UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.4/99
12 March 1956
ENGLISH
ORIGINAL: VARIOUS

INTERNATIONAL LAW COMMISSION
Eighth session

COMMENTS BY GOVERNMENTS ON THE PROVISIONAL ARTICLES CONCERNING THE REGIME OF THE HIGH SEAS AND THE DRAFT ARTICLES ON THE REGIME OF THE TERRITORIAL SEA ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS SEVENTH SESSION

56-06516

TABLE OF CONTENTS

Note by the Secretary-General

1. During its seventh session held in Geneva from 2 May to 8 July 1955, the International Law Commission adopted two drafts relating to the international law of the sea, namely, "Provisional articles concerning the régime of the high seas" and "Draft articles on the regime of the territorial sea".[1/] In accordance with the terms of its Statute, the Commission decided to invite Governments to submit their observations on these drafts.[2/] The Commission also stated that it was its intention to prepare at its eighth session, in the light of these observations, a final report on the régime of the high seas, the régime of the territorial sea and related problems for submission to the General Assembly at its eleventh session, in 1956, as requested by General Assembly resolution 899 (IX) of 14 December 1954.

2. In pursuance of the Commission's decision, the Secretary-General by a circular letter of 24 August 1955, communicated the drafts and the request of the Commission to the Governments of the States Members of the United Nations and invited them to transmit their comments to him before 1 January 1956. On 27 January 1956, the Secretary-General sent a cable to those Governments which had not replied, urging them to submit their observations by 1 March 1956. By a circular letter of 31 January 1956, he also communicated the drafts to the sixteen new Member States admitted at the tenth session of the General Assembly, and invited them to send in their comments before 15 March 1956.

3. By 12 March 1956, the Secretary-General had received comments from the Governments of ten States Members of the United Nations, namely, Belgium, Brazil, China, Denmark, Dominican Republic, India, the Philippines, Sweden, Turkey and the Union of South Africa.

4. The texts of these comments are reproduced in the present document. Comments received after 12 March 1956 will be reproduced later as addenda hereto.

1/ See Chapters II and III of the Commission's report on the work of its seventh session, Official Records of the General Assembly, Tenth Session, Supplement No. 9, document A/2934; also document A/CN.4/94.

2/ The Commission also decided to transmit a number of articles on fishing, included in the draft concerning the régime of the high seas, to certain inter-governmental organizations for comment. Cf. document A/CN.4/100.

Comments by Governments

1. BELGIUM

Transmitted by a note verbale from the Permanent Mission of Belgium to the United Nations dated 9 January 1956

[Original: French]

A. REGIME OF THE HIGH SEAS

Article 2. Freedom of the high seas

1. On several occasions, the exact scope of the term "jurisdiction" was the subject of discussion in the Commission. The present report states that the term is used in article 2 in a broad sense, including not merely the judicial function but any kind of sovereignty or authority.

Perhaps it would be advisable to define the scope of the term in the body of article 2, especially as in Chapter III of the report (Régime of the territorial sea) article 1 speaks of the "sovereignty" of a State over the territorial sea.

Consequently, the first sentence of article 2 might read as follows:

> "The high seas being open to all nations, no State may subject them to its jurisdiction, sovereignty or any authority whatsoever. Freedom ...".

Article 5. Right to a flag

2. This article lays down certain conditions for purposes of recognition of the national character of a ship.

One of these conditions is that the ship must be the "property" [in French: appartenant] of the State concerned. It is not clear whether this term should be interpreted in the strict sense of "absolute ownership", or whether it is implied that a ship chartered by a State (e.g. for a special mission) is also State "property". Whichever of these interpretations is correct, it seems that the text should be clarified.

It is pertinent to compare this text with that of article 8, which confers immunity on ships "owned or operated by a State and used only on government service".

Article 5.1 might be redrafted to read:

"Be owned or operated by the State concerned."

3. As regards the condition to be satisfied in the case of private ownership, it would probably be difficult to insist, in every instance, that a particular person must fulfil the twin conditions of being "legally domiciled" and "actually resident" in the territory of the State. In some States the civil law draws a distinction between "domicile" and "residence", whereas in other countries the distinction is non-existent. That being so, there would be no uniformity in the fundamental conditions.

In Belgian law, the Act of 20 September 1903 concerning certificates of registry takes the distinction into account and requires either residence or domicile (art. 3 (c)).

Article 5.2 (a) and (b) might therefore be worded as follows:

"... persons legally domiciled... or actually resident...".

4. It seems to have been the International Law Commission's intention to require, as the basic condition for the right to fly a flag, that the person owning the ship should be physically present in the flag State.

Belgian legislation establishes the same requirement. The Act of 1903 makes physical presence a condition not only in the case of individuals but also in that of bodies corporate, which must have their registered office in Belgium.

5. Despite its apparent intention, the Commission's draft provisions respecting bodies corporate introduce a distinction, inasmuch as a partnership is not required, by article 5, to be formed under the laws of the State concerned or to have its registered office in the country of the flag under which it wishes its ships to sail; only the individual partners with personal liability must be domiciled and reside in that country.

6. Under the provisions of a bill now before Parliament for the amendment of the Act of 20 September 1903 concerning certificates of registry (Senate document No. 153; meeting of 2 February 1954), such a certificate would henceforth no

longer be regarded as an instrument conferring nationality but as prima facie evidence of nationality. The ship's national character will depend on the nationality of its owners, for which purpose the compulsory registration statement is to be conclusive evidence. (See the bill concerning the introduction of compulsory registration for ships and boats; Senate document No. 155; meeting of 2 February 1954).

As far as individuals are concerned, the last-mentioned bill does not introduce any changes in the rules laid down by the 1903 Act. There is, however, a change which affects bodies corporate; a ship shall be deemed to have Belgian nationality if more than half the ownership thereof is vested in: (a) a commercial company or partnership formed under Belgian law and having its principal seat of business in Belgium; or (b) a foreign commercial company or partnership formed under foreign law if it has its principal seat of business in Belgium or is represented in Belgium by not less than one director and two other responsible officers of Belgian nationality who are domiciled in Belgium.

7. Perhaps the wording of the International Law Commission's draft of article 5 should be revised so as to specify that the distinction between the two types of bodies corporate referred to, respectively, in paragraphs (b) and (c) is the distinction between an association of persons and an association of capital.

8. When the Commission discussed the suggestion by Mr. Stavropoulos, the Legal Counsel of the United Nations, that it might consider the problem of ships under the United Nations flag (A/CN.4/SR.320, para. 68 et seq.) it was stated that article 5 did not exclude the registration of ships owned by "legal entities".

Article 5, however, confines itself to stating what conditions have to be fulfilled by individuals or by certain expressly specified bodies corporate, viz. partnerships and joint stock companies. What is the position of a body operating in the public interest, or of a non-profit association, that wishes a ship engaged on, say, a humanitarian or scientific mission, to fly a particular flag?

Article 8. Immunity of State ships other than warships

9. This article may, prima facie, apply to several categories of ships:

1. State-owned ships used on commercial or non-commercial government service;

2. Privately owned ships used on:

(a) non-commercial government service;

(b) commercial government service.

10. It is uncertain whether article 8 applies to all these categories or whether ships covered by 2 (a) are excluded. The relevant comment in the Commission's report seems to suggest the former, as it states that "there were no sufficient grounds for not granting to State ships used on commercial government service the same immunity as other State ships".

This interpretation is, however, only possible if it is agreed that article 5.1 should be construed in the manner suggested in paragraph 2 above.

11. Under the Hague Declaration of 3 June 1955, signed by Belgium, Denmark, France, the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany, which refers to the international Convention for Regulating the Police of the North Sea Fisheries, signed on 6 May 1882, police functions over the North Sea fisheries may be exercised increasingly by ships other than warships.

12. Moreover, if fishing vessels owned or operated by the State are to enjoy complete immunity from the jurisdiction of any State other than the flag State, in the same manner as warships, that fact will have to be borne in mind in devising the appropriate international machinery to ensure due compliance with the "Overfishing" convention. Some States might even escape the control machinery of the convention by operating their national fishing vessels as State ships.

Piracy

Article 15. Act of piracy

13. As this article constitutes an exception to article 14, it is hardly logical to say that "acts of piracy" are assimilated to "acts committed by a private vessel". The following wording would seem preferable:

"If the acts referred to in article 14 are committed by a warship or a military aircraft whose crew has mutinied, then the acts in question are assimilated to acts of piracy."

Article 16. Pirate ship

14. The article defines a pirate ship as a ship which is "devoted" to the purpose of committing acts of piracy.

The comment on article 18, however, states that before the ship can be seized it must actually have committed acts of piracy.

