to the question whether the problem of the contiguous zone can be solved before agreement is reached on the extent of the territorial sea.

/As regards

1/ American Journal of International Law, 1946, page 61.
2/ American Journal, Supplement 1942, page 22.

As regards Customs control,[1] a large number of States have adopted the principle of a high-seas zone, contiguous to the territorial waters, in which the coastal State exercises Customs control. The Rapporteur would point out for information that this memorandum does not mention those States which, while claiming territorial waters more than three miles in width, have not added "contiguous zones" to these waters.

A 100-kilometre zone is claimed by Chile (1948).

A zone extending twelve miles (four leagues) from the coast is claimed by Argentina, Canada, Chile, China, Cuba, Ecuador, Honduras, Iran, Italy, Saudi Arabia, Sweden, the United States of America and Venezuela.

A 10 kilometre zone is claimed by Colombia, France, Lebanon, Mexico, Syria and Tunisia.

A 10-mile zone is claimed by Norway and Yugoslavia.

A 6-mile zone is claimed by Ceylon, Finland and Poland.

A 10-kilometre zone is claimed by Belgium and Egypt.

A 4-mile zone is claimed by Turkey.

The Rapporteur considers that 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 number of States claiming a contiguous zone for sanitary purposes is very small. According to the Secretariat's data only Venezuela does so (nine miles). Nevertheless, in view of the close relationship between Customs and sanitary police measures, a contiguous zone could be admitted for sanitary as well as for Customs purposes.

As regards security, the situation is as follows:

A 100-kilometre zone is claimed by Chile (1948).

A 12-mile zone is claimed by Argentina, Ecuador, El Salvador, Honduras Iran and Venezuela.

/A 10-mile zone

1/ For the conventions concluded with a view to controlling the liquor traffic, see the Report on the High Seas submitted at the meeting in 1950.

A 10-mile zone is claimed by Greece and Italy.

A 9-mile zone is claimed by the Dominican Republic (in respect of Caldo-or Day).

A six-mile zone is claimed by France (in case of neutrality) and Poland.

A 5-mile zone is claimed by Uruguay (in case of neutrality).

The tendency to claim a contiguous zone for security purposes is less marked than for Customs control; neither the 1930 Codification Conference nor the International Law Commission in its report for 1949 pronounced in favour of the adoption of such a zone. Hence a contiguous zone for security purposes would not appear to be recognizable as an incident of international law which a State may normally invoke outside its territorial waters against foreign vessels.

The recognition of a contiguous zone for purposes of fishing rights would be even more hotly disputed. The Preparatory Committee of the Codification Conference had already noted that the replies of Governments did not make it possible to envisage an agreement on the extension beyond territorial waters of the exclusive fishing rights of the littoral State.

It is clear from the data provided by the Secretariat that special rights in this regard are being claimed at the present time by the following States:

Ecuador -- fifteen miles.

Argentina, Canada, Colombia and Portugal -- twelve miles.

Indo-China and Mexico -- twenty kilometres.

Lebanon, Morocco and Syria -- six miles.

This question is closely related to that of the protection of the resources of the sea (page 36 of this report). A satisfactory solution of the latter question would perhaps make it possible to discard claims concerning fishing rights in a contiguous zone, and also to diminish the tendency to extend the territorial sea for the purpose of protecting fishing rights.

The rapporteur has already raised the question whether the problem of the contiguous zone could be solved before agreement had been reached on the

/extent of

extent of the territorial sea. In his view the recognition of a contiguous zone extending twelve miles from the coast for Customs and sanitary purposes cannot affect the problem of the distance, up to twelve miles, over which claims relating to territorial waters should be recognized. To recognize a contiguous zone for this purpose might perhaps help to remove difficulties caused by reducing the extent of territorial waters.

According to last year's report, the International Law Commission provisionally 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. The Rapporteur proposes to clarify this idea by adopting the following text (compare Basis of Discussion Number 5 of the Preparatory Committee of the Codification Conference):

"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."

10. Sedentary Fisheries (paragraph 197)

The Commission requested the Rapporteur to study existing regulations governing sedentary fisheries and to report on his findings.

There are a number of sedentary fisheries in maritime areas which, although lying close to the shore, nevertheless from the legal point of view form part of the high seas. This raises a twofold problem:

(1) may a State regulate sedentary fisheries unilaterally?

