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PART II. TERRITORIAL SEA AND CONTIGUOUS ZONE

INTRODUCTION

II.1. The significance of Part II (articles 2 to 33) is that in it the Conference retained the historical concept of the territorial sea and fixed its maximum breadth at 12 nautical miles. It also retained the concept of the contiguous zone, extending it up to 24 nautical miles from the baselines. Part II covers the main aspects of the law governing the territorial sea and the contiguous zone. It is divided into a number of sections and, where necessary, subsections.

Part II corresponds in both its title and its substance to the 1958 Convention on the Territorial Sea and the Contiguous Zone, itself the outcome of the work of the First Committee of UNCLOS I. It also corresponds to items 2 and 3 of the list of subjects and issues allocated to the Second Committee at UNCLOS III (see para. Intro.7 above). Apart from a few drafting changes (including corrections of grammatical errors and a few instances of absence of concordance between the different authentic texts—which in 1958 did not include an Arabic text), the principal changes introduced at UNCLOS III are the following:

- a) the amalgamation in article 2 of articles 1 and 2 of the 1958 Convention;
- b) the new article 3 of the 1982 Convention;
- c) the new article 6 of the 1982 Convention;
- d) the addition in article 7 of paragraph 2 and the revision of paragraph 4, corresponding to article 4 of the 1958 Convention;
- e) the addition of article 14 in the 1982 Convention;
- f) the addition of article 16 in the 1982 Convention;
- g) the rewording of the provisions on innocent passage in articles 17 to 26 of the 1982 Convention, in comparison with articles 14 to 20 of the 1958 Convention;
- h) the transfer of article 29 from article 8 of the 1958 Convention on the High Seas to its present place in the 1982 Convention;
- i) the inclusion of Part XV, and in particular article 297, paragraph 1, and article 298, paragraph 1.

II.2. The impetus for some of the changes that were proposed to the 1958 regime arose from concern that the articles on innocent passage were not sufficiently linked to the conduct of a ship during its passage, but arguably left determination of innocence to a unilateral decision by the coastal State based on the vague standard of “prejudicial to the peace, good order or

security of the coastal State.”¹ A second concern was the competence of a coastal State to prescribe laws and regulations relating to innocent passage, particularly with respect to the dangers to the environment that were felt by some to be posed by the passage of supertankers and other vessels carrying hazardous cargoes.²

These concerns were met by the introduction of provisions indicating activities which would be considered prejudicial to the peace, good order or security of the coastal State, thereby rendering the passage not innocent. Provisions were also included prescribing the competence of a coastal State to adopt laws and regulations relating to innocent passage in respect of an enumerated list of matters, in accordance with the Convention and other rules of international law.

II.3. Section 1, entitled “General Provisions,” contains a single provision, article 2, on the legal status of the territorial sea, the air space over it, and its bed and subsoil. It is expressed in terms of the extension of the sovereignty of the coastal State beyond its land territory seaward. It also gives expression to the well-known aphorism that territorial sovereignty extends *usque ad coelum, usque ad infernos* (as far as the sky, as far as the infernal depths). At the same time, the article recognizes that this sovereignty is exercised subject both to the terms of this Convention and to other rules of international law.

II.4. Section 2 (articles 3 to 16), on the limits of the territorial sea, commences by giving expression to the international agreement that the maximum permissible breadth of the territorial sea is 12 nautical miles, measured from baselines determined in accordance with the Convention. That conclusion was reached only after a long, diplomatic operation which commenced at the 1930 League of Nations Conference for the Codification of International Law. Article 4 indicates how the outer limit of the territorial sea is to be determined; article 5 states what the normal baseline is; articles 6, 7, and 9 to 14 deal with particular geographical situations or other factors justifying a departure from the rule of the normal baseline; and article 8