Furthermore, the terms of article 15 suggest that a warship, which cannot in principle be regarded as "devoted" to acts of piracy, might nevertheless become a pirate ship.

Some amendment is surely necessary, so that the definition should read as follows:

"A ship or aircraft is considered a pirate ship or aircraft if it has committed, or is used or is intended to be used by the persons in dominant control for the purpose of committing, one of the acts referred to in article 14, paragraph 1."

Article 18. Seizure of a pirate ship

15. If the modification suggested in paragraph 14 above is introduced, article 18 will be fully consistent with the relevant comment in the Commission's report. If the change is not made, the operative provision itself should state that the vessel can only be seized if it has committed acts of piracy. If such a clause were introduced, then the subsequent reference, in article 19, to seizure on suspicion of piracy, would also be more logical.

B. REGIME OF THE HIGH SEAS. FISHING

Article 29. Measures unilaterally adopted by a State

16. This article is somewhat vague in its reference to the "area... contiguous" to the coast.

The International Technical Conference on the Conservation of the Living Resources of the Sea held at Rome from 18 April to 10 May 1955, did not express any opinion on the question of the contiguous zone.

Furthermore, a serious query arises regarding sub-paragraphs (a) and (b) of paragraph 2, which state that the measures adopted "shall be valid... only if /certain/ requirements are fulfilled". No State will ever be able to produce scientific evidence showing that there is an imperative and urgent need for measures of conservation or to prove that the measures are based on appropriate scientific findings.

Again, paragraph 3 provides for the possible application of measures which are still controversial. In such cases, however, the source of the controversy will be precisely the insufficiency of the evidence produced. It may be somewhat rash, therefore, to say that the country concerned may nevertheless proceed with those measures.

Nor is it a very reassuring feature that the coastal State would have exclusive discretion in deciding what is the "reasonable" period within which its negotiations with the other States must lead to an agreement (paragraph 1). The very term "reasonable" leaves too much scope for interpretation.

If the Commission persists in the view that, notwithstanding a reference to arbitration, measures which evoke criticism should nevertheless remain in effect, then inevitably the negotiations will be protracted. If in consequence of arbitration proceedings the measures in question are declared to be inconsistent with the rules of international law, these measures will then have to be rescinded ex post facto. Such a procedure is hardly likely to prevent such measures from being adopted in the first place.

Accordingly, if there is no possibility of having the whole of article 29 deleted, at least the second sentence of paragraph 3 should be deleted; this paragraph states that "the measures adopted shall remain obligatory pending the arbitral decision". It would be preferable if controversial measures remained in abeyance so long as the arbitral commission has not rendered its award.

C. REGIME OF THE TERRITORIAL SEA

Article 3. Breadth of the territorial sea

17. The breadth of the territorial sea was the subject of prolonged and lively discussions, during which the Commission made praiseworthy efforts to agree on a concrete proposal. The text now reproduced in the report calls for the following comments:

18. It would be welcome if all countries could be induced to subscribe to the principle, which the Commission admits, that international law does not justify an extension of the territorial sea beyond twelve miles. Universal acceptance of that principle would at least put a halt to the ever-growing pretensions of certain countries.

19. Furthermore, the statement that international law does not require States to recognize a breadth beyond three miles (paragraph 3) implicitly confirms that it is necessary to conclude an international agreement concerning the limits of the territorial sea. Belgium has always maintained precisely that position.

The Commission reaffirms the right of a State to refuse to recognize any extension of another State's limits beyond twelve miles. If, however, the nationals of the former State are not to remain in uncertainty about the law, some agreement must be reached with the State which so extends its limits. Let us take, for example, the case of Iceland: it would be useless to say that the United Kingdom, Belgium and other countries have the right to dispute the new Icelandic limits if it is simultaneously conceded that Iceland has the right to fix those limits. The Commission's statement, while correct in international law (cf. A/CN.4/SR.328, para. 22 et seq.), does not resolve the practical difficulties.

20. In view of the possibilities (of exercising fishing rights) opened up by the scope of draft articles 24 to 33 concerning the régime of the high seas, and especially in view of the terms of article 29, it is very probable that the principle of the twelve-mile maximum limit, as stated in article 3, would be acceptable to the majority of States.

21. It will then be possible, by means of international agreements, to arrive at the solution of fixing a limit other than the three-mile limit, provided that it is less than twelve miles.

Article 5. Straight base lines

22. This article provides that the base line, for the purpose of measuring the breadth of the territorial sea, may be independent of the low-water mark if circumstances necessitate a special régime (deep indentations of the coast, islands in its immediate vicinity, economic interests).

Although paragraph 1 of this article was adopted by the Commission by 10 votes to 3, there seems to be little justification for the inclusion of the criterion of "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage". Nowhere does the judgement of the International Court of Justice in the Fisheries Case state that mere "economic interests" constitute sufficient grounds for the adoption of straight base lines.

Article 7. Bays

23. In this connexion, it should be noted that the Hague Convention of 6 May 1882 fixed the maximum length of the closing line across the opening of a bay at ten miles.

Article 13. Delimitation of the territorial sea at the mouth of a river

24. See paragraph 23 supra.

Article 15. Delimitation of the territorial sea of two adjacent States

25. Belgium's earlier suggestion regarding this article (formerly article 16) was not adopted.

Article 23. Government vessels operated for commercial purposes

26. Cf. the comments in paragraphs 2 and 9 supra concerning the definition of "State ship".

Article 25. Warships

27. The corresponding article in the previous draft (art. 26) had laid down the principle that there existed a right of innocent passage without previous authorization or notification. Some members of the Commission wished the text to stress that such passage was in fact merely a concession, which is contingent on the consent of the coastal State. That point of view was shared by Belgium.

The majority concurred with that view and the amended wording of the present article 25 was adopted. As the text now stands, the State will have the right to refuse passage even where, in like circumstances, a merchant vessel would be entitled to pass unhampered.

2. BRAZIL

Transmitted by a note verbale from the Permanent Mission of Brazil to the United Nations dated 19 December 1955

[Original: Portuguese]

I. With regard to the régime of the high seas:

(a) It is suggested that article 5 should contain a clause providing that, for purposes of recognition of its national character, it shall suffice if the ship can prove its nationality readily, not only by means of the ship's name and port of registry clearly marked in a visible place, but also by means of the ship's papers.

(b) It is recommended, with reference to the question of hot pursuit (article 22), that it should be stipulated that for the purpose of the exercise of the right of pursuit it shall suffice if the coastal State, in the defence of its lawful interests, has good reason to believe that an offence against its laws or regulations has been or is about to be committed; a similar provision is contained in article 9 of the Convention concluded between Finland and various other countries at Helsingfors on 19 August 1925.

(c) It is recommended that the United Nations should establish, instead of a mere arbitral commission as provided by article 31, a specialized agency in the form of a permanent international maritime body competent not only to settle differences of the type contemplated in articles 26 to 30 but also to carry out technical studies concerning the problems of the conservation and utilization of the living resources of the sea.

II. With regard to the territorial sea:

(a) It is noted that the draft articles do not contain any provision relating to the contiguous zone although a reference to this zone occurs in article 22 [of the provisional articles concerning the régime of the high seas]. In our view it would be desirable to allow for such a zone, extending up to twelve miles from the coast, in the case of States whose territorial sea does not exceed six miles in breadth; such States to have

jurisdiction in the said zone purely for certain specific purposes or, preferably, for the purposes indicated in the relevant article adopted by the Commission at its fifth session (1953); with, perhaps, the addition of exclusive fishing rights - or at least the right to regulate and control fishing - with a view to the conservation of the living resources of the zone.

(b) With regard to article 7 we would state: (1) that the definition of the term "bay" given therein seems to us unnecessary and complicated. If, however, a definition is desired we would prefer that proposed by the United Kingdom Government in its reply to the request for information made by the Preparatory Committee for the 1930 Conference, viz: for the purpose of determination of the base line a bay "must be a distinct and well-defined inlet, moderate in size, and long in proportion to its width" (League of Nations, Conference for the Codification of International Law, Bases of Discussion, Volume II, page 163); and (2) that we consider the limit of twenty-five miles for the closing line at the entrance of or within a bay to be frankly excessive - especially since (except of course in the case of historical bays) this width has not, as a rule, exceeded twelve miles in practice.

