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REPORT ON THE REGIME OF THE TERRITORIAL SEA

by

J.P.A. FRANCOIS

Special Rapporteur

52-41684

44h.

CONTENTS

/INTRODUCTION

INTRODUCTION

To facilitate discussion, the Rapporteur ventures to submit his report in the form of a series of articles, each followed by comments. Its chief purpose is to clear the ground for the extensive study which will have to be made.

In drafting this report, the Rapporteur has drawn widely on the report on the territorial sea which he had the honour to submit, as Rapporteur of the Second Committee, to the 1930 Conference for the Codification of International Law. This report 1/ which was adopted by the plenary conference, was accompanied by two appendices, the first of which was entitled "The Legal Status of the Territorial Sea" and contained a preliminary draft of thirteen articles covering the regime in general and the right of passage; the second appendix, entitled "Report of Sub-Committee No. II" contained provisions concerning the base line, bays, ports, roadsteads, islands, groups of islands, straits, the passage of warships through straits and the delimitation of the territorial sea at the mouth of a river. The following passage of the report explains the scope of these appendices:

> "The First Sub-Committee had drawn up and adopted thirteen Articles on the subjects which had been referred to it for examination. The Committee had to decide what should be done with the result of the Sub-committee's labours. Some delegations thought that, despite the impossibility of reaching an agreement on the breadth of the territorial sea, it was both possible and desirable to conclude a Convention on the legal status of that sea, and for that reason proposed that these Articles should be embodied in a convention to be adopted by the Conference. Most of the delegations however took a contrary view. The Articles in question were intended to form part of a convention which would determine the breadth of the territorial sea. In several cases the acceptance of these Articles had been in the nature of a compromise and subject to the condition, expressed or implied, that an agreement would be reached on the breadth of the belt. In the absence of such an agreement there could be no question of concluding a convention containing these Articles alone. On the basis of a recent precedent, a third compromise was suggested, namely, that the Articles should be embodied in a convention which might be signed and ratified, but which would not come into force until a subsequent agreement was concluded on the breadth of the territorial sea. It was eventually agreed that no convention should be

/concluded

1/ Annex 10 to the Acts of the Conference for the Codification of International Law, Vol. I, Plenary Meetings, League of Nations document No. C.351.M.145.1930.V, pages 123 et seq. published separately in League of Nations document No. C.230.M.117.1930.V.

concluded immediately, and it was decided that the Articles proposed by the First Sub-Committee and provisionally approved by the Committee should be attached as an annex to the Committee's report (Appendix I, page 126).

"The absence of agreement as to the breadth of the territorial sea affected to an even greater extent the action to be taken on the Second Sub-Committee's report. The questions which that Sub-Committee had to examine are so closely connected with the breadth of the territorial sea that the absence of an agreement on that matter prevented the Committee from taking even a provisional decision on the Articles drawn up by the Sub-Committee. These Articles nevertheless constitute valuable material for the continuation of the study of the question, and are therefore also attached to the present report (Appendix II, page 131)". 2/

The Rapporteur proposes to enunciate, in Chapter I, entitled "General Provisions", the principle of the sovereignty of the coastal State over the territorial sea. The question of the bed of the sea and of the subsoil is also dealt with in this chapter. As the Commission does not wish at the present time to deal with the status of the air, all reference to the status of the air space above the territorial sea has been omitted. Chapter II, entitled "Breadth of the territorial sea" deals with that subject and various related questions. If the Commission accepts the principle of sovereignty, there will be no need to regulate the rights of the coastal State with regard to fishing and coastal traffic, and other rights deriving ipso jure from the idea of sovereignty. On the other hand, certain points in respect to which the sovereignty of the coastal State is limited will require explicit treatment; these include the right of innocent passage through the territorial sea for various types of foreign vessels, and certain limitations on the jurisdiction which the coastal State may exercise over vessels during such passage. The subject is dealt with in Chapter III, entitled "Right of Passage".

Not wishing to exceed his terms of reference, the Rapporteur has considered only the regime of the territorial sea in time of peace. Following the example of the 1930 Codification Conference, the report does not deal with the rights of belligerents and neutrals in time of war, and the Rapporteur has ignored the 1939 Declaration of Panama, which provides for the exercise by neutral States of special rights in certain waters in time of war. This does not mean, however, that in determining the width of the territorial sea it will not be necessary to take into account the effect the decision will have on the rights of belligerents and neutrals in time of war, since whatever delimitation

/is decided

2/ League of Nations documents C.351.M.145.1930.V, pages 124-125; C.230.M.117.1930.V, page 4.

is decided upon will apply equally in time of war. It would be undesirable to fix the breadth of the territorial sea in one way for peacetime, and in another for states of war and possibly also for neutrality.

DRAFT REGULATION

CHAPTER I

General Provisions

Article 1

Meaning of the term "territorial sea"

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

Comment

With the exception of one drafting change, the proposed text is identical with the first paragraph of article 1 of the 1930 Regulation. The Rapporteur recommends the expression "territorial sea", as it clearly indicates that inland waters are not included. The 1930 Report stated the following:

> "There was some hesitation whether it would be better to use the term 'territorial waters' or the term 'territorial sea'. The use of the first term, which was employed by the Preparatory Committee, may be said to be more general, and it is employed in several international conventions. There can, however, be no doubt that this term is likely to lead -- and indeed has led -- to confusion, owing to the fact that it is also used to indicate inland waters, or the sum total of inland waters and 'territorial waters' in the restricted sense of this latter term. For these reasons, the expression 'territorial sea' has been adopted." 3/

While acknowledging that complete uniformity in this regard does not yet exist, it may be noted that the expression "mer territoriale" has gained ground since 1930. As regards the term to be used in English, the Rapporteur, although aware that the terms "territorial waters", "marginal sea" and "maritime belt" are sometimes preferred, and that the term "territorial sea" does not yet have the same currency in English as the term "mer territoriale" has among French authorities, nevertheless proposes the use of the term "territorial sea".

Different expressions are also used to indicate the State which exercises sovereignty over the territorial sea; the Rapporteur prefers the term "Etat riverain" to "Etat côtier".

/Article 2

3/ League of Nations documents C.351.M.145.1930.V. page 126; C.230.M.117.1930.V page 6.

Article 2

Juridical status of the territorial sea

Sovereignty over this belt is exercised subject to the conditions prescribed by international law.