(2) may a State reserve sedentary fisheries for its own subjects?

If the régime of the continental shelf as proposed in this report were applied to such sedentary fisheries, these two questions should be answered affirmatively, since the actual point at issue is the exploitation of the bed of the sea, which forms part of the continental shelf.

/If, however,

If, however, disregarding the régime of the continental shelf, the régime proposed in this report for the resources of the sea were to be applied to sedentary fisheries, the first question would have to be answered in the affirmative and the second in the negative.

The question of sedentary fisheries could, however, be dealt with independently both of the continental shelf and of the régime of the resources of the sea. The following are the results obtained from a study of the regulations governing the most important sedentary fisheries.1/

Ceylon

Pearl fishing has been practised for many centuries in the waters off the coast of India. The pearl banks which extend from 6 to 21 miles seawards from the coast have long been regulated by the authorities of the coastal State. As early as 1811 a colonial law (Regulation No. 3 for the Protection of H.M. Pearl Banks of Ceylon) authorized the arrest and conviction of any vessel found within, or standing on and off in the proximity of, the limits of the pearl banks.

A judicial decision on the subject was handed down in 1903. It reversed a judgment in which a trial judge held that the banks, being more than three miles from the coast, should be governed by the régime of the high seas. The appellate judge took the opposite view and decided that the banks did not partake of the nature of the high seas. His chief ground was that the offence had been committed in Palk's Bay, an arm of the sea almost completely land-locked and hence under a jurisdiction excluding the normal three-mile rule; he stated that British sovereignty over that maritime area had been established from time immemorial and had never been contested.2/ In an article entitle "Those is the Bed of the Sea?", published in the British Year Book of International Law for 1923, Sir Cecil Hurst pointed out that both the Gulf of Manaar and Palk's Bay, the two great bays which divide India from Ceylon, would probably be claimed as part of the national territory and not part of the high seas at all. Even if it were not so, the claim to ownership of the pearl banks in those bays could, he argued, be based on long usage and uncontested enjoyment.3/

/Fisheries

1/ Much of the material contained in the following pages was made available to the Rapporteur by Mr. Manley Hudson. The Rapporteur wishes to express his gratitude to Mr. Manley for his kind collaboration.

2/ Oidel, I, 493 et seq.

3/ Page 41.

Fisheries in these waters are regulated by two ordinances, the Chanks Ordinance of 20 June 1891, as amended by Ordinance No. 2 of 1929, and the Pearl Fisheries Ordinance of 12 February 1929.

Article of the Ordinance of 1891 states the following:

"It shall not be lawful for any person to fish for, dive for or collect chanks, bêche-de mer, coral or shells in the seas within the limits defined in Schedule B except in accordance with the rules for the regulation, supervision, protection or control of such operations which may be made by the Governor and published in the Gazette, and every person who shall fish for, dive for, or collect, or who shall use or employ any boat, canoe, raft or vessel in the collection of chanks, bêche-de-mer, coral or shells in the said seas except in accordance with such rules shall be guilty of an offence punishable with simple or rigorous imprisonment for a period not exceeding six months, or with a fine not exceeding one hundred rupees, or with both; and every boat, canoe, raft or vessel so employed as aforesaid, together with all chanks, bêche-de-mer, coral or shells unlawfully collected, shall be forfeited;

"Provided that

"a. Nothing in this section contained shall prevent any person from collecting coral or shells from any portion of the said seas in which the water is of the depth of one fathom or less;

"b. It shall be lawful for the Governor from time to time or at any time, by notification in the Gazette, to alter the limits defined in Schedule B, or exempt any portion or portions of the seas within the said limits from the operation of this Ordinance;

"c. Rules made under this section shall not be construed so as to permit any person to fish for, dive for, or collect chanks, bêche-de-mer, coral, or shells within the area specified in Part I of the First Schedule to the Pearl Fisheries Ordinance.

"2. All rules made under this Ordinance shall be laid, as soon as conveniently may be, on the table of the State Council at two successive meetings of

/the Council

th[illegible], and shall be brought before the Council at the next subsequent sitting held thereafter by a motion that the said rules shall not be [illegible] approved, and if upon the introduction of any such motion, or upon any subsequent thereof, the said rules are disapproved by the Council, such rules shall be deemed to be rescinded as from the date of such disapproval, but without prejudice to anything already done thereunder; and such rules, if not so disapproved, shall continue to be of full force and effect. Every such disapproval shall be published in the Gazette".