(c) With regard to roadsteads (the subject of article 9) we maintain the view which we previously communicated to the International Law Commission. We might now cite in support of our case passages from the books of the leading authorities on the public international law of the sea; for example, Gilbert Gidel says: "Every roadstead should be subject to the régime of internal waters" (Gidel, Le droit international public de la mer, II, pages 22 et seq. To the same effect see also: C. John Colombos, The International Law of the Sea, third edition, 1954, page 66, paragraph 78; and J. L. de Azcárraga, Régimen jurídico de los especios marítimos, page 109. Cf. Oppenheim-Lauterpacht, seventh edition, page 455, paragraph 190c).

(d) With regard to islands, drying rocks and drying shoals, with which the draft articles 10 and 11 are concerned: if mere drying rocks and drying shoals may be taken as points of departure for extending the territorial sea, with the result that the waters between them and the coast become internal waters, it seems to us unreasonable that the same should not apply to islands in precisely the same situation. In our view it would be desirable to set a limit on the use of such drying rocks or drying shoals - as well as islands in the same situation - as points of departure for extending the territorial sea. Thus, instead of specifying that this applies to drying rocks etc. "which are wholly or partly within the territorial sea", the provision should be made applicable, for example, to those which lie within three miles. This would obviate the exaggerated widening of a State's territorial waters at particular points.

3. CHINA

Transmitted by a letter from the Permanent Mission of China to the United Nations dated 9 February 1956

/Original: Chinese/

I. Comments on the provisional articles concerning the régime of the high seas

1. Provisional article 10 provides that in the event of a collision on the high seas, criminal proceedings against persons responsible for the incident may be instituted only before the authorities of the State to which the ship on which such persons were serving belonged or of the State of which such persons are nationals. This provision is incompatible with articles 3 and 4 of the Chinese Criminal Code.

The Chinese Government believes that although criminal jurisdiction is primarily territorial, it does not follow that a State can assume jurisdiction only over offences which are committed wholly within its territory. An offence must be deemed to have been committed within the territory of a State if the overt act constituting the offence is committed within the territory of that State or if the offence produces its effect within the territory of that State. In either case, the offence is within the penal cognizance of that State. This is a principle generally accepted in modern penal legislation and incorporated in the Chinese Criminal Code.

In a collision case, if an unlawful, injurious act involving the criminal responsibility of the crew of one vessel produces its effect upon a vessel of a different nationality, the offence is of the same nature as a crime which produces its effect in the territory of the State to which the victim vessel belongs. Under the principle stated above, it cannot be doubted that such an offence is within the criminal jurisdiction of that State.

This rule was unequivocally affirmed in the judgement rendered in 1927 by the Permanent Court of International Justice in the "Lotus" case. It should be pointed out that the provisional article in question, in its attempt to alter this rule, has run counter to the notion of the territoriality of criminal jurisdiction now adopted by most States. For this reason, the Chinese Government is unable to agree to provisional article 10.

It is stated in the Report of the International Law Commission covering the work of its seventh session that the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, signed at Brussels in 1952, modified the rule affirmed in the judgement on the "Lotus" case. Since this convention has not yet won general acceptance, its provisions can have only limited application as rules of international law.

2. Piracy has been said to "consist in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons". (See the Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, 1927, page 116.) This is piracy in the restricted sense.

In a broad sense, any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel can also be regarded as having committed piracy. This interpretation is fully in accord with the views of writers and authorities on international law and is adopted in the Chinese Criminal Code, which provides for the punishment of both types of piracy. (See article 5, paragraph 8, and article 333, paragraphs 1 and 2, of the Chinese Criminal Code.)

Since provisional article 14 contains only the definition of piracy in its narrow sense, the Chinese Government believes that it should be amended to include also piracy in its broad sense as described in the preceding paragraph.

3. Provisional articles 25 and 26 on the regulation and control of fishing activities appear to favour States whose nationals are already engaged in fishing in any given area of the high seas and fail to take into account the possible interests of the States whose nationals may in future participate in the fishing activities in such areas. The Chinese Government considers it desirable to adopt appropriate supplementary provisions in this regard in order to safeguard such interests.

II. Comments on the draft articles on the régime of the territorial sea

1. In draft article 3, the International Law Commission has, in effect, recognized the right of each State to decide on the breadth of its own territorial sea within the limits of three to twelve miles. Although this formulation may be regarded as expedient under the prevailing circumstances, the Chinese Government wishes to reserve its position on this question for the time being.

2. The Chinese Government fully agrees with the provisions of draft article 7 that waters within a bay should be considered internal waters if the line drawn across the opening does not exceed twenty-five miles and that where the entrance of a bay exceeds twenty-five miles, a closing line of such length should be drawn within the bay.

ANNEX

TEXTS OF ARTICLES 3, 4, 5 and 333 OF THE CHINESE CRIMINAL CODE[1/]

Article 3

This Code shall apply to any offence committed within the territorial limits of the Republic of China. Offences committed on any Chinese vessel or aircraft beyond the territorial limits of the Republic of China shall be deemed to have been committed within the territorial limits of the Republic of China.

Article 4

An offence shall be deemed to have been committed within the territory of the Republic of China if the overt act constituting the offence is committed within the territory of the Republic of China, or if the offence produces its effect in the territory of the Republic of China.

1/ The texts of the various articles, with the exception of article 4, are based on the translations made by the Legal Department of the Shanghai Municipal Council (The Commercial Press, Shanghai, China, 1935), pp. 2-3 and 119. Texts of articles 3, 4 and 5, taken from the same source, already appear in Laws and Regulations on the Régime of High Seas (United Nations Legislative Series), Vol. II (1952), p. 24. A new translation of article 4, the key article on which the Chinese Government bases its comments on the question of collision, has been made because the existing text does not fully express the meaning of the original.

Article 5

This Code shall apply to any one of the following offences committed beyond the territorial limits of the Republic of China:

1. Offences against the internal security of the State;
2. Offences against the external security of the State;
3. Offences relating to counterfeit currency;
4. Offences relating to counterfeiting of valuable securities, as specified in articles 201 and 202;
5. Offences relating to false documents and seals, as specified in articles 211, 214, 216 and 218;
6. Offences relating to opium;[2/]
7. Offences against personal liberty, as specified in article 296;
8. Offences of piracy, as specified in articles 333 and 334.

Article 333

Whoever navigates any vessel not being commissioned by a belligerent State or not being part of the naval forces of any State, with intent to commit violence or employ threats against any other vessel or against any person or thing on board such other vessel, is said to commit piracy, and shall be punished with death, or imprisonment for life, or for not less than 7 years.

Whoever being a ship's officer[3/] or a passenger on board a ship, with intent to plunder or rob, commits violence or employs threats against any other officer[3/] or passenger and navigates or takes command of the ship shall be deemed to have committed piracy.

Where death results from the commission of piracy, the offender shall be punished with death; or if grievous bodily harm results, the offender shall be punished with death or imprisonment for life.

2/ An additional item which appears in the Chinese text submitted by the Chinese Government. Article 5 was amended on 7 November 1948.

3/ "A member of the crew" and "another member of the crew" would be closer to the meaning of the original expressions.

4. DENMARK

Letter from the Permanent Mission of Denmark to the United Nations dated 13 January 1956

/Original: English/

In reply to your note of 24 August addressed to the Minister for Foreign Affairs concerning the report of the International Law Commission I am directed by the Ministry for Foreign Affairs to inform you:

that at the moment the report of the International Law Commission is under consideration by the appropriate Danish authorities and

that these authorities are not yet able to complete their final statement on the report as a whole among other reasons because the Committee, which has been established to examine the report and comment on an, if possible, unambiguous delimitation of the Danish territorial sea, has not as yet terminated its deliberations.

Nevertheless at this stage the Danish Government is able to submit the following comments to the present draft of article 25, section 2, concerning regulations as regards the right of innocent passage through international straits:

The Danish Government agrees with the principle of international law that warships in time of peace have the right of innocent passage through international straits. It is the view of the Danish Government, however, that this principle does not debar the State in question from taking, in certain areas, reasonable measures for the protection of its security provided that these measures do not amount to a prohibition or to a suspension of the right of innocent passage, vide paragraph 4 of Article 18 of the Draft articles. The requirement of previous notification, for example, would be within the scope of such reasonable measures, and the Danish Government therefore believes that in its comments to paragraph 2 of Article 25 the Commission has gone too far by suggesting that

> "in straits normally used for international navigation between two parts of the high seas, the right of passage must not be made subject to previous authorization or notification".

The Danish Government is of the opinion that innocent passage is not interfered with when for special reasons, for instance security reasons, passage is made subject, not to any authorization, but merely to previous notification through diplomatic channels.