Comment

Article 1, paragraph 2 of the Regulations approved by the Second Committee of the 1930 Codification Conference reads as follows:

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

The Report contained the following observations on this point:

> "The idea which it has been sought to express by stating that the belt of territorial sea forms part of the territory of the State is that the power exercised by the State over this belt is in its nature in no way different from the power which the State exercises over its domain on land. This is also the reason why the term 'sovereignty' has been retained, a term which better than any other describes the juridical nature of this power. Obviously, sovereignty over the territorial sea, like sovereignty over the domain on land can only be exercised subject to the conditions laid down by international law. As the limitations which international law imposes on the power of the State in respect of the latter's sovereignty over the territorial sea are greater than those it imposes in respect of the domain on land, it has not been thought superfluous to make special mention of these limitations in the text of the article itself. These limitations are to be sought in the first place in the present Convention; as, however, the Convention cannot hope to exhaust the matter, it has been thought necessary to refer also to other rules of international law." 4/

The Rapporteur does not hesitate to describe the juridical nature of the authority exercised by the coastal State over the belt of sea in question as "sovereignty". Since the Codification Conference, this idea has won almost general acceptance; there are only a very few authorities, notably in France, who on the basis of the ideas enunciated by Mr. de la Pradelle as far back as 1898, continue to deny the sovereignty of the coastal State and to

/attribute

4/ League of Nations documents C.351.M.145.1930.V, page 126; C.230.M.117.1930.V, page 6.

attribute to it merely certain police or conservation rights. These authorities include Mr. Le Fur, 5/ Mr. Aman 6/ and Mr. Sibert. 7/ The Conseil d'Etat ruled in this sense in a decision dated 24 May 1935:

> "The territorial sea is that portion of the sea over which the police powers of the State are exercised; it does not form part of the public domain of the coastal State." 8/

Nearly all contemporary authorities, however, recognize the sovereignty of the coastal State, although in some cases they use such different terms as imperium, dominium, jurisdiction, and even ownership. Examples are provided by Gidel, 9/ Lauterpacht, 10/ Starke, 11/ Kelsen, 12/ Verdross, 13/ Sauer, 14/ Guggenheim, 15/ Quadri, 16/ Florio, 17/ Balladore Pallieri, 18/ Accioly, 19/ Mateesco 20/ etc.

Among the recent treaties in which the idea of sovereignty has been adopted is the Treaty of Peace with Japan of 8 September 1951, article 1 (b) of which is worded as follows:

> "The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters". 21/

The same idea is to be found in the Convention on International Civil Aviation adopted at Chicago on 7 December 1944, article 2 of which states:

> "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State". 22/

/Acceptance.

5/ Précis de droit international public, 1939, page 425.
6/ Le statut de la mer territoriale, 1938, pages 31, 107.
7/ Traité de droit international public, 1951, page 721.
8/ Revue de droit international, 1936, page 303.
9/ La mer territoriale et la zone contiguë, Académie de droit international, Recueil des Cours, 1934, II, page 139.
10/ Sovereignty over Submarine Areas, British Yearbook of International Law, 1950, page 387.
11/ An Introduction to International Law, 1950, pages 145 and 147.
12/ General Theory of Law and State, 1946, page 211.
13/ Völkerrecht, 1950, page 173.
14/ Grundlehre des Völkerrechts, 1948, page 102.
15/ Lehrbuch des Völkerrechts, 1948, I, page 356.
16/ Diritto internazionale pubblico, 1949, page 423.
17/ Il mare territoriale e la sua delimitazione, 1947, page 27.
18/ Diritto internazionale pubblico, 1948, page 301.
19/ Traité de droit international public, 1941, II, page 97.
20/ Vers un nouveau droit international de la mer, 1950, page 45.
21/ La documentation française: Notes et études documentaires, 13 November 195
22/ Hudson, International Legislation, 1950, IX, page 169.

Acceptance of the principle of sovereignty does not mean that the exercise of such sovereignty is not limited by international law:

> "In fact, through the entire branch of international law related to state territory and territorial sovereignty there runs as a constant theme the phenomenon of limitation of sovereignty in various spheres and directions". 23/

This idea has been expressed in the text of the article.

Hence, it would be possible to retain the text adopted by the Second Committee in 1930, apart from a number of drafting changes due to the fact that there is no question at present of embodying the provisions in a convention.

Article 3

Juridical status of the bed and subsoil

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

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

Comment

Article 2, as adopted in 1930, was worded as follows:

> "The territory of a coastal State includes also the air space over the territorial sea, as well as the bed of the sea, and the subsoil.
>
> "Nothing in the present Convention prejudices any conventions or other rules of international law relating to the exercise of sovereignty in these domains". 24/

Except for a slight drafting change and the omission of a reference to air space (see page 4, above), the two paragraphs of the proposed article are identical with those of article 2 of the 1930 Regulation.

It follows from the sovereignty over the territorial sea enunciated in article 2 that the territory of a coastal State includes, in the absence of

/explicit

23/ Lauterpacht, op cit., British Yearbook of International Law, 1950, page 391.

24/ League of Nations documents, C.351.M.145.1930.V, page 126; C.230.M.117.1930.V, page 6.

explicit limitations, the bed of the territorial sea and the subsoil. Although some authorities disagree, 25/ a number of States accept this sovereignty in their practice. Moreover, the International Law Commission has already taken this view in the draft articles on the continental shelf adopted in 1951 (article 1, paragraph 7). 26/

The Rapporteur would recall that the International Law Commission decided to distinguish clearly between the rights of States over the continental shelf on the one hand, and their rights over the bed and subsoil of the territorial sea, on the other.

/CHAPTER II

25/ Fauchille, Traité de droit international public, 1925, I, 2, page 204.
26/ Report of the International Law Commission covering the work of its third session, General Assembly, Official Records, Sixth Session, Supplement No. 9 (A/1858), page 18

CHAPTER II

Limits of the Territorial Sea

Article 4

Breadth

The breadth of the belt of sea defined in article 1 shall be fixed by the coastal State but may not exceed six marine miles.

Comment

The 1930 Conference failed to reach an agreement which would fix the breadth of the territorial sea for the future. It refrained from taking a decision on the question whether existing international law recognized any fixed breadth of the belt of territorial sea. 27/

A study of current legislation, as collected by the Secretariat and others, shows the following: 28/

ARGENTINA*		1 league
	Security	4 leagues
	Customs	4 leagues
	Fishing	12 miles
AUSTRALIA		3 miles
BELGIUM		3 miles
	Customs	10 kilometres
BRAZIL*		3 miles
	Fishing	12 miles
BULGARIA		12 miles
CANADA		3 miles
	Customs	3 leagues
	Fishing	12 miles
CEYLON		3 miles
	Customs	2 leagues
	Sedentary fisheries	

/CHILE*

27/ For an outline of the various opinions, see the Report of the Second Committee, League of Nations documents C.351.M.145.1930, V, pages 123-124; C.230.M.117.1930.V, page 3

28/ States claiming rights over a "continental shelf" are indicated by an asterisk

CHILE*		50 kilometres (1948)
	Security	100 kilometres
	Customs	100 kilometres
CHINA (Nationalist Government)		3 miles
	Customs	12 miles
COLOMBIA		6 miles (1930)
	Fishing	12 miles
	Pollution of the sea	12 miles
	Customs	20 kilometres
COSTA RICA*		
	Fishing	12 miles
	Pollution of the sea	3 miles
CUBA		6 miles
	Customs	12 miles
	Fishing	3 miles
	Pollution of the sea	5 miles
	Social welfare	3 miles
	Security (maritime frontier)	3 miles
DENMARK		1 ordinary league
	Customs	1 nautical mile (4 kvartmil)
	Fishing	3 miles
GREENLAND		3 miles
DOMINICAN REPUBLIC		3 leagues
ECUADOR		12 miles
	Security	4 leagues
	Customs	4 leagues
	Neutrality	4 leagues
	Fishing	12 miles
EGYPT		6 miles
	Security	12 miles
	Navigation	12 miles
	Health control	12 miles
	Customs	12 miles
	Fishing	3 miles
EL SALVADOR*		200 miles
	Security	4 leagues
	Customs	4 leagues
FINLAND		4 miles
	Customs	6 miles