Schedule B is worded as follows:

"Eastward of a straight line drawn from a point six miles westward of Talaimennar to a point six miles westward from the shore two miles south of Talaiville".

Article 4 of the Ordinance of 1925 states that:

"1. No person shall fish, or dive for, or collect pearl oysters on or from any pearl bank, or use a vessel for any such purpose, unless he holds a licence (in this Ordinance referred to as a pearl fishery licence) authorizing him so to do".

Article 8.

"If any pearls or pearl oysters are found in the possession, power or control of any person on a pearl bank, or proceeding from a pearl bank to the shore, or disembarking or immediately after having disembarked, on coming from a pearl bank, and there appears to the Magistrate to be prima facie evidence that the pearls or pearl oysters were obtained in contravention of the provisions of this Ordinance, then such pearls or pearl oysters shall be forfeited to the Government unless satisfactory evidence is given that they were lawfully obtained, and that person shall be guilty of an offence unless satisfactory evidence is given that he was not personally concerned in the unlawful obtaining thereof and that they were not dishonestly retained in his possession, power or control with the knowledge that they had been unlawfully obtained".

The Ordinance delineates as a pearl bank an area between the three-and five-fathom lines on one hand and the 100-fathom line on the other hand. The 100-fathom line runs at a distance from 4 to 16 miles from the mainland and islands of Ceylon.

/Australia

Materials

The pearl and beche-de-mer fisheries off the coasts of Queensland and Western Australia are regulated by two complementary series of statutes. One is the private legislation of Queensland and Western Australia; the other is federal legislation applicable beyond the territorial limits of the states. These statutes are summarized in the following paragraphs.

1. Queensland. The original "Pearl-shell and Beche-de-mer Fishery Act of 1881" (45 Vict. no. 2), passed by the colonial legislature of Queensland and assented to on 15 September 1881, has been extensively amended by amendment acts of 1886, 1891, 1893, 1896, 1898, 1913 and 1931. The original act requires in section 5 the licensing of all boats engaged in the fishery "within the Colony of Queensland or within one league to seaward from any part thereof". Later acts, without altering this provision, speak only of "within the limits of the territorial jurisdiction of Queensland." Official texts of the several acts are collected in 3 Public Acts of Queensland, 1828-1936, pp. 543-565.

2. Western Australia. The Pearling Act (no. 45 of 1912), enacted by the local legislature of Western Australia and assented to on 21 December 1912, was in force without amendment at the end of 1948. It supersedes various earlier statutes dating from 1873. The act regulates the pearl fishery in comprehensive fashion, including provisions for exclusive control of a "pearl shell area" in Sharks Bay described in an annexed schedule as follows:

> "The area is bounded by a South-West line from Charles Point on the mainland to Cape Ronsard at the North end of Bernier Island, thence by the Western Shores of Bernier and Dorre Islands to Cape St. Cricq, thence by a straight line to Cape Inscription at the North end of Dirk Hartog Island and by its Western shore to Surf Point, thence by a straight line to Steep Point on the mainland, and from thence by the coast line to the starting place at Charles Point."

It appears from the map that this line encloses all of Sharks Bay, crossing entrances from the sea which are some 14 and 20 miles in width, and passing along the outer shores of off-lying islands. Also significant are other sections of the act limiting the eligibility for licenses of non-British persons.

/3. Federal

3. Federal legislation. The Federal Council of Australasia, forerunner of the Commonwealth Government, was established under an act of the United Kingdom Parliament of 14 August 1885 (48 and 49 Vict. c. 60). Among the powers granted to the Council was the power to legislate concerning "fisheries in Australasian waters beyond territorial limits." Under this power the Council passed "The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1888" (51 Vict. no. 1); and in the following year it passed "The Western Australian Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of 1889" (52 Vict. no. 1). The two acts, substantially the same in their provisions, undertook to extend to "Australasian waters adjacent to" the two colonies the requirements of the various local Queensland and Western Australian statutes. These waters are defined in a schedule to each act. With respect to Queensland, the waters included are all those outside the territorial jurisdiction of Queensland and

> "within a line drawn from Sandy Cape northward to the south-eastern limit of the Great Barrier Reefs, thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of nine and a half degrees south, thence in a north-westerly direction, embracing East Anchor and Bramble Cays, thence from Bramble Cays in a line west by south (south seventy-nine degrees west) true, embracing Warrior Reef, Saibai and Tuan Islands, thence diverging in a north-westerly direction so as to embrace the group known as the Talbot Islands, thence to and embracing the Deliverance Islands, and onwards in a west by south direction (true) to the meridian of one hundred and thirty-eight degrees of east longitude, and thence by that meridian southerly to the shore of Queensland."