5. DOMINICAN REPUBLIC

Transmitted by a letter from the Permanent Mission of the Dominican Republic to the United Nations dated 5 March 1956

[Original: Spanish]

1. The provisions of municipal law concerning the régime of the high seas, the régime of the territorial sea and the submarine or continental shelf are contained in article 5 of the Constitution of the Dominican Republic, in Act No. 3342 of 13 July 1952 concerning the extent of the territorial waters of the Republic and in the Harbour and Coastal Police Act (No. 3003) of 12 July 1951.

2. So far as the extent of the territorial sea and the continental shelf are concerned, article 5 of the Constitution of the Republic provides that "the adjacent territorial sea and continental shelf are likewise part of the national territory", and adds that "the extent of the territorial sea and of the continental shelf shall be defined by statute". Article 1 of Act No. 3342 (vide supra) provides:

> "a zone of three nautical miles along the coasts, the said zone extending seaward from the mean low-water mark, is hereby established as the extent of the territorial or jurisdictional waters".

Article 4 establishes:

> "an additional zone adjacent to the territorial sea, to be known as the 'contiguous zone', which shall consist of a belt extending outward from the outer limit of the territorial sea to a distance of twelve nautical miles into the high seas".

Previous delimitations are subject to a transitional provision of the Act which states:

> "The dimensions of the territorial sea and of the contiguous zone which are specified in this Act constitute the minimum limit of the aspirations of the Dominican Republic and, accordingly, do not represent an immutable position with respect to any progressive development of positive international law that may hereafter affect the régime of the sea."

3 The Bays of Samaná, Ocoa and Neiba, within the boundaries formed by lines drawn transversally between their respective capes and points, are declared historical waters or bays. These lines demarcate the boundaries of the internal waters and the base line of the territorial waters in the bays in question.

4. With regard to maritime resources, article 5 provides:

> "The Dominican State reserves the right of ownership in and utilization of the natural resources and wealth which occur or may be discovered in the sea bed or subsoil of the sea in an area, adjacent to Dominican territory, the extent of which shall be determined by the National Administration according to the requirements inherent in the taking possession and exploitation of the said natural resources and wealth and, where appropriate, through international treaties. The Dominican State shall have power to set up or to authorize the setting up of structures or installations necessary for the exploitation of the said resources and to exercise all and any policing measures necessary for their conservation."

5. In pursuance of Act No. 3003 (vide supra), if any crime or offence is committed on board a Dominican or foreign merchant vessel, whether in a port or in the territorial waters of the Republic, the harbour-masters (Comandantes de Puerto) are empowered to act; they report the circumstances to the ordinary courts, but this action does not prejudice whatever action may be taken by other officials of the Judicial Police. If a crime or offence is committed on board a warship, the harbour-master concerned may not go on board but instead prepares a report setting forth the facts which have come to his notice.

6. The provisions relating to entry into port in distress or through force majeure and to the nationality of ships are contained, respectively, in article 46 and in articles 96 and 97 of Act No. 3003:

> "A vessel shall be deemed to have entered a Dominican port in distress or owing to force majeure if its entry is occasioned by:
>
> (a) lack of general provisions for the needs of the voyage;
>
> (b) legitimate fear of being captured by enemies or pirates;
>
> (c) accidents which render the vessel unseaworthy;
>
> (d) a storm which cannot be weathered on the high seas;
>
> (e) an unexpected illness or serious injury suffered by a passenger or crew member and requiring urgent attention; or
>
> (f) a mutiny on board, threats or serious disagreements between the crew.

In all other cases entry into port shall be deemed to be voluntary."

"The following vessels possess Dominican nationality:

(a) vessels registered as such with the Port Authorities;

(b) vessels seized from the enemy in time of war or condemned as prize";

"a vessel cannot acquire Dominican nationality until its foreign registration has been cancelled".

7. The enclosed copies of article 5 of the Constitution and of Act No. 3342 contain provisions concerning the extent of the territorial waters of islands or islets; canals and other waters considered as territorial; the regulations governing the territorial sea and the contiguous zone in the areas bordering on the territory of the Republic of Haiti; and the powers of jurisdiction or control in the contiguous zone and in internal waters declared to be national territory.

6. INDIA

Transmitted by a note verbale from the Permanent Mission of India to the United Nations dated 10 February 1956

[Original: English]

Régime of the High Seas

Article 2: The Government of India are of the view that it is desirable to clarify that the freedoms enumerated in this article are to be enjoyed in conformity with the rules of International Law. The position as it exists today is that the freedom of the High Seas is subject to certain recognized exceptions in International Law including the right of a coastal State to adopt measures necessary for self defence. Most of these exceptions find place in the subsequent articles, and it does not appear to be the intention of the International Law Commission to introduce any basic changes to the existing position. To put the matter beyond controversy, the Government of India would suggest the insertion of the following clause at the end of the article:

> "These freedoms shall be enjoyed in conformity with the provisions of these articles and other rules of International Law".

It would appear that a similar provision has been made in Article 1(2) on the Régime of the Territorial Sea.

Article 5: The Government of India have undertaken a revision of their Laws relating to merchant shipping and for the present they would like to reserve their comments on this draft article.

Article 22: The Government of India are of the view that this article should be suitably amended so as to allow the right of pursuit of a foreign vessel also in cases where the pursuit has commenced within the contiguous zone though outside the territorial sea. The Government of India feel that unless such a right is recognized the utility of contiguous zones would be much diminished and the purpose of establishing such zones may be somewhat frustrated.

Articles 24 to 30: The Government of India have no comments on article 24. They are however, of the view that the basis of the draft articles 25 to 30 are unacceptable. They do not protect the legitimate interests of Coastal states and

in particular are unfair to under-developed areas, with expanding population increasingly dependent for food on the living resources of the seas surrounding the coasts, and which for political reasons were unable hitherto to assert their rights to develop their fishing fleets. The Government of India feel that a Coastal State should have the exclusive and preemptive right of adopting conservation measures for the purpose of protecting the living resources of the sea within a reasonable belt of the high seas contiguous to its coast. Unless such a right of the coastal State is recognized, States with well developed fishing fleets may indulge in indiscriminate exploitation of the living resources of the sea contiguous to the coast of another State much to the detriment of that State and its people. The Government of India consider that it would be undesirable to confer a right on a State to adopt conservation measures or establish conservation zones in areas contiguous to the coast of another merely because its nationals have engaged in the past in fishing in such areas. The primary right and duty of conservation of living resources should be that of the coastal State in respect of areas contiguous to its coast. The Government of India do not deny the right of other States to fish in the High Seas contiguous to the coast of another, but where conservation measures have been adopted by the coastal State, other States may approach the latter for suitable agreements in this regard. The Government of India feel that the exercise of such a right by the coastal State will be in the general interest of the international community and will not in any way interfere with the freedom of bona fide fishing in the High Seas enjoyed by all the States. The Government of India attach great importance to these articles and desire that these be reconsidered in the light of the above comments.

The Government of India would suggest the following amendments to these articles:

Article 25: Insert the words "contiguous to its coast" between the words "high seas" and "where" in line 2.

Article 26: Insert the words "beyond the belt of 100 miles from the coast of a State" after the words "high seas" in line 2.

Article 28: This becomes unnecessary if amendments to 25 are accepted.

Article 29: The proviso to paragraph 1 should be omitted and the following proviso be substituted:

"Provided that a State whose nationals are engaged or may be engaged in fishing in those areas may request the coastal State to enter into negotiations with it in respect of these measures".

In paragraph (2): clause (a): Omit the word "scientific".

clause (b): In place of the existing clause substitute the following: "That the measures adopted are reasonable".

clause (c): At the end of the clause insert the words "as such".

Article 30: May be deleted.

Articles 31 to 33: The Government of India would prefer to reserve their comments on these articles until a final decision is reached on the subject of Arbitral Procedure.

Annexures to Articles on the Régime of the High Seas: The Government of India wish to offer the same comments as under articles 24 to 33.

Régime of the Territorial Sea

Article 1: The Government of India would suggest insertion of the following proviso at the end of paragraph 2:

"Provided that nothing in these articles shall affect the rights and obligations of States existing by reason of any special relationship or custom or arising out of the provisions of any treaty or convention".

Article 3: The Government of India are unable to accept paragraph 3 of this article as this will be in conflict with the provisions of paragraph 2 and would render the said provisions meaningless. The Government of India would suggest that paragraph 3 should be omitted and paragraph 2 be redrafted as follows:

"The maximum breadth of the territorial sea may be fixed at 12 miles and within that limit each country whatever may be the geographical configuration of its coast line should have freedom to fix a practical limit".