/FRANCE

FRANCE		
	Fishing	3 miles
	Neutrality	6 miles
	Customs	20 kilometres
	Security	3-6 miles
ALGERIA		
	Fishing	3 miles
INDO-CHINA		
	Fishing	20,000 metres
MOROCCO		
	Fishing	6 miles
TUNISIA		
	Customs	20,000 metres
GERMANY		3 miles
GREECE		6 miles
	Neutrality	6 miles
	Security	10 miles
GUATEMALA*		12 miles
	Customs	2 leagues
HONDURAS*		12 kilometres
ICELAND		4 miles
INDIA		1 league
INDONESIA		3 miles
IRAN*		6 miles
	Customs	12 miles
	Security	12 miles
IRELAND		in accordance with international law
ISRAEL		3 miles
ITALY		6 miles
	Customs	12 miles
	Security, merchant vessels	10 miles (in time of peace)
	Security, warships	6 miles (in time of peace)
	Security, warships and merchant vessels	12 miles (in time of war)
	Neutrality	6 miles

JAPAN		3 miles
	Neutrality	3 ri
KOREA, SOUTH*		
	Fishing	50-60 miles
LEBANON		
	Fishing	6 miles
	Customs	20 kilometres
	Criminal law	20 kilometres
LIBERIA		1 league
MEXICO*		9 miles (1945)
	Fishing	20 kilometres
	Customs	20 kilometres
NETHERLANDS		3 miles
NICARAGUA*		
NORWAY		1 ordinary marine league
	Fishing	1 ordinary marine league (7,529 metres)
	Neutrality	3 miles
	Customs	10 miles
PAKISTAN*		
PANAMA*		
PERU*		3 miles
POLAND		
	In 1932:	3 miles
	Defence	6 miles
	Customs	6 miles
PORTUGAL		6 miles
	Customs	6 miles
	Fishing (1917)	reciprocity
	Neutrality	6 miles
ROMANIA		12 miles
SAUDI ARABIA*		6 miles
	Security	12 miles
	Customs	12 miles
SPAIN		6 miles
	Customs	6 miles
	Neutrality	3 miles
	Fishing	6 miles

/SPANISH MOROCCO

SPANISH MOROCCO		
	Neutrality	3 miles
SWEDEN		4 miles
	Neutrality	3 miles
	Customs	4 miles
	Fishing (in the frontier waters of Denmark and Sweden)	3 minutes of latitude
SYRIA		
	Fishing	6 miles
	Customs	20 kilometres
TURKEY		6 miles
	Customs	4 miles
UNION OF SOUTH AFRICA		3 miles
UNION OF SOVIET SOCIALIST REPUBLICS		12 miles
UNITED KINGDOM		3 miles
UNITED STATES OF AMERICA*		3 miles
	Customs	4 leagues
CALIFORNIA		3 miles
FLORIDA		3 leagues
LOUISIANA		27 miles
OREGON		1 league
WASHINGTON		1 league
URUGUAY		5 miles
	Fishing	3 kilometres
VENEZUELA		3 miles
	Security	12 miles
	Customs	12 miles
	Protection of interests (1944)	12 miles
	Neutrality	3 miles
	Health control	12 miles
YUGOSLAVIA		6 miles
	Customs	6 miles
	Fishing	10 miles

/It is clear

It is clear from the documentary material submitted by the Secretariat that the breadth of the territorial sea has also been fixed in a number of treaties The three-mile rule was adopted in the North Sea Fisheries Convention concluded between Germany, Belgium, Denmark, France, the United Kingdom and the Netherlands on 6 May 1882.[30] The Convention concerning the Suez Canal (29 October 1888), while not referring explicitly to a "territorial sea", nevertheless contains the following provision:

> "...the high contracting parties agree that no act of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports..."[31]

A special category was formed by the treaties concluded for the purpose of combating the smuggling of alcoholic liquors. A number of these treaties, including those between the United States of America, on the one hand, and Germany, the United Kingdom and the Netherlands, respectively, on the other, contain the following provision:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline onwards and measured from low-water mark constitute the proper limits of territorial waters."[32]

In the treaties concluded between the United States and other countries (including France, Italy, the Scandinavian countries, Belgium and Spain), this stipulation was replaced by the following:

> "The High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction."[33]

/The Rapporteur

30/ De Martens, Nouveau recueil general de traités, deuxieme serie, IX, page 557.
31/ Ibid., deuxieme serie, XV, page 560.
32/ League of Nations, Treaty Series, Vol. 27, page 183; Vol. 33, page 435; Vol.41, page 273.
33/ Ibid., Vol.26, page 45; Vol.27, page 363; Vol.29, page 423; Vol.61, page 416; Vol.67, page 133; Vol.72, page 173; de Martens, Nouveau Recueil, troisieme serie, XVII, page 532.

The Rapporteur also wishes to draw attention to an agreement concluded on 22 May 1930 between the Union of Soviet Socialist Republics and the United Kingdom, in which it was provided that:

> "The Government of the Union of Soviet Socialist Republics agrees that fishing boats registered at the ports of the United Kingdom may fish at a distance of from 3 to 12 geographical miles from low-water mark, along the Northern coasts of the Union of Soviet Socialist Republics and the islands dependent thereon".

It also contained the following provision:

> "Nothing in this temporary Agreement shall be deemed to prejudice the views held by either contracting Government as to the limits in international law of territorial waters".34/

The foregoing makes it clear that there is a lack of unanimity with regard to the breadth of the territorial sea, a fact which is noted by all authorities. Gidel states the following:

> "There is no rule of international law concerning the extent of the jurisdiction of the coastal State over its adjacent waters other than the minimum rule whereby every coastal State exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and partial jurisdiction beyond that distance in the case of certain specific interests".35/

Scelle points out that:

> "In reality there is no rule established by custom, merely rules laid down by States, either unilaterally, or more rarely by treaty, compliance with which they enforce within the limits of their power... In short, there is anarchy".36/

It should, however, be noted that the States which proclaimed the three-mile rule at the 1930 Conference owned 80 per cent of the world tonnage. Pearce Higgins and Colombos therefore feel justified in asserting that: "The three-mile limit is the proper limit of territorial waters".37/ At the present

/time,

34/ League of Nations, Treaty Series, Vol. 102, page 104.
35/ Le droit international public de la mer, 1934, III, page 135.
36/ Cours (Manuel) de droit international public, 1948, page 425.
37/ The International Law of the Sea, Second Edition, 1951, page 76. See also Fenwick, International Law, 1948, page 376.

time, the three-mile limit, either alone or in combination merely with a contiguous zone for customs, fiscal or sanitary control (the only contiguous zone which the International Law Commission declared its readiness to accept) is applied by the following States: Australia, Belgium, China, Denmark, Germany, Indonesia, Israel, Italy, Japan, Netherlands, Union of South Africa, United Kingdom and United States of America.

Even in certain countries which have adopted the three-mile rule, doubts are expressed as to the possibility of maintaining that position. "The irresistible tide of economic, political and social interests," says Joseph Walter Bingham, "is running against the Anglo-American three-mile doctrine. It is doomed".[38] 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".[39]

Hyde makes the following observation:

> "The international society thus finds itself in a position where many of its members are dissatisfied with the operation of a rule long imbedded in its law of nations".[40]

As early as 1910 Westlake had called the rule "quite obsolete and inadequate".

In these circumstances, the Rapporteur is forced to the conclusion that a proposal to fix the breadth of the territorial sea at three miles would have no chance of success, and that agreement on this distance, either de lege lata, or de lege ferenda, is out of the question. Nevertheless, the problem must be solved, since if each State were left absolutely free to determine the breadth of its territorial sea itself, the principle of the freedom of the seas would suffer to an inadmissible extent.