¹ See, e.g., Introductory Note to Fiji’s draft article relating to passage through the territorial sea, A/AC.138/SC.II/L.42 and Corr.1, reproduced in III SBC Report 1973, at 91; statements of the following representatives in Sub-Committee II of the Sea-Bed Committee: Malta, A/AC.138/SR.57 (1971, mimeo.), at 169; Canada, A/AC.138/SR.58 (1971, mimeo.), at 193; United States of America, A/AC.138/SC.II/SR.6 (1971, mimeo.), at 28, and A/AC.138/SC.II/SR.8 (1971, mimeo.), at 46. See also statements at UNCLOS III, at the 35th plenary meeting (1974) by Hungary, para. 8, I Off. Rec. 142; and in the Second Committee, at the 3rd meeting (1974) by the German Democratic Republic, para. 23, II Off. Rec. 101; at the 4th meeting (1974) by the USSR, para. 19, *ibid.* 105; and Pakistan, para. 22, *ibid.*; and at the 6th meeting (1974) by Poland, para. 18, *ibid.* 116; and the Ukrainian SSR, para. 29, *ibid.*

² See, e.g., Introductory note to A/AC.138/SC.II/L.42 and Corr.1, *supra* note 12; and statements by the representative of Canada, A/AC.138/SR.58 (1971, mimeo.), at 193; and Indonesia, A/AC.138/SC.II/SR.12 (1971, mimeo.), at 113. See further, at UNCLOS III, the statement at the 38th plenary meeting by the Khmer Republic, paras. 52, 56 and 58, I Off. Rec. 162.

extends the right of innocent passage to certain internal waters. Most of these provisions are taken from the 1958 Convention on the Territorial Sea and the Contiguous Zone, though with some variations and additions. Article 15, also taken from the 1958 Convention, deals with the delimitation of the outer limits and the lateral limits of the territorial sea between States whose coasts are opposite or adjacent to each other; and article 16 details the various charts and lists of geographical coordinates required to give adequate publicity to the baselines and lines of delimitation with other States. Section 2 corresponds to the work of the Second Sub-Committee of the Second Committee of the Codification Conference of 1930.

II.5. The provisions of the 1958 Convention relating to the measurement of the territorial sea were themselves closely influenced by the report of a Committee of Experts which was convened in 1953 to prepare a report for the International Law Commission on technical questions concerning the territorial sea. Given its importance, the Report of that Committee of Experts is reproduced as an Appendix to this Introduction.³

II.6. Section 3 (articles 17 to 32) deals with innocent passage in the territorial sea, and is itself divided into three subsections. Subsection A (articles 17 to 26) contains rules applicable to all ships—that is, all private or publicly-owned or operated ships of all States, including military and nonmilitary ships and other vessels. Subsection B (articles 27 and 28) contains the rules applicable to merchant ships and foreign government ships operated for commercial purposes; and subsection C (articles 29 to 32) sets forth the rules applicable to foreign warships and other government ships operated for noncommercial purposes. This part of the Convention corresponds to the work of the Second Committee at the 1930 Codification Conference.

II.7. Section 3 has a direct antecedent in Section III of the 1958 Convention on the Territorial Sea and the Contiguous Zone, entitled “Right of Innocent Passage,”⁴ and is itself a successor to the work of the First Sub-Committee of the Second Committee of the 1930 Conference. The negotiation of the articles of this section in the Sea-Bed Committee and at UNCLOS III indicated that the provisions adopted at UNCLOS I no longer met international requirements, and that with the extension of the breadth of the territorial sea, coupled with certain coastal State rights beyond, it had become necessary to reconsider and clarify the provisions on innocent passage through the territorial sea. The positions of the various delegations were reflected in the large number of proposals on innocent passage introduced in the Sea-Bed Committee (especially at its 1973 session) and

³ A/CN.4/61/Add.1 (1953, English mimeo.), II YB ILC 1953, at 77 (in French).

⁴ The one exception is article 29 (definition of warships), which was taken from article 8, paragraph 2, of the 1958 Convention on the High Seas.

at the second session of the Conference (1974). These were consolidated in the Main Trends Working Paper in Provisions 24 to 47.⁵

II.8. Section 4 contains a single article (article 33) on the contiguous zone (completing the title of Part II: Territorial Sea and Contiguous Zone). The inclusion of this article in Part II is related to a long controversy over the question of the juridical status of the waters of the contiguous zone. The waters in question do not form part of the territorial sea but are “contiguous” to it. As late as the draft articles on the law of the sea prepared by the International Law Commission (1956), the contiguous zone was placed in the part on the high seas (article 26, paragraph 1, of the ILC’s draft explained that “[t]he term ‘high seas’ means all parts of the sea that are not included in the territorial sea . . . or in the internal waters”). It was moved to what corresponds to its present place in the organization of UNCLOS I,⁶ without any change in the status of those waters.