Article 5: The Government of India would suggest the substitution of the word "area" in place of the word "region" in paragraph 1.

Article 7: Comments to be telegraphed later.

Articles 8, 9, 13: Comments to be telegraphed later.

Article 16: The Government of India would suggest insertion of the following clause at the end of paragraph 1:

"Except in times of war or emergency declared by the coastal State".

Article 19: The Government of India would suggest insertion of the following as sub-clause (a) and the existing sub-clauses be re-numbered as (b), (c), (d), (e) and (f) respectively.

"(a) the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".

7. PHILIPPINES

Note verbale from the Permanent Mission of the Philippines to the United Nations dated 20 January 1956

/Original: English/

The Permanent Representative of the Philippines to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to refer to the latter's communication (LEG 292/9/01; LEG 292/8/01), dated 24 August 1955, addressed to the Vice-President and Secretary of Foreign Affairs of the Philippines, drawing his attention to the report of the International Law Commission covering the work of its seventh session held in Geneva from 2 May to 8 July 1955, and inviting the Philippine Government to submit the observations on the following drafts: paragraph 18, the Annex to Chapter II, and paragraph 24, all of which are contained in document A/CN.4/94.

The Philippine Government is in general agreement with the technical and scientific aspects of the provisions of Chapter II (Régime of the High Seas), the Annex to Chapter II, and the "Draft Articles on the Régime of the Territorial Sea" in Chapter III. However, on certain specific provisions in the document, the following observations are submitted:

1. On the "Definition of the high seas", Article 1, page 6

As already stated, in this Mission's note verbale of 7 March 1955, in response to the Secretary-General's telegram LEG 292/9/01 of 3 February 1955 -

> "All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines. All other water areas embraced within the lines described in the Treaty of Paris of 10 December 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the Agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of Commonwealth Act No. 4003 and article 1 (this was inadvertently given as article 2 in the note verbale of 7 March 1955) of the Philippine Constitution, are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws,

defence and security, and protection of such other interests as the Philippines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over those waters. All natural deposits or occurrences of petroleum or natural gas in public and/or private lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries belong inalienably and imprescriptibly to the Philippines, subject to the right of innocent passage of ships of friendly foreign States over those waters."

In view of the foregoing considerations, and in line with this Article, the Philippine Government assumes that high seas cannot exist within the waters comprised by the territorial limits of the Philippines as set down in the international treaties referred to above. In case of archipelagos or territories composed of many islands like the Philippines, which has many bodies of water enclosed within the group of islands, the State would find the continuity of jurisdiction within its own territory disrupted, if certain bodies of water located between the islands composing its territory were declared or considered as high seas.

2. On Chapter II (Limits of the territorial sea), Article 3 (Breadth of the territorial sea), page 40

The Philippine Government considers the limitation of its territorial sea as referring to those waters within the recognized treaty limits and for this reason, it takes the view that the breadth of the territorial sea may extend beyond twelve miles. It may therefore be necessary to make exceptions, upon historical grounds, by means of treaties or conventions between States. It would seem also that the rule prescribing the limits of the territorial sea has been based largely on the continental nature of a coastal State. The Philippine Government is of the opinion that certain provisions should be made taking into account the archipelagic nature of certain States like the Philippines.

8. SWEDEN

Letter from the Ministry for Foreign Affairs of Sweden dated 4 February 1956

/Original: French/

By letter dated 24 August 1955 you invited the Swedish Government to submit its observations on the drafts - contained in the report of the International Law Commission covering the work of its seventh session - relating to the codification of certain parts of international law, i.e., the provisional articles concerning the régime of the high seas (chapter II of the report) and the draft articles on the régime of the territorial sea (chapter III of the report).

The Swedish Government has studied the Commission's drafts with the greatest interest, and would like to express the following views.

I. As regards the "provisional articles concerning the regime of the high seas", the Swedish Government wishes to confine itself for the time being to the following comments.

With respect to the right to fish (articles 24 et seq.), the Swedish Government considers that the conclusion of an international convention concerning fishing on the high seas would be particularly desirable, and believes that the establishment of an arbitral commission, as proposed in article 31, might serve a useful purpose.

The provisions of article 29 granting the coastal State the right unilaterally to adopt measures of conservation are open, in the Swedish Government's view, to the most serious reservations. How will it be possible to prove that there are fully appropriate scientific findings to show that certain measures are necessary or advisable? That is a question which may justifiably be asked. The measures adopted could, of course, be examined by an international organ; but such an organ might be long in coming to its decision, and the delay might entail considerable losses. The provision proposed in article 29 might lead to abuse, and in the Swedish Government's view should be deleted.

Article 34 concerns the right of States to lay telegraph or telephone cables and pipelines on the bed of the high seas. But by modern technical methods electric power too may be transmitted beneath the sea, through high-tension cables. The Swedish Government considers that this possibility should be taken into account in drafting a provision on the subject.

II. As regards the rules of international law concerning the territorial sea, the first questions that arise are those relating to the breadth of the territorial sea and the base line for measuring it. The Swedish Government stated its position on these matters in its letter of 12 April 1955, and it still holds the same views.

With respect to the new draft prepared by the International Law Commission at its seventh session, the Swedish Government desires to add the following observations.

There are marked differences of opinion among States on these questions, and experience has shown that a generally acceptable solution will be difficult to achieve. Nor has the International Law Commission succeeded in embodying a definitive text on the breadth of the territorial sea in its latest draft; it has merely set forth the following considerations:

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

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

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

In formulating these propositions, the Commission's apparent intention was to take into account the divergent opinions which have been expressed on the matter. Since, however, these opinions are actually irreconcilable, the Swedish Government considers that the Commission's propositions cannot be accepted as a statement of existing law, or as a useful basis for future solutions.

The Swedish Government supports the Commission's view that the limitation of the territorial sea to three miles is not based on uniform international practice, since besides the three-mile limit international law also recognizes other limits, for instance four miles and six miles. The Swedish Government believes that Sweden's four-mile limit may as justifiably be considered traditional as the three-mile limit fixed by some countries; and presumably the same applies to the six-mile limit applied by some other countries. The Commission states in its comment that the extension of the territorial sea to twelve miles does not

constitute a violation of international law; but this can only mean one thing: that such an extension is justified under international law. If that were so, however, these limits would clearly have to be respected by other States. The territorial sea is part of the coastal State's territory, and, as stated in article 1 of the Commission's draft, is subject to its sovereignty. One of the fundamental rules of international law is that States are bound to respect the territories of other States. It is hard to conceive of any State territory which a few States would be bound to respect while other States would not. The Commission says in its comment that the claim to a territorial sea up to twelve miles in breadth may be supported erga omnes by any State which can show a historical right in the matter. This rule is so important that it might well have been embodied in the actual text of the rules formulated by the Commission, which as it now stands it really contradicts.

The Swedish Government shares the Commission's view that any extension of the territorial sea beyond twelve miles infringes the principle of freedom of the seas, and is therefore contrary to international law. In connexion with the twelve-mile limit, the Swedish Government would point out that until recent years a territorial sea of twelve miles in breadth has been applied only in a few isolated instances, and to waters of little importance for international shipping. The Swedish Government feels that any extension of the territorial sea to twelve miles must be considered an exception, and that six miles is a maximum breadth claimed by enough States, and over a sufficient period of time, to be considered the breadth of the territorial sea recognized in international practice. Moreover, it should be borne in mind that the extension of the territorial sea to twelve miles practised in recent years by some States has elicited protests from other States.

Similarly, the Swedish Government does not believe that the views set forth by the Commission are calculated to provide a basis for a future solution of the question. A solution along these lines would mean that while each State would acquire the right to extend its territorial sea to twelve miles, the other States would not for their part be bound to recognize any extension of the territorial sea beyond the three-mile limit. A solution of this kind might be termed a compromise, in that it would meet the conflicting views at present held. However, it would be no real solution, for it would tend to perpetuate rather than to reconcile the existing divergencies. The present state of uncertainty on the subject would

therefore persist, and constant disputes would arise, disputes which would indeed defy solution because both of the two mutually exclusive positions would be declared to be in conformity with international law. Let us assume, for instance, that a State fixes the breadth of its territorial sea at six miles and prohibits foreigners from fishing within the zone thus delimited - a step which it would clearly be entitled to take if we follow the Commission's view - and let us assume further that fishermen who are nationals of a State which refuses to recognize any limit in excess of three miles engage in fishing in the disputed zone. If these fishermen are arrested and fined by the coastal State, the other State will undoubtedly protest and support its nationals. How will an international court be able to rule on a dispute of this kind if both parties are able to base their case on international law? In the Swedish Government's view, it is essential that the territorial sea to which a State is entitled should be respected by other States.