With respect to Western Australia, the waters are all those outside the territorial jurisdiction of Western Australia and within a

> "parallelogram of which the North-Western corner is in longitude 112° 52' East, and the latitude 13° 30' South, of which the North-Eastern corner is in longitude 129° East, and latitude 13° 30' South, of which the South-Western corner is in longitude 112° 52' East, and latitude 35° 8' South, and of which the South-Eastern corner is in longitude 129° East, and latitude 35° 8' South."

/Section 19

Section 19 of the Queensland act expressly provides that

"This Act applies only to British ships, and boats attached to British ships."

An identical provision occurs in Section 2 of the Western Australia act. Texts of the two acts may be conveniently found in 18 Hertslet, Commercial Treaties, pp. 573, 576; extracts, with a map, appear in the Fur Seal Arbitration, Appendix I to the United States Case, pp. 467-469. It may also be noted that although the Federal Council of Australasia has been defunct since 1900, these acts are still in force. The present Australian Constitution continues in the Commonwealth Government the power to regulate fisheries beyond territorial limits (Section 51, x).

Tunisia

The reserved zone off the coasts of the Regency of Tunis in which the Tunisian Government regulates fishing is at present bounded as follows:

1. From the Algerian-Tunisian frontier to Ras Kaboudia, that part of the sea comprised between low water mark and a line running parallel with the coast at a distance of three miles off shore, except the Gulf of Tunis, of which that part lying within the line joining Cape Farina, Plane Island, Zembra Island and Cape Bon falls entirely within the reserved zone.

2. From Ras Kaboudia to the frontier of Tripolitania, that part of the sea bounded by a line running from the end of the three-mile line described above to the 50-m. isobath off Ras Kaboudia, and following the same until its junction with a line running north-east from Ras Ahadir.

The inclusion in the reserved zone of a considerable part of the Gulf of Gabes is justified by the existence there of indigenous fisheries in the shallows and of sponge beds controlled since time immemorial by the local government. These historic waters are bounded, not by distance in relation to a coastal line, but by depth, as this is the only factor of importance in relation to their use.

The position is that:

(A) As the indigenous fishery areas covered by title are marked even at high tide by the tips of palm stakes driven into the sea bottom, they do not extend to a greater depth than 2.5 - 3 metres;

/(B) As

(B. As sponges cannot be fished by trident at a greater depth than 18 or 20 metres, the depth of 20 metres has been chosen as the inner limit of fishing by diver and trawl, the lower depths being reserved for divers;

(C. As fishing by diver and trawl was carried out in the past at depths not exceeding 50 metres, the supervising authorities adopted that depth as the practical boundary of the Tunisian beds.

The legal arguments for this view are as follows:

There exist certificates of title, deeds of concession by the Beys, dating back to 1872 and reserving ownership of those waters to a depth of about 3 metres, irrespective of the distance from the coast, to the poor inhabitants of the region. Deeds of family succession, some of which date back to 1854, include in the real property indigenous fishery areas situated in the above-mentioned zones around the Kerkennah Islands and along the coast of the Sfax region. The Government has charge of more than 1,000 titles of this kind. These beds extend as far as 17 miles from the mainland.

In regard to greater depths and sponge fishing, the "Tunisian beds" have always been under the control of the Beys' Government. In 1948 the sovereign transferred the concession to his minister Ben Ayed, who took care to have it established by decrees in proper form notified to the consuls. These, despite the protests of the evicted concessionary, a Greek, never ventured to contest the Bey's sovereign prerogative right to dispose of the sponge beds off the Tunisian coast. The Ben Ayed concession lasted until 1869, when the financial commission set up beside the Beys to guarantee the Regency's debts to European Powers decided to farm out the sponge fishing and declare its yield to be public revenue.

In 1875 a Greek captain and a French merchant sought to contest this system as infringing the principle of the freedom of the seas, but their claims were defeated by judgment of their respective consuls.