In his dissenting opinion annexed to the Judgment of the International Court of Justice in the Fisheries Case (18 December 1951)[41], Judge Alvarez stated the following:

/"Each State

38/ Proceedings of the American Society of International Law, 1940, page 62
39/ American Journal of International Law, 1946, page 61.
40/ International Law, I, 1945, page 455.
41/ I.C.J. Reports 1951, page 150.

> "Each State may determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an abus de droit".

These criteria clearly lack the necessary juridical precision for a codification of the rules of law.

Sibert[42] supports the argument that there is merely a series of zones which vary with the kind of protection concerned in each case, and which often vary also from one country to another. This theory is held principally in France and Italy. Florio[43], reviving an argument previously defended by the Italian Sarpi in 1686 and by the Argentine Storni in 1922[44], considers that it would be unnecessary to require uniformity in this respect and that a system could be adopted whereby different breadths would be fixed for the different parts of a country's coast and for different parts of the world. The Rapporteur cannot accept these proposals and agrees with Gidel that: "to define these local requirements is undoubtedly a very difficult matter and one which will always leave the door open to discussion".[45]

Azcarraga[46] suggests that the breadth of the sea should be fixed in relation to certain factors, such as the size of the territory and of its population. The Rapporteur does not think that this is a practical proposition.

Realizing the existence of a very strong body of opinion which holds that in view of technical developments and particularly the increased speed of vessels, a breadth of three miles would no longer be satisfactory, the Rapporteur suggests that the Commission should consider the possibility of limiting the breadth of the territorial sea to a maximum of six miles. He is well aware that this suggestion will be opposed, firstly, by those States which support the three-mile rule, either because they are particularly interested in the principle of the freedom of the seas, or because they fear any increase in their responsibilities in those waters, particularly in the event of neutrality in time

/of war;

42/ Traité de droit international public, 1951, page 731.
43/ Il mare territoriale e la sua delimitazione, 1947, page 103.
44/ Gidel, Le droit international public de la mer, 1934, III, page 130.
45/ Op.cit., page 132.
46/ Los derechos sobre la plataforma submarina, Revista Española de Derecho Internacional, 1949, II, page 47.

of war; secondly, the six-mile rule will be rejected by those States which claim a greater breadth. It seems very doubtful, indeed, that a compromise on the six-mile rule can easily be achieved. It is clear, however, that in view of all the conflicting views which have been expressed on this matter, no agreement will be possible if neither side is prepared to make concessions. The champions of the freedom of the seas will have to realize that the general or the quasi-general acceptance of the six-mile rule -- which has already been adopted by a number of States -- would put a stop to any tendency to adopt unilaterally a still greater distance. Those States which fix the breadth of the territorial sea at six miles will always be free to conclude agreements among themselves recognizing the right to fish, on a basis of reciprocity, in those parts of the territorial sea beyond the three-mile limit. States will, of course, remain free to fix the breadth of the territorial sea at a distance of less than six miles. Those who favour a greater distance will have to realize that the adoption of the system of protecting marine resources recommended by the International Law Commission in the report drawn up at its third session, is likely to remove certain difficulties which they fear will result from a reduction of that zone; moreover, adoption of the six-mile rule would not preclude the establishment of contiguous zones as provided for in the report of the International Law Commission for customs, fiscal and sanitary purposes.

The question has been raised whether, in cases where the sea is perpetually frozen, the sovereignty of the coastal State extends to the furthest limits of the ice forming a contiguous mass off the coast. In 1911, Russia formulated the theory that the territorial sea should be measured from the limit of the perpetual ice extending outwards from the coast. This doctrine has not been adopted. Under the treaty of 9 February 1920 concerning the Archipelago of Spitsbergen[47], a uniform regime was laid down for the territorial sea, whether frozen or not. The same principle was adopted in the Convention concerning the Aaland Islands of 20 October 1921[48] and in the Treaty of Peace between Russia and Finland dated 14 October 1920.[49]

/Further claims

47/ League of Nations, Treaty Series, Vol.2, page 7.
48/ Ibid., Vol.9, page 211.
49/ Ibid, Vol.3, page 5.

Further claims of this kind have recently been advanced in application of the so-called principle of sectors. In 1926, the Union of Soviet Socialist Republics laid claim to the whole of the Arctic north of Soviet territory as far as the North Pole. The United States Government rejected this claim as "an attempt to create artificially a closed sea and thereby infringe the right of all Nations to the free use of the high seas".50/ Several countries, however, are now claiming sovereignty over sections of the polar regions. The Rapporteur wishes merely to point out this fact to the Commission, without proposing the insertion of a special provision to cover it.

The Rapporteur asks the Commission to consider whether the determination of the breadth of the territorial sea is so essential to the codification of the juridical status of that sea that if all efforts to reach an agreement on it were to fail, the whole idea of that codification would have to be abandoned.

This was the view taken by the 1930 Conference but the Rapporteur does not consider that the Commission should follow this example. Even if it should prove impossible to achieve uniformity with regard to the breadth of the territorial sea at this stage, it is desirable to continue to strive for agreement on the other disputed questions.

Article 5

Base Line

1. As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

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

/3. The line

50/ Pearce Higgins and Colombos, op.cit., page 84.

3. The line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.

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

Comment

Sub-Committee II of the 1930 Conference attached the following observations to its article on the base line:

> "The line of low-water mark following all the sinuosities of the coast is taken as the basis for calculating the breadth of the territorial sea, excluding the special cases of (1) bays, (2) islands near the coast and (3) groups of islands, which will be dealt with later. The article is only concerned with the general principle.
>
> "The traditional expression 'low-water mark' may be interpreted in different ways and requires definition. In practice, different States employ different criteria to determine this line. The two following criteria have been taken more particularly into consideration: first, the low-water mark indicated on the charts officially used by the Coastal State, and, secondly, the line of mean low-water spring tides. Preference was given to the first, as it appeared to be the more practical. Not every State, it is true, possesses official charts published by its own hydrographic services, but every Coastal State has some chart adopted as official by the State authorities, and a phrase has therefore been used which also includes these charts.
>
> "The divergencies due to the adoption of different criteria on the different charts are very slight and can be disregarded. In order to guard against abuse, however, the proviso has been added that the line indicated on the chart must not depart appreciably from the more scientific criterion: the line of mean low-water spring tides. The term 'appreciably' is admittedly vague. Inasmuch, however, as this proviso would only be of importance in a case which was clearly fraudulent, and as, moreover, absolute precision would be extremely difficult to attain, it is thought that it might be accepted.
>
> "If an elevation of the sea bed which is only uncovered at low tide is situated within the territorial sea off the mainland, or off an island, it is to be taken into consideration on the analogy of the North Sea Fisheries Convention of 1882 in determining the base line of the territorial sea.
>
> "It must be understood that the provisions of the present Convention do not prejudge the questions which arise in regard to coasts which are ordinarily or perpetually ice-bound."51/

/In its Judgment

51/ League of Nations document, C.351.M.145. 1930. V, page 131; C.230.M.117. 1930. V, page 11.

In its Judgment of 18 December 1951 in the Fisheries Case, the International Court of Justice found that, for the purpose of measuring the breadth of the territorial sea,

> "it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States".52/

The Court considers that this criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory.