The Swedish Government wishes to reiterate the opinion expressed in its letter of 12 April 1955: that the solution most likely to meet the conflicting views would be one which would grant States a certain freedom in establishing the breadth of their territorial sea themselves, while at the same time restricting that freedom within rather narrow limits.

The Swedish Government considers that the maximum breadth for the extension of the territorial sea should be fixed at six miles, perhaps with the proviso that States which can show a historical right should be entitled by way of exception to claim a larger territorial sea. The Swedish Government feels that such a solution would be reasonably well in keeping with the present position in law.

However, the outer limit of the territorial sea depends not only on the breadth of the territorial sea but also on the base line from which it is measured. Article 5 of the Commission's draft, concerning straight base lines, is of particular importance in this connexion.

The Swedish Government considers this article to be a distinct improvement over the draft prepared by the Commission at its sixth session, particularly because the provisions of paragraph 2 of the article, concerning the maximum length for such base lines, have not been retained. However, the Swedish Government still feels that the article is unduly complicated, and that it contains several conditions and reservations which serve no useful purpose. The most important

provision in the article, in its view, is that which states that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. This provision is based on the fact that it is primarily geographical conditions that make "internal waters" of a stretch of sea, and that these conditions are bound to have legal consequences. Stretches of water which are geographically linked to the land domain must obviously be treated juridically as part of the land domain; in other words, the geographical and the juridical concepts of internal waters are identical. It follows, in the Swedish Government's view, that the lines constituting the outer limits of internal waters must also, and on the same grounds as the land domain, serve as the base lines for measuring the territorial sea. If that be so, however, it is difficult to see how the other conditions laid down by the Commission for the drawing of straight base lines can be of any value. If the straight lines do not form the limits of internal waters, no economic interests peculiar to a region can, according to the provisions of the article in question, justify their use as base lines. If, on the other hand, the straight lines do form the outer limits of internal waters, it follows ipso facto that they must be employed as base lines for measuring the territorial sea. As the Swedish Government pointed out in its letter of 12 April 1955, any other solution would lead to absurd consequences. The fact of the straight lines constituting the limits of internal waters is therefore both a necessary and a sufficient condition for their use as base lines for measuring the territorial sea; and any mention in this connexion of circumstances necessitating a special régime is superfluous. Hence, it would be sufficient for article 4 to state that the breadth of the territorial sea is measured from the low-water line along the coast or from the straight lines constituting the outer limits of internal waters. Article 5 would then be redundant, and the same applies, in principle, to the provisions concerning bays, ports and the mouths of rivers. It might be useful to have a definition of "internal waters"; this could be extracted from article 5 ("sufficiently closely linked to the land domain" etc.) and inserted in article 4.

The Commission naturally attached considerable significance to the judgement of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway. However, the Swedish Government ventures to draw

attention to Article 59 of the Statute of the Court, which provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Hence, while a judgement of the Court is law so far as the parties are concerned, it does not constitute international law. As for the general reasons and considerations upon which a judgement of the Court may be based, they affect other cases only in so far as they reflect generally recognized principles of international law. In the case in point, for instance, the geographical reasons may be accepted without accepting the economic reasons.

The Swedish Government believes that in drawing base lines geographical considerations alone should be applied, not economic factors. To draw base lines for the purpose of extending the territorial sea to a point which would satisfy the coastal State's economic interests could only lead to abuse. Such a method of delimiting internal waters has no foundation in existing law, nor can it be accepted from the standpoint of lex ferenda. The Commission's stipulation that the sea areas lying within the base lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters would preclude the coastal State from arbitrarily drawing base lines by which sea areas that are not internal waters geographically would become internal waters.

Unlike the territorial sea, which is a purely juridical concept - from the geographical standpoint the territorial sea naturally forms part of the high seas - the term "internal waters" is essentially a geographical concept. To turn part of the high seas into internal waters on economic grounds can no more be condoned, surely, than to change internal waters into high seas or the territorial sea by applying a maximum length of, say, ten miles.

The Swedish Government sees no need for a definition of the term "bay", since this is a purely geographical concept which corresponds to the general acceptance of the term. It would be more to the point to define the conditions under which a bay could be considered internal waters. The Swedish Government considers that a bay should not be regarded as constituting internal waters unless it is a well-marked indentation and its coasts belong to a single State. The definition of the conditions under which a bay could be regarded as constituting internal waters might be taken from the provisions of article 7, paragraphs 1 and 2, concerning the term

"bay".[1] Accordingly, the Swedish Government considers that the term "historical bay", which implies that a certain limit is set on the breadth of bays, is both redundant and unwarranted.

The Commission raised a question concerning the measuring of the territorial sea in bays the coasts of which belong to several States. In this connexion, the situation on the frontier between Sweden and Norway is of some interest. The frontier crosses a bay and then an archipelago situated outside the entrance to the bay. Under the terms of certain Swedish Orders on fishing and customs control, the base line for measuring the territorial sea outside the archipelago is constituted by a straight line connecting the outermost islet on the Swedish side with the outermost islet on the Norwegian side. However, this is a rather special case.

As regards the other provisions of Chapter II of the Commission's draft concerning the régime of the territorial sea, the Swedish Government refers to its letter of 12 April 1955.

In conclusion, the Swedish Government wishes to point out that several provisions in both of the Commission's drafts can obviously apply only to peacetime conditions. This point should be clarified in future conventions. In this connexion, article 8 of the Barcelona Statute of 20 April 1921 on freedom of transit might serve as a model.

1/ The Swedish Government feels that in principle no limit should be placed on the breadth of bays which can be considered as internal waters.

9. TURKEY

Note verbale from the Permanent Mission of Turkey to the United Nations dated 2 March 1956

[Original: English]

The Permanent Representative of Turkey to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's Note of 24 August 1955, No. LEG 292/9/01, LEG 292/8/01, concerning the provisional Articles on the régime of the high seas and on the régime of the territorial sea formulated by the International Law Commission.

The Representative of Turkey will be grateful to His Excellency the Secretary-General if he would kindly transmit the following observations to the members of the Commission.

I. General

In the view of the Turkish Government the work of the International Law Commission has already contributed precious data on many important aspects of international maritime law. Part of these preliminary data might form a valuable basis for discussions in a future international convention concerning the régimes of the high seas and of the territorial sea.

However, in the opinion of the Turkish Government, other parts of the Commission's work have already shown that the subject matter of a certain number of the provisional Articles does not lend itself to a general codification. The foremost among these are the provisional Articles in which an attempt has been made to insert some general principles regarding the régime of straits.

In opposition to the general conditions affecting the application of the régime of the high seas and in certain cases of the territorial sea which may provide, to a certain extent, common criteria all over the world, the conditions affecting the régimes of straits are, and by nature ought to be, widely divergent.

Indeed, the impossibility of working out general rules applicable to all straits is not only illustrated by the divergent practices at present applicable in various straits but is also recognized by doctrine.

The Preparatory Committee appointed in 1924 by the Council of the League of Nations to report on certain aspects of international law which might lend themselves to a solution by international conventions, had attempted to render this task easier

by setting down distinctions on the characteristics of various straits. It was suggested that the question should be approached from the basis of whether the straits are subject to treaty regulations, whether the entrances are wider or narrower than 12 nautical miles, whether the straits are less than 12 miles wide at their entrances and exceed this limit at their subsequent course. In this latter case, a further distinction was made on such salt-water areas which exceed the 12-mile limit but whose coasts belong to a single State in which case they were recognized as internal waters.

However, even this detailed method of approach has not made it possible to reach agreement on general rules regarding the régime of straits.

The Turkish authorities are well aware that the International Law Commission has not attempted a general codification of the régime of straits and that the provisional Articles under consideration are only aimed at dealing with certain general aspects regarding passage. But the difficulties involved in having to choose only some of the general principles admitted in international law and of stating them out of the general context of rules and regulations which condition and modify their essence, are noticeable in the present text.

For example, although existing rules of international law, provisions of special conventions, precedent and State practice admit freedom of innocent passage in the best interests of international commerce and navigation, there is no case where such freedom might be interpreted to disregard the security, public order, sanitary well-being and other duties of the coastal State towards its own people. On the contrary, wherever written rules have been set down, special attention has been given to protect the sovereignty, security, public order, sanitary well-being, economic, fiscal and other interests of the coastal State as well as to safeguard the legitimate interests of international commerce and navigation.