The limitation of supervision to the 50-metre line has been in force since the farming out of the sponge fishery, and is expressly enacted in Article 29 of the Instruction of 31 December 1874 relating to the Navigation and Fisheries Service, inserted at page 115 et seq. of the 1874 volume of Acts, Decrees, Regulations and Circulars governing the services administered

/by the

by the Public Works Department of the Regency of Tunis. For 44 years this circular has been very widely distributed and known and has never been contested. Moreover, the Government's view has been upheld by judicial decisions -- for example, a judgment of the Sousse Correctional Tribunal of 11 July 1929, on appeal from a judgment of the Sfax Summary Court (justice de paix) convicting the owner of an Italian trawler caught fishing without a licence on 11 July 1928 six miles south-east of Kerkennah Buoy No. 7 at a depth of 35 metres.

Tunisia's right to regard as territorial water the whole of the zone lying between the Ras Kaboudia 50-metre line and the Tripolitanian frontier cannot therefore be seriously contested.

Other French overseas territories

Legislation has been enacted from time to time to govern pearl fisheries in various French territories, including French Oceania, New Caledonia, and French Somaliland. This appears usually to be confined to territorial waters, as in New Caledonia (Decree of 13 February 1898, 1 Recueil de legislation et jurisprudence coloniales, 1898, premiere partie, p. 71), and French Somaliland (Decree of 5 September 1899, 3 ibid. (1900), premiere partie, p. 38). A local regulation of 19 November 1901, modifying various earlier instruments, excludes aliens from the pearl banks of the Gambier Archipelago in French Oceania (5 ibid. (1902), premiere partie, p. 348).

Persian Gulf

No national legislation claiming exclusive control over any of the Persian Gulf pearl fisheries is known to exist. The fisheries, which long antedate the growth of national States in the Gulf area, are governed by customs and usages of immemorial standing. Basic among these is the concept that the pearl banks are open equally to all the peoples of the Gulf on the common understanding that traditional methods and standards will be observed. Respect for these traditional rights was guaranteed in the Saudi Arabian and other Persian Gulf offshore proclamations of 1949. Instrusion by outsiders, except possibly kinsfolk of the Gulf peoples, is resented and has been discouraged by the British, who have long exercised powers of maritime police in the Gulf. This British protection of pearling has been based on British political and naval predominance in the Gulf rather than on any legal authority.

/Ireland

Ireland

The sedentary oyster fisheries on the east coast of Ireland formerly extended beyond the three nautical-mile limit. From time immemorial to the nineteenth century the Irish authorities made rules governing the Wexford coast oyster beds. A convention was signed with France on 11 November 1867 relating to oyster dredging by French fishermen. The Sea Fisheries Act 1868 was based on this convention. One of its clauses authorized the Irish commissioners, with the approval of the Queen in Council, to make rules governing oyster dredging on any deposit or bed within [illegible] miles seaward of a line joining Lambay Island and Cainscore Point. The rules were to apply to all ships and persons "on whom they might be binding".[1/] As the 1867 convention was never ratified, the rules could only be enforced against British boats. The oyster beds were abandoned long ago and oyster fishing has therefore ceased. The Order in Council of 5 April 1869 was repealed on 5 April 1921. Fishing is now governed by the Sea Fisheries Protection Act, 1933, section 2 of which reads as follows:

"In this Act the expression 'the exclusive fishery limit of Saorstát Eireann' means that portion of the seas within which citizens of Saorstát Eireann have, by international law, the exclusive right of fishing and where such portion is defined by the terms of any convention, treaty or arrangement for the time being in force made between Saorstát Eireann and any other State".

Venezuela

The Venezuelan Pearl Fisheries Act No. 19.143 of 22 July 1935 (58 Recopilación de leyes y decretos de Venezuela, page 210) declares pearl fishing to be a national industry, to be directed and administered by the Federal Executive. Elaborate provisions are laid down for licensing ships and divers, for fixing the dates for the pearling season, and for protecting the oyster beds. The principal exploitable area is divided by Article 5 into three zones, described as follows:

"First zone: The oyster bed known as Banco de Porlamar, extending between Punta de Mosquito and Morro de Porlamar; the oyster beds situated between Morro de Porlamar and Punta de la Ballena; those situated between Punta de Mosquito and Punta de Mangle; the oyster bed known as Cabecera de Coche and its extension as far as Caribe Island.