With regard to the question whether a drying rock, in order to be taken into account, must be situated within four miles (the breadth of the territorial sea in question) of permanently dry land, the Court points out the following:

> "The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land."53/

The Court noted that three methods had been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the trace parallele, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. The Court considers that this method may be applied without difficulty to an ordinary coast which is not too broken. Where a coast is deeply indented and cut into, or where it is bordered by an archipelago, such as the "skjaergaard" in Norway, the base line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. On this the Court has the following to say:

/"In such

52/ I.C.J. Reports 1951, page 128.
53/ Ibid., page 129.

"In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.

"It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ('following all the sinuosities of the coast'). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the trace parallele, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. 'On the other hand', it is said in the Reply, the courbe tangente -- or, in English, "envelopes of arcs of circles" -- method is the method which the United Kingdom considers to be the correct one'.

"The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by the Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based upon this method.

"The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters."54/

/The Rapporteur

54/ Ibid., pages 129-130.

The Rapporteur feels bound to interpret the Judgment of the Court, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; he has therefore taken it as his basis in drafting the article. Paragraph 2 of the article reflects the Court's opinion concerning a deeply indented coast, as expressed in the Judgment. The Rapporteur has deemed it necessary to retain as a general rule in paragraph 1 the principle laid down by Sub-Committee II in the first paragraph of its article. The condition that the line of low-water mark indicated on the charts officially used by the coastal State should not depart appreciably from the line of mean low-water spring tides has also been retained. Although the Court did not pronounce an opinion on this subject, the Rapporteur considers that the third paragraph of the Sub-Committee's article may also be retained, and it is now embodied in article 5, paragraph 4.

Article 6

Bays

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

Comment

Sub-Committee II of the 1930 Conference made the following observations on this question:

> "It is admitted that the base line provided by the sinuosities of the coast should not be maintained under all circumstances. In the case of an indentation which is not very broad at its opening, such a bay should be regarded as forming part of the inland waters. Opinions were divided as to the breadth at which this opening should be fixed. Several Delegations were of opinion that bays, the opening of which did not exceed ten miles, should be regarded as inland waters; an imaginary line should be traced across the bay between the two points jutting out furthest, and this line would serve as a basis for determining the breadth of the territorial waters. If the opening of the bay exceeds ten miles, this imaginary line will have to be drawn at the first place, starting from the opening, at which the width of the bay does not exceed ten miles. This is the system adopted i.a. in the North Sea Fisheries Convention of May 6th, 1882. Other Delegations were only prepared to regard the waters of a bay as inland waters if the two zones of territorial sea met at the opening of the bay, in other words, if the opening did not exceed twice the breadth of the territorial sea.

States which were in favour of a territorial belt of three miles held that the opening should therefore not exceed six miles. Those who supported this opinion were afraid that the adoption of a greater width for the imaginary lines traced across bays might undermine the principle enunciated in the preceding article so long as the conditions which an indentation has to fulfil in order to be regarded as a bay remained undefined. Most Delegations agreed to a width of ten miles, provided a system were simultaneously adopted under which slight indentations would not be treated as bays.

"However, these systems could only be applied in practice if the Coastal States enabled sailors to know how they should treat the various indentations of the coast.

"Two systems were proposed; these have been set out as annexes to the observations on this article. The Sub-Committee gave no opinion regarding these systems, desiring to reserve the possibility of considering other systems or modifications of either of the above systems."[55]

In its Judgment of 18 December 1951 in the Fisheries Case, the International Court of Justice pointed out that although the ten-mile rule with regard to bays has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. The Court considers that consequently, the ten-mile rule has not acquired the authority of a general rule of international law.[56]

The Rapporteur has nevertheless inserted the Sub-Committee's article in article 6, since the Commission's task is not merely to codify existing law, but also to prepare the progressive development of law. It does not follow that the ten-mile rule would apply to a State such as Norway which has always opposed any attempt to apply that rule to its coast because of the latter's geographical formation. Inasmuch as the drawing of the base line in bays constitutes a very difficult problem -- Gidel devotes not less than 77 pages to it in his book -- the Rapporteur cannot possibly deal with the various points involved within the scope of this report. The question could be reserved for study at a later date with the assistance of experts.

The 1930 Sub-Committee took the view that a system should simultaneously be adopted under which slight indentations would not be treated as bays. Two systems had been proposed,[57] but the Sub-Committee gave no opinion regarding these systems, desiring to reserve the possibility of considering other systems or modifications of either of the above systems.

/The Rapporteur

55/ League of Nations documents C.351.M.145. 1930. V, pages 131-132; C.230.M.117. 1930. V, pages 11-12.

56/ I.C.J. Reports 1951, page 131.

57/ See Appendices A and B to the Report of the Sub-Committee, League of Nations documents C.351.M.145. 1930. V, page 132; C.230.M.117. 1930. V, page 12.

The Rapporteur considers that this constitutes a very complicated technical question which lies outside the juridical scope of the International Law Commission's work. He therefore suggests that in this first phase of its work, the Commission should refrain from giving an opinion on this question. It would be able to revert to it with the assistance of experts at a later stage.

Article 7

Ports

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

Comment

This article is identical with that of the 1930 Regulation.[58/] The Report merely pointed out that the waters of the port as far as a line drawn between the outermost fixed works constituted the inland waters of the coastal State.

Article 8

Roadsteads

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

Comment

The 1930 Report stated the following:

> "It had been proposed that roadsteads which serve for the loading and unloading of vessels should be assimilated to ports. These roadsteads would then have been regarded as inland waters, and the territorial sea would have been measured from their outer limits. It was thought, however, impossible to adopt this proposal. Although it was recognised that the Coastal State must be permitted to exercise special rights of control and of police over the roadsteads, it was considered unjustifiable to regard the waters in question as inland waters, since in that case merchant vessels would have had no right of innocent passage through them. To meet these objections it was suggested that the right of passage in such waters should be expressly recognised, the practical result being that the only difference between

/such

58/ League of Nations documents C.351.M.145. 1930. V, page 133; C.230.M.117. 1930. V, page 12.

such 'inland waters' and the territorial sea would have been the possession by roadsteads of a belt of territorial sea of their own. As, however, such a belt was not considered necessary, it was agreed that the waters of the roadstead should be included in the territorial sea of the State, even if they extend beyond the general limit of the territorial sea."59/

Article 9

Islands

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

Comment

The text of this article is taken from the 1930 Report; in that document it was accompanied by the following observations:

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

"An elevation of the sea bed, which is only exposed at low tide, is not deemed to be an island for the purpose of this Convention. (See however the above proposal concerning the Base Line.)"60/

As regards lighthouses erected in the high seas, the Rapporteur would refer to the following observations by Pearce Higgins and Colombos:61/

"The absence of any mention of 'rocks' from the North Sea Fishery Convention of 1882 has led to questions being raised with regard to the lighthouses erected on the Eddystone, the Bell Rock and the Seven Stones Rocks off the Scilly Islands. As to the Eddystone, the British Government has refrained from putting forward a claim to territorial jurisdiction, presumably on the ground that the rock is not permanently over high tide. Sir Charles Russell, in his arguments during the Behring Sea Arbitration, claimed that a lighthouse built upon a rock or upon piles driven into the bed of a sea 'becomes as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and has incident to it all the rights which belong to the protection of territory.' Westlake would limit this statement to a claim to immunity from violation and injury, together with exclusive authority and jurisdiction of the territorial State. 'It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it, converting a large tract into territorial waters.'62/ The rock of reef on which the Eddystone lighthouse is built is covered by sea at high tide, 'but exposed to the extent of an area of about 500 square yards at low-water of neap tides.'63/

/"As regards

59/ League of Nations documents C.351.M.145.1930.V, page 133; C.230.M.117.1930, V, page 13.
60/ Ibid., same pages.
61/ International Law of the Sea, second edition, 1951, pages 81-82.
62/ Westlake, International Law, Vol.I, 1910, page 190.
63/ Fulton, The Sovereignty of the Sea, 1911, page 642.