For the particular implementation of this general rule in régimes of passage through different straits, the individual characteristics of the straits concerned, the degree of their importance to the security of all the territory of the coastal State, the proximity of the routes of passage to the coasts, the size and importance of the towns and cities situated on the shores of the straits, established practices existing by virtue of historical precedent and of international treaties and numerous other considerations have formed the basis upon which final rules of practice have been agreed upon.

In view of the considerations stated above, the Turkish authorities are doubtful that any useful purpose may be served by an attempt to formulate provisional Articles on passage through straits, even though these articles may only attempt to deal with certain of the more general principles and even though the special circumstances affecting the régime of certain straits which are of vital importance to the security and well-being of the coastal State, may be noted by amending these articles. It is, therefore, considered that the provisional Articles regarding certain aspects of passage through straits should not be included in the final report of the International Law Commission to the General Assembly. If the Commission considers it to be useful, a compilation of the various régimes applicable in different straits might be added as an appendix to the above-mentioned report.

Having stated their preference for a change of method in dealing with some of the subjects included in the provisional Articles, the Turkish authorities would like, however, to make certain suggestions in an attempt to render the present text, as far as possible, more harmonious with certain aspects of international law.

As the work of the Commission at this stage is considered to be exploratory and preliminary and as any final interpretation of the various articles will be possible only when the Commission's work is ready as a whole, the Turkish Government wishes to state that it does not consider itself committed in any way by the opinions expressed by it at this stage on the work of the Commission.

Provisional Articles on the Régime of the Territorial Sea

Article 2: Juridical status of the air space over the territorial sea and of its bed and subsoil.

Add the following paragraph:

"The provisions of the following articles regarding passage by sea are not applicable to air navigation of any kind."

Comment: Although the addition of this provision might seem superfluous in a set of provisional Articles dealing exclusively with maritime law, the fact that in the present text the sovereignty of the coastal State over the air space is defined as an extension of its sovereignty over its territorial sea, makes it necessary to specify that any conditions which may exist on the exercise of this

latter sovereignty are not applicable by extension to navigation by air which is regulated by other rules of international law.

Article 3: Breadth of the territorial sea.

Delete paragraph 3.

Comment: Paragraphs 2 and 3 of the present text of Article 3 summarizing the views of the Commission on the breadth of the territorial sea, are contradictory. According to paragraph 2, international law admits the extension of the territorial sea up to 12 miles. This indeed is a correct assertion as numerous states have already accepted the 12-mile limit for their territorial seas. Paragraph 3, however, asserts that international law does not require States to recognize a breadth beyond three miles and, therefore, constitutes not only a contradiction to paragraph 2 but also a future source of conflict as the Commission is indicating the acceptance as well as the negation of the same principle. The Turkish authorities are of the opinion that the 12-mile limit has already obtained the general practice necessary for its acceptance as a rule of international law.

Article 7: Bays.

1. Change the title of this Article to "Bays and Internal Seas".
2. Add the following paragraph as paragraph 2:

> "For the purpose of these regulations an internal sea is a well marked sea area which may be connected to high seas by one or more entrances narrower than 12 nautical miles and the coasts of which belong to a single state. The waters within an internal sea shall be considered internal waters."

Comment: The 12-mile limit of the breadth of the entrances has been retained from the work of the Preparatory Committee of the League of Nations. It may be changed to two belts of the territorial sea.

Article 12: Delimitation of the territorial sea in straits.

Paragraph 4: After "... straits which join two parts of the high seas ..." add "except where the connexion passes through an internal sea ...".

Article 18: Rights of protection of the coastal State.

Paragraph 4: Begin the paragraph with the words "In peace time ...". Add the following sentence:

> "The rights of the coastal state to enforce appropriate measures in times of war or when it considers itself under the menace of war or in conformity with its rights and obligations as a member of the United Nations are reserved."

Article 19: Duties of foreign vessels during their passage.

Re-number first sentence as paragraph 1. After the end of sub-paragraph (e) add the following sentence as paragraph 2:

"Submarines shall navigate on the surface."

Comments: This provision exists in the present text under Article 25 regarding the passage of warships. However, the eventuality of the passage of non-military submarines, such as those which may be used for scientific or other purposes, is not covered by paragraph 3 of the present Article 25. As Article 25 in its entirety should be conceived subject to the provisions of Articles 16 to 19, it would be preferable to delete the paragraph on the passage of submarines from Article 25 and add it to Article 19. Under the provisions suggested here below to be included for a re-drafting of Article 25, other restrictions on the passage of submarines existing at present in certain areas cannot be affected by the provisional Articles and shall, therefore, continue to be enforced.

Article 20: Charges to be levied upon foreign vessels.

Paragraph 2: Delete the words "rendered to the vessel."

Add the following paragraph:

"The right of the coastal state to demand and obtain information on the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the perception of charges is reserved."

Comments: The present wording of this paragraph is in contradiction to régimes now being applied in various parts of the world. By deleting the words "rendered to the vessel" more elasticity will be given to the text so that it might be applied in various ways in accordance with international agreements or other forms of established precedent. The additional third paragraph is also necessary in view of existing practices.

Article 23: Government vessels operated for commercial purposes.

After the words "... shall also aply to ..." add the word "unarmed".

Article 25: Passage (Warships).

Comments: In the view of the Turkish authorities, paragraph 2 of the present text will have to be completely re-drafted in order to reflect rules of international law now being applied in connexion with the innocent passage of warships through straits.

The Report of the International Law Commission for 1955 (Document A/2934) mentions the fact that "this Article does not affect the rights of states under a convention governing passage through the straits to which it refers." However, having taken note of this assertion, the Turkish authorities still do not consider the present text of the paragraph as an accurate and realistic description of the actual practice existing today regarding the innocent passage of warships through straits.

In the first place, the texts of paragraph 2 and paragraph 3 of the Article are, in themselves, contradictory. Paragraph 2 in its present form might be interpreted to imply that, except in cases where international conventions have established different procedures, the innocent passage of warships through straits is in general entirely independent of any considerations regarding the security and well-being of the coastal state which "may not interfere in any way" with such passage. In opposition to this statement, paragraph 3 stipulates that "submarines shall navigate on the surface", thereby admitting that the security of the coastal State cannot be ignored. Having thus admitted a principle which reflects more accurately present day practices, the question remains whether the navigation of submarines on the surface is the only rule affecting the innocent passage of warships through straits. As it is known, the régime applicable in certain straits eliminates completely the passing of submarines whether on the surface or not, except in special circumstances well defined in international conventions. Furthermore, the special nature of certain straits has made it necessary to set special rules and regulations affecting the innocent passage of warships other than submarines. In this category, for example, international law provides in certain cases rules which limit the tonnage of individual warships as well as that of the global forces which may effect simultaneous passage.

Further rules exist to regulate the time of the day when passages are allowed, and the general conditions under which they may be effected. The preceding regulations cited as examples, and other norms which are applicable at present in connexion with the innocent passage of warships through straits, show clearly that the present text of paragraph 2, Article 25, does not reflect existing rules of international law. It is, therefore, deemed necessary to consider a re-drafting of the paragraph in order to reflect the general principles upon which have been based the various régimes now being applied.

In the second place, the present wording of the Article is rather vague on the fact that the provisions of Articles 16 to 19, which are applicable in the case of the innocent passage of ships through the territorial sea in general, are equally applicable in connexion with the innocent passage of warships through straits as far as the waters of such straits form a part of the territorial sea of the coastal State. The rights of the coastal State to demand previous notification and authorization in certain cases, as noted in paragraph 1, are also dealt with vaguely in connexion with paragraph 2. While re-drafting the paragraph, special care should be taken to eliminate any ambiguities in these matters.

In the third place, the general principles regarding the innocent passage of warships through straits are in themselves based upon different premises according to whether the passage is effected in times of peace, in times of war, in times when the coastal State considers itself to be under the menace of war or in cases of certain conditions which might exist in conformity to the provisions of the Charter of the United Nations. A new paragraph should be added to take note of this situation.

The comments submitted above are aimed to render the present text of Article 25, concerning the general principles of the innocent passage of warships through straits, more harmonious with present-day rules of international law. However, as the subject is one of vital importance in many respects and as the details of application are very intricate in certain cases, it is suggested that apart from re-drafting the Article in the manner submitted above, a further paragraph should be added with direct reference to the fact that régimes which are applied by virtue of international treaties or conventions shall not be affected by the provisions of this Article. The substantial discrepancies existing between the French and English texts of paragraph 2 should also be noted.