/"Second zone:

"Second zone: The oyster beds situated west of the Macanao Peninsula, between Punta del Tunal and Punta de Arenas and extending as far as Tortuga Island, those situated in Cubagua Island; those in the shoals of the Araya Peninsula and in the Gulf of Cariaco.

"Third zone: The oyster beds situated in the area of sea between Cape Negro and the Punta de la Ballena and extending as far as Los Testigos."

These areas may possibly, in some cases at least, extend beyond the three-mile limit of territorial waters ordinarily recognized by Venezuela. Nothing in the law appears to exclude its application to foreigners.

Panama

Chapter III of Title V of the Codigo Fiscal of Panama (Official edition, 1931) deals with the power of the Government to regulate hunting and fishing. Articles 396-409 of the chapter provide for control of the pearl and mother-of-pearl fisheries. Article 409 (reproducing Article 252 of the original law of 1910 establishes zones and periods within which the taking of mother-of-pearl shell with mechanical devices is permitted, as follows:

"First zone: The zone constituted by the whole of the Great Gulf of Panama and bounded by a straight line joining Punta Mala to the Colombian frontier including the Archipielago de las Perlas and all the other islands in the Gulf. Fishing will be permitted in this zone from April to December 1918.

"Second zone: The zone between Punta Mala and Punta Mariato, including the islands lying between those points. Fishing will be permitted in this zone from January to March 1918.

"Third zone: The zone between Punta Guarida and Punta Burica, including the islands between those points. Fishing will be permitted in this zone from April to December 1918.

"Fourth zone: The zone between Punta Mariato, Jicarita Island, the Montuosas Islands and Punta Guarida, including all the islands lying within that perimeter. Fishing will be permitted in this zone from January to March 1919.

"From 1 April 1919 onwards the time-table for the zones will continue to be as aforesaid."

/The straight

The straight line to be laid down across the Gulf of Panama under the foregoing provisions is well over 120 miles in length; others of the prescribed lines, drawn to off-lying islands, are more than 50 and 50 miles long. Nothing in the law appears to exclude its application to foreigners. It is believed to be still in force, though no edition later than 1931 has been available.

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 Rapporteur proposes 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."

11. Continental Shelf (Paragraphs 198, 199, 200)

In regard to the continental shelf the International Law Commission had provisionally adopted the following views:

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 productions 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.

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 the opinion of the Commission, the sea-bed and subsoil of the submarine areas above referred to were not to be considered as either res nullius or res communis. The sea-bed and subsoil were subject to the exercise, by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation. The exercise of such control and jurisdiction was independent of the concept of occupation. There could be no question of such right of control and jurisdiction over the waters covering those parts of the sea-bed. Those waters remained under the regime of the high seas. 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.

/For works

For works and installations established in the waters of the high seas for working the sea-bed and subsoil, special security zones might be set up, but they could not be classed as territorial waters. The Commission considered that protection of the resources of the sea should be independent of the concept of the continental shelf.

The Commission requested the Rapporteur to submit at its next session a further report and to include therein concrete proposals based on the conclusions above set forth.

Since the International Law Commission adopted its report, the problem of the continental shelf was discussed at the London Conference of the International Bar Association in July 1950, on the basis of the report of a commission consisting of Dr. Enrique Garcia-Sayan, Mr. C. P. Driessen and Mr. Edward V. Saher, and also at the Copenhagen Conference of the International Law Association in August 1950, on the basis of the report of a commission of which Mr. Leopold Dor was chairman and Mr. P. R. Feith rapporteur. The principles provisionally adopted by the International Law Commission, which to a large extent reflected the ideas expressed in those two reports, found widespread support in both conferences but were criticized by a certain number of speakers. It may be of some value to consider here the objections raised in the two Associations.

The system adopted in the Copenhagen Commission's report was opposed on the ground that to give the littoral State competence in this matter would open the door to ever-increasing exactions by coastal States affecting both navigation and fishing in the waters overlying the continental shelf. This fear was expressed principally by the Scandinavian representatives. From the outset, however, the International Law Commission had borne that objection in mind and endeavoured to avoid those dangers by very precise specification of the powers to be attributed to the littoral State.

(a) One of the chief requirements was to refrain from attributing to the littoral State <u>sovereignty</u> over the continental shelf, and to give it merely a right of control and jurisdiction to the extent necessary for exploration and exploitation. By avoiding the use of the word "sovereignty" the Commission desired to escape the consequences of accepting the idea of sovereignty, especially in respect of the waters and air overlying the shelf.