"As regards the Bell Rock which lies approximately ten miles east-south-east of Arbroath and has a lighthouse on it, complaints have been made of foreign fishermen using the fishing ground in its neighbourhood. This rock is also entirely covered at high water; at the ebb of spring tides it is uncovered to a depth of four feet, while at low-water of neap tides the top of the rock is just visible.[64] Whether the British Government has claimed that the waters surrounding this rock are territorial is not known, but probably the same considerations apply to it as to the Eddystone.

"The Seven Stones Rocks are a reef off the Scilly Islands, about seven miles from Land's End and about a mile in length, with a lightship on it. No part of the rocks is above the sea at low-water of neap tide These rocks are not claimed as being within British territorial waters.[65] This refusal to assert jurisdiction is mentioned by Westlake[66] as an example of 'greater moderation' than the claim advanced at the beginning of the nineteenth century by Spain to the Falkland Islands on the ground of dependence on the Continent."

The Rapporteur recalls that in the draft articles on the continental shel adopted by it in 1951, the International Law Commission considered that installations constructed for the exploration of the continental shelf and the exploitation of its natural resources should not have the status of islands for the purpose of delimiting territorial waters, but that to reasonable distances safety zones might be established around such installations, where the measures necessary for their protection might be taken.[67] The same view could be taken in the case of lighthouses erected on rocks, where these are only exposed at low tide

Article 10

Groups of islands

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

Comment

While formulating an observation on the lines of the first sentence of t proposed article, Sub-Committee II of the 1930 Conference was of the opinion that owing to the lack of technical details the idea of drafting a text on this subject should be abandoned.[68]

/In its

64/ Fulton, The Sovereignty of the Sea, 1911, page 642.
65/ Ibid., pages 642-643.
66/ Op.cit., page 119.
67/ Draft articles on the continental shelf and related subjects, Part I, article 6. See document A/1858, page 19, or document A/CN.4/49, page 3.
68/ League of Nations documents C.351.M.145.1930.V, page 133; C.230.M.117.1930.V, page 13.

In its Judgment of 18 December 1951 in the Fisheries Case, the International Court of Justice made the following observations:

> "The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the 'skjaergaard'. Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.
>
> "In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."69/

The Rapporteur has inserted article 10 not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject.

Article 11

Straits

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

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

Comment

This text is identical with that proposed in 1930, which was accompanied by the following observations:

> "Within the straits with which this Article deals the belts of sea around the coast constitute territorial sea in the same way as on any other part of the coast. The belt of sea between the two shores may not be regarded as inland waters, even if the two belts of territorial sea and both shores belong to the same State. The rules governing the line of demarcation between the ordinary inland waters and the territorial sea are the same as on other parts of the coast.

/"When the

69/ I.C.J. Reports 1951, page 131.

"When the width throughout the straits exceeds the sum of the breadths of the two belts of territorial sea, there is a channel of the high sea through the strait. On the other hand, if the width throughout the strait is less than the breadth of the two belts of territorial sea, the waters of the strait will be territorial waters. Other cases may and in fact do arise: at certain places the width of the strait is greater than, while elsewhere it is equal to or less than, the total breadth of the two belts of territorial sea. In these cases portions of the high sea may be surrounded by territorial sea. It was thought that there was no valid reason why these enclosed portions of sea -- which may be quite large in area -- should not be treated as the high sea. If such areas are of very small extent, however, practical reasons justify their assimilation to territorial sea; but it is proposed in the Article to confine such exceptions to 'enclaves' of sea not more than two nautical miles in width.

"Just as in the case of bays which lie within the territory of more than one Coastal State, it has been thought better not to draw up any rules regarding the drawing of the line of demarcation between the respective territorial seas in straits lying within the territory of more than one Coastal State and of a width less than the breadth of the two belts of territorial sea.

"The application of the Article is limited to straits which serve as a passage between two parts of the high sea. It does not touch the regulation of straits which give access to inland waters only. As regards such straits, the rules concerning bays, and where necessary islands, will continue to be applicable."[70]

(For the right of passage of warships through straits, see article 22.)

Article 12

Delimitation of the territorial sea at the mouth of a river

1. When a river flows directly into the sea, the waters of the river constitute inland water up to a line following the general direction of the coast drawn across the mouth of the river whatever its width.

2. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

Comment

This article was submitted by Sub-Committee II of the 1930 Conference without comment,[71] since the criterion in question is that most generally adopted. It is open, however, to the objection that an estuary does not admit of a general and sufficiently firm definition; to determine whether an estuary is involved, it is necessary to consider such factors as the distance between the coasts, the nature of the coastline and alluvial deposits, currents, and the like.[72]

/Article 13

70/ League of Nations documents C.351.M.145.1930.V, pages 133-134; C.230.M.117.1930.V, pages 13-14.

71/ League of Nations documents C.351.M.145.1930.V, page 134; C.230.M.117.1930.V, page 14.

72/ Gidel, op.cit., III, page 613.

Article 13

Delimitation of the territorial sea of two adjacent States

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

Comment

The 1930 Codification Conference did not deal with this question. Several possible solutions may be considered. A solution in principle might be to continue the general line of the land frontier towards the open sea, to the farthest limit of the marine territories of the two States. Another solution is that of the median line, a line "every point of which is equidistant from the nearest point or points on the coastlines of the two States".[73/]

In its Judgment of 23 October 1909 on the maritime frontiers between Norway and Sweden,[74/] the Permanent Court of Arbitration adopted for that purpose a line perpendicular to the coast at the point at which the frontier between the two territories reaches the sea.

The Bulgarian Government's Ukase dated 10 October 1951 concerning the territorial and inland waters of the Bulgarian People's Republic contains the following provision: "The geographical parallel of the point at which the land frontier reaches the coast delimits the territorial waters of Bulgaria and those of neighbouring States". This rule, however, must be regarded as a solution applicable only to a particular case.

The International Law Commission might adopt in principle the rule of the median line which has been put into practice in a certain number of cases.[75/] This solution, however, would not be applicable if the special configuration of the coastline necessitated modifications. Such cases, for example, arise when the line of delimitation runs through a river or a bay, the waters of which are not equally navigable in the vicinity of the median line. In such cases, the determining principle might be that of the "thalweg". If, for example, after leaving the territory of one State a river traverses the territorial sea of another

/State

73/ Whittemore, Boggs, Delimitation of Seaward Areas under National Jurisdiction, 1951, page 259. See also by the same author: National Claims in Adjacent Seas, Geographical Review, 1951, pages 185 et seq.

74/ Bruns, Fontes Juris Gentium, Series A, Sectio I, Tomus 2: Digest of the Decisions of the Permanent Court of Arbitration, page 50.

75/ Gidel, op.cit., III, page 769.