Addition of a new Article:

Article 27:

Add the following text as Article 27:

"Nothing in the preceding Article shall be construed to affect the rights and obligations of states resulting from the provisions of the Charter of the United Nations."

Comment: While paragraph 2 of Article 1 refers to "other rules of international law", it does not cover clearly the implications of the text submitted above. It is

considered necessary to make a specific reference to the provisions of the Charter and to situations which may arise through the application of these provisions within the scope of the United Nations.

Provisional Articles on the Régime of the High Seas

Article 1: Definition of the high seas.

After the words "... not included in the territorial sea ..." and before the words "... or in the internal waters ..." insert the words "... or in the internal seas ...".

Comments: The necessity of inserting internal seas in this Article is due to the fact that no satisfactory definition or enumeration of internal waters exists in the present text of the provisional Articles on the régime of the high seas and the régime of the territorial sea. If such a definition, which would specifically include internal seas, were to be added to the present text, it might be possible to leave the text of Article 1 in its present form. However, until proper amendments are made elsewhere, the addition suggested above is considered as essential to the text.

Article 10: Penal jurisdiction in matters of collision.

The Turkish authorities appreciate the fact that the International Law Commission has made an endeavour in this Article to find a solution to the question of competing and conflicting juridical authorities in problems arising out of collisions and similar incidents of navigation on the high seas. However, the present text of Article 10 does not seem to bring a satisfactory solution to the problem involved. No legal basis can be found to substantiate the assertions of this Article which are contradictory to existing practices and to the judgement rendered by the Permanent Court of International Justice on 7 September 1927 in the "Lotus" case. Furthermore, the present text does not take into account some of the basic general principles of penal law.

The subject is considered as one in which further studies might be of special value. For example, the possibility of establishing some kind of international penal court competent to deal with these cases or of extending such competence to existing bodies of international jurisdiction might be studied.

However, if such competence is left to national jurisdiction, the Turkish authorities are of the opinion that the following rules should be adopted:

(a) In the event of a collision on the high seas between ships from different ports of registry, judicial and administrative competence shall be recognized to the State whose authority extends over that port of registry from among those of the ships concerned which is the nearest to the scene of the collision.

(b) In the event of an incident of navigation on the high seas (such as damage to a submarine telegraph or telephone cable or pipeline) judicial and administrative competence shall be recognized to the State whose authority extends over the port of registry of the vessel involved or to the State whose authority extends over the country to which the damaged property belongs depending on which one of these two lies the nearest to the scene of the incident.

Comment on some important discrepancies between the English and French versions of the provisional Articles

Some important discrepancies between the English and French versions of the provisional Articles render particularly difficult the interpretation of the intentions of the Commission. Foremost among these is the substantial difference in the scope and the meaning of the French and English versions of Article 25, paragraph 2 of the provisional Articles on the régime of the territorial sea. The words "ne peut entraver le passage inoffensif" of the French text appear as "may not interfere in any way with innocent passage" in the English text. It is considered that a divergence exists in the meaning of these two texts. However, as the comments submitted above regarding this Article apply equally to both texts which, in the view of the Turkish authorities, should be re-drafted, this example has been furnished only as an indication to facilitate the work of the Commission.

10. UNION OF SOUTH AFRICA

Transmitted by a letter from the Permanent Mission of the Union of South Africa to the United Nations dated 23 February 1956

[Original: English]

Comments on Draft Articles on the Régime of the Territorial Sea

Chapter II. Limits of the Territorial Sea

Article 3

The Union Government concurs with the view expressed in the fourth paragraph of the Commission's comment, that the task of harmonizing divergent views regarding the delimitation of the territorial sea between three miles and the maximum of twelve miles which the Commission is prepared to recognize, could best be entrusted to a diplomatic conference.

Pending the adoption by international agreement of a common standard - which should be binding without exception on all contracting States - the Union Government considers that the rules enunciated in draft article 3 embody as good an interim solution of the problem as can be expected at the present stage.

The Union Government supports the view of the Commission that the breadth of the territorial sea should not exceed twelve miles.

Article 4

The Union Government adheres to the view expressed in its comment on the 1954 draft, namely that the seaward edge of the surf should in certain cases be taken as the point of departure in measuring the breadth of the territorial sea.

Article 5

The amendments embodied in the present draft of this article appear to be an improvement on the 1954 text.

Article 7

Paragraph 5 of this Article is to the effect that "the provisions laid down in paragraph 4 shall not apply to so-called 'historical' bays ...". In its comment,

the Commission explains that "paragraph 5 states that the foregoing provisions shall not apply to 'historical' bays."

It seems clear that there is a contradiction, arising possibly from a misprint, between the text of paragraph 5 and the Commission's explanatory comment.

Article 7 would be acceptable to the Union Government only if it were amended in such a way as to leave no doubt that the so-called "historical" bays were to be treated as sui generis and excluded not only from the operation of the rule contained in paragraph 4 but also from the application of criteria laid down in the rest of the Article.

As the draft stands, it would appear that "historical" bays which do not conform to the definition contained in paragraph 1 - i.e., whose area is less than that of a semi-circle drawn on the closing line of the indentation - must lose their status as bays. It seems doubtful, both from the tenor of the draft articles as a whole and from the explanatory comment given by the Commission, whether this was the intention. A small amendment to the wording of paragraph 5 would suffice to remove any ambiguity about the special status of historical bays, in regard to which international law has always recognized, and must continue to recognize, more elastic criteria than are laid down in Article 7.

Article 10

It is noted that the Commission did not take up the Union Government's suggestion for a modification of the 1954 draft, the effect of which would have been to eliminate narrow enclaves of high seas between the outer limit of the territorial sea of the mainland and that of an island lying offshore at a distance equivalent to twice the breadth of the territorial sea.

Article 12, paragraph 3, provides that:

> "if as a consequence of this delimitation (of the territorial sea in a strait separating two or more States) an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea."

While the analogy is not an exact one, the principle underlying this rule appears to be that an isolated enclave of the high seas would be of little value to navigation; and it has felt that the same consideration would apply to narrow wedges of the high seas lying between an island and the mainland.

The Union Government is still inclined to the view that a modification of Article 10 on the lines suggested might be of practical value.

Article 11

The Union Government adheres to the view, expressed in its comments on the 1954 draft of this Article, that States should be permitted to take the surf-line to seaward of a drying rock or shoal which lies within the territorial sea, as the point of departure for measuring the territorial sea, rather than the rock or shoal itself.

The minor drafting changes which have been introduced in the revised text of this article are regarded as an improvement.

Chapter III. The Right of Innocent Passage

The arrangement of articles in the present version represents a distinct improvement on the 1954 text. The following points, however, appear to call for further comment.

General

It is suggested that suitable provision should be made in this chapter requiring submarines to navigate on the surface when passing through the territorial sea of another State.

Article 19

This Article imposes on foreign ships exercising the right of passage, the duty to observe the laws and regulations of the coastal State, particularly where they relate to the matters specified in paragraphs (a) to (e).

The new paragraph (c) is regarded as an improvement on the old text in that it refers specifically to "living" resources whereas the 1954 draft refers merely to "products", a term which is open to various interpretations. The Union Government feels, however, that a reference should also be made to the duty of foreign ships to respect laws and regulations of the coastal State designed to conserve or protect mineral or other resources of the territorial sea and of the sea-bed and subsoil beneath it. Such provision could be made either by way of an addition to paragraph (c) or by means of a new paragraph. It is urged that the right of the

coastal State to make regulations to protect mineral and other resources in the territorial sea, and the corresponding duty of foreign vessels to observe such regulations, is sufficiently important to warrant inclusion even though the list contained in paragraphs (a) to (e) is not intended to be exhaustive.

Article 21

In the revised text the arrangement of Chapter III has been changed by introducing the following headings:

A. General Rules (Articles 16 to 19)

B. Merchant vessels (Articles 20 to 22)

C. Government vessels other than warships (Articles 23 and 24)

D. Warships (Articles 25 and 26).

In view of these specific headings, and on the assumption that it is necessary to have a separate section to cover Government vessels, it is suggested that for the sake of clarity the heading to Section A should be amended to read:

"A. General Rules relating to all vessels".

If this amendment is agreed to, as Section B applies only to "merchant vessels", the word "merchant" appearing in Article 21 (1) might be deleted.

In any case, it is not clear why the phrase "foreign merchant vessel" is used in paragraph 1 but not in paragraph 2 or in Article 22, where the phrase "foreign vessel" is employed. It is felt that in the interests of consistency the same phrase should be used throughout unless it is desired to draw a distinction between merchant vessel and others.