/(b) In regard

(b) In regard to the waters overlying the shelf, the International Law Commission expressly provided that "There could be no question of such right of control and jurisdiction over the waters covering those parts of the sea-bed. Those waters remained under the regime of the high seas. 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." The International Law Commission thus distinguished very clearly between limitation of fishing rights in order to protect the fish, and the idea of the continental shelf. In so far as such a limitation of fishing rights is necessary, it should be studied separately. In accordance with the Commission's request, this question is dealt with in another part of this report.

(c) Works and installations established in the high seas for working the sea-bed and subsoil would not have their own territorial waters but only security zones. Navigation and fishery must not be obstructed by such works to a greater extent than that strictly necessary for the working of the soil and subsoil. It might be possible to go slightly farther in such restrictive measures and provide, in accordance with the report of the International Law Commission, that exploitation should be permitted 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".

In view of the safeguards contained in the system recommended by the International Law Commission, the objections raised at Copenhagen do not appear to be justified.

2. The opinion was expressed at the Copenhagen Conference that the proclamations were not sufficient to set up instantly a customary right. The International Law Commission has certainly not alleged that the question of a customary right has yet arisen. The Rapporteur ventures to interpret the Commission's point of view as follows. In view of the economic need to exploit as effectively as possible the resources below the sea-bed, the international community accepts, in the interest of development of the possibilities of technical exploitation, the right of the littoral State to exercise control and jurisdiction over the continental shelf under very precise conditions. This right is not one resulting from unilateral action or from proclamations of certain States. Such proclamations are not intended to do

/more than

more than give form to principles which most nations regard as principles of international law. The proclamations do not create the right; they declare it. There is no need to make the recognition of this right in each particular case depend on a proclamation.

3. At Copenhagen certain speakers refused to accept control and jurisdiction by the littoral State over the continental shelf, and held that it would be desirable to attribute to the international community natural resources which did not yet belong to the recognized domain of certain States. The International Law Commission had already discussed this argument and rejected it because of the impossibility of putting it into practice. The Rapporteur would also reject the idea that the community of States would benefit if a right in this matter were attributed to the first occupier. As the proclamation of the President of the United States has already declared, this idea would obscure the fact that effective working of the sea-bed and subsoil depends on installations situated on the territory of the littoral State. Experience in the Gulf of Mexico has shown outstandingly that the working of oil deposits under the high seas is especially lucrative if the oil can be transported direct by pipeline to the littoral State.1/

4. The Rapporteur considers that it would not be justifiable to oppose a legal system regarded as favourable to the development of the international community by elevating the rules hitherto in force to the rank of eternal and immutable principles. A legal science based upon such an idea would be likely to paralyze the growth of law. As the International Law Commission has already remarked in its report, a development beneficial to all mankind would be hindered. It is not surprising that Mr. Albert de Lapradelle will not attribute to the littoral State exclusive rights over the continental shelf, for he rejects also the sovereignty of the littoral State over its territorial sea. In this matter, however, the ideas of this eminent jurist have been refuted both by doctrine and by practice, and are hardly likely to prove attractive in connexion with the regime of the continental shelf.

5. The International Law Commission should also consider how the continental shelf should be defined.

/In its 1950

1/ Deazley, Scott and West. Installation of offshore flow lines. World Oil, 1 February 1950.

In its 1950 report the Commission adopted the view that the term continental shelf presupposed a geological formation which was sometimes not present, although the sea might be relatively shallow for a considerable distance offshore. The Commission extended the regime which it desires to accept for the continental shelf to all parts of the adjacent sea where the depth allows the subsoil to be worked. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the right were made dependent on the existence of such a shelf in the geological sense, thus excluding in certain cases the shallow water offshore which none the less allows the working of the subsoil. If the term continental shelf were taken to include the shallow water which the International Law Commission has in mind, there would be no objection to the use of the term continental shelf without qualification. It would however be necessary to ensure that no doubt remained as to the meaning of the term (see Basis of Discussion No. 1, page 124).