II.9. At the third session of the Conference (1975), the Chairman of the Second Committee formed an informal consultative group on innocent passage which held six meetings. That group produced a consolidated text on innocent passage,⁷ and that was used as the principal basis for the formulation of the articles on innocent passage in the ISNT/Part II. Although most of the issues on innocent passage were resolved by the time of the preparation of the ISNT/Part II at the end of the third session, one issue—the question of passage of warships through the territorial sea—continued to be the subject of comment and proposals for amendment until the end of the Conference.

One of the aspects of innocent passage which complicated the initial discussions was the question whether the rules governing innocent passage would apply to all parts of the territorial sea, or whether different regimes would apply to passage through those parts of the territorial sea which formed straits used for international navigation and to passage through archipelagic waters. Some of the proposals embraced not only innocent passage through the territorial sea but also passage through straits and archipelagic waters. By the second session of the Conference (1974), the reformulation of the regime of innocent passage had reached an advanced stage. Attention then focused on regimes applicable to passage through straits used for international navigation and through archipelagic waters. By the end of the third session (1975) these regimes had been accepted, and were incorporated in the ISNT/Part II as distinct regimes.

⁵ A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provisions 24–47, III Off. Rec. 93, 107, 111–15 (Rapporteur-general) [Main Trends].

⁶ At UNCLOS I, the First Committee was assigned the topics of the territorial sea and the contiguous zone.

⁷ See A/CONF.62/C.2/L.89/Rev.1 (1975), paras. 11 and 12, IV Off. Rec. 195, 196 (Rapporteur, Second Committee). For the consolidated text on innocent passage see C.2/Blue Paper No. 14 (1975, mimeo.). Reproduced in IV Platzöder 253.

II.10. The basic structure of the section on innocent passage in the territorial sea differs from that of Part II, Section III (Right of innocent passage), of the 1958 Convention on the Territorial Sea and the Contiguous Zone. In the 1958 Convention that section is divided into four subsections: A—Rules applicable to all ships; B—Rules applicable to merchant ships; C—Rules applicable to government ships other than warships; and D—Rules applicable to warships. Subsection C contains articles which distinguish between government ships operated for commercial purposes and those operated for noncommercial purposes; it also provides for subsections A and B to apply to government ships operated for commercial purposes, and for subsection A and only one article of subsection B to apply to government ships operated for noncommercial purposes.

This was the general scheme followed in the Main Trends Working Paper⁸ and in the ISNT/Part II.⁹ Following the article-by-article examination of the ISNT/Part II in informal meetings of the Second Committee at the fourth session of the Conference (1976), however, the Chairman proposed a reorganization which gave the same status to merchant ships and to government ships operated for commercial purposes. The title of subsection B was then changed to “Rules applicable to merchant ships and government ships operated for commercial purposes.” Subsection C became “Rules applicable to warships and other government ships operated for non-commercial purposes.” These titles were incorporated in the RSNT/Part II and remained unchanged.¹⁰

II.11. Part II of this Convention does not exhaust the topic of the territorial sea. Other relevant provisions are found throughout Part XII on the protection and preservation of the marine environment, especially in articles 211, 218 and 220, related to the particular aspect of innocent passage through the territorial sea, and in Part XIII on marine scientific research, notably article 245 (see Volume IV of this series). Disputes concerning the interpretation or application of the provisions of Part II come within the scope of Part XV on the settlement of disputes, but article 297, paragraph 1, and article 298, may affect the operation of the dispute settlement organs in a concrete case (see Volume V of this series).¹¹

II.12. The terms “territorial sea” and “territorial waters” are used interchangeably in State practice (including treaties and legislation), judicial

⁸ *Supra* note 5.