State on its way to the high sea or, in other words, if the navigable channel of that river seawards from its mouth lies wholly or partly within the territorial sea of another State, the median line no longer constitutes a satisfactory solution. This is true, for example, of the mouth of the Scheldt in the "Wielingen". The Commission will perhaps decide in favour of the general solution which this problem requires, leaving aside all historical arguments, conclusive though they may be in each individual case.

CHAPTER III

Right of Passage

Article 14

Meaning of the right of passage

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

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

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

Comment

To quote Oppenheim[76] "it is the common conviction that every State has by customary international law the right to demand that in time of peace its merchantmen may inoffensively pass through the territorial maritime belt of every other State. Such right is a consequence of the freedom of the open sea". The right of innocent passage would appear to be accepted by most authorities.[77]

The text of this article is taken from that contained in the report of the 1930 Second Committee. The latter was accompanied by the following observations:

> "For a passage to be deemed other than innocent, the territorial sea must be used for the purpose of doing some act prejudicial to the security, to the public policy or to the fiscal interests of the State. It is immaterial whether or not the intention to do such an act existed at the time when the vessel entered the territorial sea, provided that the act is in fact committed in that sea. In other words, the passage ceases to be innocent if the right accorded by international law and defined in the present Convention is abused and in that event the Coastal State resumes its liberty of action. The expression 'fiscal interests' is to be interpreted in a wide sense, and includes all matters relating to Customs. Import, export and transit prohibitions, even when not enacted for revenue purposes but e.g. for purposes of public health, are covered by the language used in the second paragraph, promulgated by the Coastal State.
>
> /"It should,

76/ International Law, 1948, I, paragraph 188.

77/ For a contrary opinion, see Quadri, Le navi private nel diritto internazionale, 1939, page 53.

"It should, moreover, be noted that when a State has undertaken international obligations relating to freedom of transit over its territory, either as a general rule or in favour of particular States, the obligations thus assumed also apply to the passage of the territoria sea. Similarly, as regards access to ports or navigable waterways, any facilities the State may have granted in virtue of international obligations concerning free access to ports, or shipping on the said waterways, may not be restricted by measures taken in those portions of the territorial sea which may reasonably be regarded as approaches to the said ports or navigable waterways."78/

Section A. Vessels other than warships.

Article 15

Right of innocent passage through the territorial sea

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

2. It is bound to use the means at its disposal to safeguard in the territorial sea the principle of the freedom of maritime communication and not to allow such waters to be used for acts contrary to the rights of other States.

Comment

1. Paragraph 1 of this article is taken from article 4, paragraph 1 of the 1930 Report. The observations on that article were as follows:

"The expression 'vessels other than warships' includes not only merchant vessels, but also vessels such as yachts, cable ships, etc., if they are not vessels belonging to the naval forces of a State at the time of the passage."79/

Article 4 of the 1930 Report contained a second paragraph worded as follows:

"Submarine vessels shall navigate on the surface."80/

As, contrary to expectations in 1930, commercial submarine vessels have not become of any practical importance, it would seem unnecessary to insert a provision on this subject.

In consequence of the recognition of the right of innocent passage to foreign vessels, it is the duty of the coastal State not to allow the territorial sea to be used in a manner prejudicial to the interests of other States. This is what the International Court of Justice stated on 9 April 1949 in the Corfu Channel Case:

/"The obligations

78/ League of Nations Documents C.351.M.145.1930.V, page 127; C.230.M.117.1930.V, page 7.
79/ Ibid., same pages.
80/ Ibid., same pages.

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters... Such obligations are based on certain general and well-recognized principles, namely: elementary considerations of humanity...the principle of the freedom of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[81]

The Rapporteur considers that this idea could be expressed in the text of the article and he therefore proposes the addition of paragraph 2.

Article 16

Steps to be taken by the Coastal State

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

Comment

This article also appeared as article 5 in the 1930 Report. The observations on this article were worded as follows:

> "The article gives the coastal State the right to verify, if necessary, the innocent character of the passage of a vessel and to take the steps necessary to protect itself against any act prejudicial to its security, public policy or fiscal interests. At the same time, in order to avoid unnecessary hindrances to navigation, the coastal State is bound to act with great discretion in exercising this right. Its powers are wider if a vessel's intention to touch at a port is known, and include inter alia the right to satisfy itself that the conditions of admission to the port are complied with."[82]

Article 17

Duty of foreign vessels during their passage

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

/(a) the safety

81/ I.C.J. Report 1949, page 22.
82/ League of Nations documents C.351.M.145.1930.V, page 127; C.230.M.117.1930.V, Page 7.

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

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

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

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

2. The Coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels.

Comment

This article is identical with article 6 of the 1930 Report. The latter was accompanied by the following observations:

"International law has long recognised the right of the Coastal State to enact in the general interest of navigation special regulations applicable to vessels exercising the right of passage through the territorial sea. The principal powers which international law has hitherto recognised as belonging to the Coastal State for this purpose are defined in this Article.

"It has not been considered desirable to include any special provision extending the right of innocent passage to persons and merchandise on board vessels. It need hardly be said that there is no intention to limit the right of passage to the vessels alone, and that persons and property on board are also included. A provision however specially referring to 'persons and merchandise' would on the one hand have been incomplete because it would not e.g. cover such things as mails or passengers' luggage, whilst on the other hand it would have gone too far because it might have excluded the right of the Coastal State to arrest an individual or to seize goods on board.

"The term 'enacted' must be understood in the sense that the laws and regulations are to be duly promulgated. Vessels infringing the laws and regulations which have been properly enacted are clearly amenable to the courts of the Coastal State.

"The last paragraph of the Article must be interpreted in a broad sense; it does not refer only to the laws and regulations themselves, but to all measures taken by the Coastal State for the purposes of the Article."83/

/Article 18

83/ Ibid., pages 127-128 and pages 7-8, respectively.

Article 18

Charges to be levied upon foreign vessels

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

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

Comment

This article reproduces article 7 of the 1930 Report; the latter text was accompanied by the following observations:

> "The object of this article is to exclude any charges in respect of general services to navigation (light or conservancy dues, etc.), and to allow payment to be demanded only for special services rendered to the vessel (pilotage, towage, etc.). These latter charges must be made on a basis of strict equality and with no discrimination between one vessel and another.
>
> "The provision of the first paragraph will include the case of compulsory enchoring in the territorial sea, in the circumstances indicated in Article 3, last paragraph."84/

Article 19

Arrest on board a foreign vessel

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

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

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

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

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

/3. The local

84/ Ibid., pages 1-8 and 8, respectively. The article 3 referred to in the passage quoted corresponds to article 14 of this text.

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

Comment

This article appeared as article 8 in the 1930 Report. The Report also contained the following observations on this subject:

"In the case of an offence committed on board a foreign vessel in the territorial sea, a conflict of jurisdiction may arise between the Coastal State and the State whose flag the vessel flies. If the Coastal State wishes to stop the vessel with a view to bringing the guilty party before its courts, another kind of conflict may arise: that is to say between the interests of navigation, which ought to be interfered with as little as possible, and the interests of the Coastal State in its desire to make its criminal laws effective throughout the whole of its territory. The proposed article does not attempt to provide a solution for the first of these conflicts; it deals only with the second. The question of the judicial competence of each of the two States is thus left unaffected, except that the Coastal State's power to arrest persons or carry out investigations (e.g. a search) during the passage of the foreign vessel through its waters will be confined to the cases enumerated in the article. In cases not provided for in the article, legal proceedings may still be taken by the Coastal State against an offender if the latter is found ashore. It was considered whether the words 'in the opinion of the competent local authority' should not be added in (2) after the word 'crime', but the suggestion was not adopted. In any dispute between the Coastal State and the flag State some objective criterion is desirable and the introduction of these words would give the local authority an exclusive competence which it is scarcely entitled to claim.