6. In regard to the delimitation of the continental shelf there are several differing points of view:

(a) Rights to the continental shelf might be attributed without defining or delimiting it. This was the method followed in President Truman's proclamation of 28 September 1945, although an official commentary contains the following declaration: "Generally submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf." The same view is expressed in the report submitted to the International Bar Association: "The definition of the continental shelf should express the geographical-geological conception of this formation." The report adds: "Although the end of the shelf (beginning of the continental slope) generally appears to coincide with the 200 m. isobath, this naturally is not an exact figure. The geographical-geological limit would therefore seem preferable."

(b) The rights might be attributed as far as the line which, because of the depth of the sea overlying the shelf, constitutes the extreme limit of possible working. In this system -- which has been retained provisionally by the International Law Commission -- a delimitation has been adopted, but a very flexible one which can be changed as technique develops.

/(c) The continental

(c) The continental shelf might be defined as that part of the sea bed and sub-soil "which underlies a water depth not exceeding 200 metres, with the proviso that it should be open to a coastal State to prove that its continental shelf, as a result of exceptional geological conditions, underlies greater depths." This system is recommended in the International Law Association's report. It is somewhat ambiguous: on the one hand, adoption of the 200 m. isobath means acceptance of a fixed delimitation of the continental shelf; but on the other hand an extension is admitted in all cases in which the continental shelf in the geological sense extends to a depth of more than 200 m.

(d) A delimitation of the continental shelf as far as a depth of 200 m. might be accepted, as in the Mexican proclamation.

(e) The continental shelf might be proclaimed to a distance fixed by each government according to the circumstances but not to exceed 200 miles from the shore, as has been done by Chile, Costa Rica and Peru.

This last system, as noted in the Govare Report of the French Branch of the International Law Association, is based solely on concern for the fisheries, since the subsoil cannot be worked at a distance from the shore where the sea is deeper than 200 m. If the International Law Commission has decided to deal with fisheries independently of the continental shelf, this limit should be rejected.

(f) The right to the continental shelf might be accepted without delimitation, but otherwise rights of control and jurisdiction, whether a shelf exists or not, are attributed to all littoral States to a distance of 20 miles, as the French Branch of the International Law Association has done. The Rapporteur does not think it necessary to attribute a minimum width of 20 miles as in that proposal, for there is no need to attribute control and jurisdiction over the subsoil at a depth of over 200 m., where working is impossible.

The most reasonable system appears to be that of the International Law Commission. It is nevertheless debatable whether for the sake of making the right more precise it would not be better to accept a maximum depth based on the possibility of working under the technical conditions of the near future. If later on it became technically possible to work the subsoil at a greater depth, the figure for the maximum depth could be raised. If this were done, the proposal in the report submitted to the International Law Association could be used, leaving out the provision covering extension of the continental shelf

/to a depth

to a depth of over 200 m., thus: "The continental shelf should be defined as that part of the sea-bed and its subsoil which underlies a water depth not exceeding 200 m."

This system would have the following advantages:

1. It would no longer be necessary to make specific mention of shallow waters;

2. All discussion of the exact geological-geographical definition of the continental shelf would be avoided;

3. Precision would be ensured for the right by a fixed delimitation.

With the foregoing considerations in mind, the Rapporteur ventures to submit to the Commission the following articles as a basis for discussion.

1. The continental shelf is constituted laterally 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.

2. The continental shelf outside territorial water is subject to the exercise by the coastal State of a right of control and jurisdiction for the purposes of its exploration and exploitation.

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.

4. The waters covering the continental shelf outside the territorial waters remain within the regime of the high seas.

5. The air above the waters covering the continental shelf outside territorial waters remains within the regime of the free air.

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.

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

... principle expressed in 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.).

8. The coastal state which is erecting or has erected any installation of the description referred to in 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.

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.

The Rapporteur desires to add the following:

Note to 3. - The protection of cables and pipe-lines on the high seas has been dealt with in another part of the report (see p. 34). It is sufficient here to lay down that other States shall retain the right to lay cables and pipe-lines in the continental shelf and that the coastal State may impose on this right only such limitations as are necessary for the exploitation of the bed and subsoil of the sea.

Note to 7 and 8. - These articles have been borrowed from the report of the International Law Association. The breadth of the security zone has been fixed at 500 m. "in view of the fact that, according to the legislation of various countries, the safety zone around an oil well (within which smoking and lighting of fires is prohibited) is defined in this way."

Note to 9. -

Note to 2. - 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 the award of 23 October 1909 relating to the sea frontiers between Norway and Sweden (Bruns, Fontes Juris Gentium, Ständiger Schiedshof, p. 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.

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