⁹ A/CONF.62/WP.8/Part II (ISNT, 1975), IV Off. Rec. 152, 154 (Chairman, Second Committee).

¹⁰ A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), V Off. Rec. 151, 156 (Chairman, Second Committee).

¹¹ The ISNT/Part II, article 137, and the RSNT/Part II, article 131, both envisaged that disputes arising out of the articles being negotiated through the Second Committee should be resolved in accordance with the provisions of what became Part XV of the Convention. These were never discussed by the Second Committee, however, which itself did not examine the settlement of disputes at large.

decisions and arbitral awards and in the literature. There is no substantial difference between these two terms, although there may be a subtle distinction in that territorial “waters” sometimes encompass internal waters.

The Committee for the Progressive Codification of International Law of the League of Nations used the term “territorial waters,” and that was the term employed by the Assembly of the League of Nations in its resolution of 27 September 1927 by which it decided to convene the first conference on the codification of international law—the Hague Conference of 1930.¹² At that Conference the topic was allocated to the Second Committee. At the Committee’s first meeting, the representative of France (G. Gidel) drew attention to what he termed a question of the terminology to be used, with particular reference to “territorial sea” or “territorial waters,” and a lengthy discussion on this issue took place.¹³ The Committee decided on the first expression, and in its report wrote:

There was some hesitation whether it would be better to use the term “territorial waters” or the term “territorial sea”. The use of the first term, which was employed by the Preparatory Committee, may be said to be more general and it is employed in several international Conventions. There can, however, be no doubt that this term is likely to lead—and indeed has led—to confusion, owing to the fact that it is also used to indicate inland waters, or the sum total of inland waters and “territorial waters” in the restricted sense of the latter term. For these reasons, the expression “territorial sea” has been adopted.¹⁴

II.13. The issue was revived in the course of the codification work of the United Nations. In a series of resolutions adopted by the General Assembly between 1949 and 1957 (i.e., resolutions 374 (IV), 798 (VIII), 899 (IX) and 900 (IX), and 1105 (XI) (see Volume I, at 153–56)), the term “territorial waters” was used. The topic originally placed on the agenda of the International Law Commission (ILC) at the invitation of the General Assembly was also denominated “territorial waters.” In his first report entitled “Régime of the Territorial Sea,” however, the Special Rapporteur, J.P.A. François (the Netherlands), drew attention to the conclusion reached by the Second Committee at the 1930 Conference, and proposed following that terminology. After a discussion at its 165th and 166th meetings, the Commission adopted that suggestion. In its report for 1952 it entitled the

¹² League of Nations *Official Journal*, Special Supplement No. 54, at 211 (1927). Reproduced in Sh. Rosenne (ed.), 1 *League of Nations Conference for the Codification of International Law [1930]*, at ix (1975).

¹³ League of Nations, III *Acts of the Conference for the Codification of International Law*, LN doc. C.351(b).M.145(b).1930.V, at 12 and 30. Reproduced in Sh. Rosenne, *supra* note 12, Volume 4, at 1214 and 1232.

¹⁴ *Supra* note 12, *Acts of the Conference . . .*, Annex V, Appendix 1, at 213; Rosenne, *supra* note 12, Volume 4, at 1415. On the question of the terminology during the early part of the 20th Century see the *Land, Island and Maritime Frontier Dispute* case, 1992 ICJ Reports 351, para. 392.

relevant chapter "Régime of the Territorial Sea" and simply stated that it had adopted the suggestion of the special rapporteur as the expression "territorial waters" had "sometimes been taken to include also inland waters."¹⁵ The ILC amplified this in its final report on the law of the sea, in which Part I of the draft articles was entitled "Territorial Sea." In paragraph (2) of its commentary on draft article 1 the ILC wrote:

The Commission preferred the term "territorial sea" to "territorial waters". It was of the opinion that the term "territorial waters" might lead to confusion, since it is used to describe both internal waters only, and internal waters and the territorial sea combined. For the same reason, the [1930] Codification Conference also expressed a preference for the term "territorial sea". Although not yet universally accepted, this term is becoming more and more prevalent.¹⁶