"The Coastal State cannot stop a foreign vessel passing through the territorial sea without entering the inland waters of the State simply because there happened to be on board a person wanted by the judicial authorities of the State for some punishable act committed elsewhere than on board the vessel. It would be still less possible for a request for extradition addressed to the Coastal State in respect of an offence committed abroad to be regarded as a valid ground for interrupting the vessel's voyage.

"In the case of a vessel lying in the territorial sea, the jurisdiction of the Coastal State will be regulated by the State's own municipal law and will necessarily be more extensive than in the case of vessels which are simply passing through the territorial sea along the coast. The same observation applies to vessels which have been in one of the ports or navigable waterways of the Coastal State. The Coastal State, however, must always do its utmost to interfere as little as possible with navigation. The inconvenience caused to navigation by the stopping of a large liner outward bound in order to arrest a person alleged to have committed some minor offence on land can scarcely be regarded as of less importance than the interest which the State may have in securing the arrest of the offender. Similarly, the judicial authorities of the Coastal State should, as far as possible, refrain from arresting any of the officers or crew of the vessel if their absence would make it impossible for the voyage to continue."85/

/These

85/ Ibid., pages 128-129 and pages 8-9 respectively.

These observations make it apparent that the proposed article does not attempt to provide a solution for conflicts of jurisdiction in criminal law between the coastal State and the flag State. The Rapporteur considers that at the present stage of the International Law Commission's work this question will have to be reserved.

According to Gidel,[86/] a foreign vessel passing through the territorial sea and having on board a person charged with an offence falling within the competence of the courts of the coastal State ought to be subject to measures aiming at his arrest. To mitigate the severity of this principle, which would be likely to lead to a considerable increase in the number of instances in which a vessel could be arrested, it should, Gidel considers, be added that any coastal State which exercised this right wrongly or abusively would be liable under ordinary law. In the Rapporteur's view, it would be better to confine arrest to the cases provided for by the article in the proposed text. The text also rightly does not allow a vessel to be stopped in order to arrest a person on board whom the coastal State has been requested to extradite.

Article 20

Arrest of vessels for the purpose of exercising civil jurisdiction

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

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

/Comment

86/ Op.cit. III, page 261.

Comment

The text of this article is identical with that of article 9 of the 1930 Report. The observations accompanying that article were as follows:

> "The rules adopted for criminal jurisdiction have been closely followed. A vessel which is only navigating the territorial sea without touching the inland waters of the Coastal State may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board or for levying execution against or for arresting the vessel itself except as a result of events occurring in the waters of the Coastal State during the voyage in question, as for example, a collision, salvage, etc., or in respect of obligations incurred for the purpose of the voyage."87/

The Rapporteur would point out that this article does not attempt to provide a general solution for conflicts of jurisdiction in private law between the coastal State and the flag State. Questions of this kind will have to be settled in accordance with the general principles of private international law, and cannot be dealt with by the Commission at this stage of its work. Hence, questions of competence with regard to liability under civil law for collisions in the territorial sea are not covered by this article. Its sole purpose is to prohibit the arrest of a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction, except in certain clearly defined cases.

On 29 June 1933, the United States-Panama General Claims Commission, composed of Baron van Heeckeren, Presiding Commissioner, Elihu Root and Ricardo Alfaro, pronounced a decision88/ whereby, contrary to the rule proposed in the Rapporteur's text, a vessel could be arrested on account of a collision which had occurred during an earlier voyage. Arrest of this kind is also permitted under United Kingdom legislation; an Act of 1854 states the following:

> "Whenever any injury has, in any part of the world, been caused to any property belonging to Her Majesty or to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or within three miles of the coast thereof, it shall be lawful for the judge of any court of record in the United Kingdom...to issue an order to detain such ship" 89/

/The decision

87/ League of Nations documents C.351.M.145.1930.V, page 129; C.230.M.117.1930.V, page 9.
88/ Text in the American Journal of International Law, 1934, page 596.
89/ Gidel, op.cit., III, page 267.

The decision of the General Claims Commission (given with the dissenting vote of Mr. Alfaro) has been challenged by Mr. Borchard,[90] among others. The Rapporteur shares the view of Mr. Alfaro, Mr. Borchard and Mr. Gidel,[91] and is in favour of retaining the text of the article as adopted in 1930.

Article 21

Vessels employed in a governmental and non-commercial service

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

Comment

This article is identical with that inserted in the 1930 Report as article 10. The observations attached to this article were worded as follows:

> "The question arose whether, in the case of vessels belonging to a Government and operated by a Government for commercial purposes, certain privileges and immunities might be claimed as regards the application of Articles 8 and 9. The Brussels Convention relating to the immunity of State-owned vessels deals with immunity in the matter of civil jurisdiction. In the light of the principles and definitions embodied in that Convention (see in particular Article 3), the Article now under consideration lays down that the rules set out in the two preceding Articles are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and the persons on board such vessels. Government vessels operated for commercial purposes therefore fall within the scope of Articles 8 and 9."[92]

Section B. Warships

Article 22

Passage

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

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

/3. Submarines

90/ American Journal of International Law, 1935, page 103.
91/ Op.cit., III, page 269.
92/ League of Nations Documents C.351.M.145.1930.V, page 129; C.230.M.117.1930.V, page 9. The articles 8 and 9 referred to in the passage quoted correspond to articles 19 and 20 of this text.

3. Submarines shall navigate on the surface.

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

Comment

Article 12 of the 1930 Report contained only the first three paragraphs of the proposed article. The observations relating to these three paragraphs were worded as follows:

> "To state that a coastal State will not forbid the innocent passage of foreign warships through its territorial sea is but to recognize existing practice. That practice also, without laying down any strict and absolute rule, leaves to the State the power, in exceptional cases, to prohibit the passage of foreign warships in its territorial sea.
>
> "The Coastal State may regulate the conditions of passage, particularly as regards the number of foreign units passing simultaneously through its territorial sea -- or through any particular portion of that sea -- though as a general rule no previous authorization or even notification will be required."93/

The provision which now appears as paragraph 4 of the article constituted the third paragraph of the observations attached to the article proposed by the 1930 Commission. The text, however, was slightly different and was worded as follows:

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

The Rapporteur has changed the wording of this provision in the light of the Judgment delivered by the International Court of Justice in the Corfu Channel Case on 9 April 1949, which states:

> "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a Coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a Coastal State to prohibit such passage through straits in time of peace."94/

/The Judgment

93/ Ibid., page 130 and page 10, respectively.
94/ I.C.J. Reports 1949, page 28.

The Judgment also contained the following passage:

"Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic."95/

Article 23

Non-observance of the regulations

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

Comment

This article is identical with article 13 of the 1930 Report. The latter was accompanied by the following observations:

"A special stipulation to the effect that warships must, in the territorial sea, respect the local laws and regulations has been thought unnecessary. Nevertheless, it seemed advisable to indicate that on non-observance of these regulations the right of free passage ceases and that consequently the warship may be required to leave the territorial sea."96/

95/ Ibid., page 28.
96/ League of Nations Documents C.351.M.145.1930.V, page 131; C.230.M.117.1930.V, page 10.