At UNCLOS I the issue was not discussed in full on the record. Bulgaria submitted a proposal directly to the Drafting Committee of the First Committee, to replace the term "territorial sea" by "territorial waters" wherever it occurred. A report by the Secretariat on the work of that Drafting Committee stated that the Committee had not been unanimous as to that proposal, and that "[a] substantial majority . . . favoured the retention of the term 'territorial sea' for the reasons given by the International Law Commission in paragraph (2) of the commentary on article 1." The Drafting Committee's recommendation was approved by the First Committee at its 65th meeting without discussion.¹⁷

II.14. The General Assembly at first nevertheless continued to use the expression "territorial waters" (e.g., in resolution 2574 A (XXIV) of 15 December 1969 (see Volume I, at 169)). In resolution 2750 C (XXV) of 17 December 1970 (ibid. 178) convening UNCLOS III, however, it adopted the expression "territorial sea" and this is now widely accepted, although some national legislation retains the older term "territorial waters."¹⁸ The issue as such was not a matter for discussion at UNCLOS III. Occasionally the expression "territorial waters" appeared in proposals submitted to the Sea-

¹⁵ For the first report of Prof. François (A/CN.4/53) see II YB ILC 1952, at 27. For the discussion in the ILC see 165th meeting, paras. 2–22, I YB ILC 1952, at 148. See also Report of the International Law Commission covering the work of its fourth session (A/2163), Chap. IV, para. 37, II YB ILC 1952, at 68.

¹⁶ Report of the International Law Commission covering the work of its eighth session (A/3159), article 1 *Commentary*, para. (2), II YB ILC 1956, at 253, 265.

¹⁷ First Committee, 65th meeting (1958), para. 6, UNCLOS I, III Off Rec. 200. For the proposal by Bulgaria, see A/CONF.13/C.1/L.69 (1958, mimeo.). And see the statement by the representative of Bulgaria at the 40th meeting of the First Committee, para. 4, ibid. 122. For the Secretariat's report on the work of the Drafting Committee of the First Committee, see A/CONF.13/L.167 (1958), "Heading of Part I," ibid. 254.

¹⁸ For a recent discussion of the same issue, with particular reference to Soviet legislation, see the remarks of Sh. Rosenne, W.E. Butler and A.L. Kolodkin in 14 *COLP Proceedings* 296–98 (1990).

Bed Committee and the Conference, but in no instance did this term survive the initial negotiating process.

II.15. Some of these articles are cast in general terms and in an axiomatic form. On one hand, there is little room for doubt that they give expression to a vast if not unwieldy mass of international customary law which has been built up over the centuries in a continuing process. On the other hand, their implications evolve with the passage of time and with technological advances, so that they may also be regarded as the points of departure for future evolution in the law. They reflect the law as the international community agreed to express it in the 1982 Convention.

Article 32
Immunities of warships and other government ships
operated for non-commercial purposes

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

SOURCES

First Conference

1. Convention on the Territorial Sea and the Contiguous Zone (1958), article 22, corresponding in part to article 23 of the ILC's draft articles. For the antecedent history see Secretariat Reference Guide on article 23. For the discussion at UNCLOS I see Report of the First Committee, A/CONF.13/L.28/Rev.1 (1958), paras. 90–92, UNCLOS I, II Off. Rec. 115, 122.

Third Conference

2. A/AC.138/SC.II/L.18, article 20, reproduced in III SBC Report 1973, at 3, 9 (Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen).
3. A/AC.138/SC.II/L.28, article 31, paragraphs 2 and 3, reproduced in III SBC Report 1973, at 35, 48 (Malta).
4. A/AC.138/SC.II/L.42 and Corr.1, articles 11 and 13, reproduced in III SBC Report 1973, at 91, 97 (Fiji).
5. A/CONF.62/C.2/L.3 (1974), Chapter II, articles 25 and 27, III Off. Rec. 183, 185 (U.K.).
6. A/CONF.62/C.2/L.16 (1974), articles 14 and 18, III Off. Rec. 192, 194 (Malaysia, Morocco, Oman and Yemen).
7. A/CONF.62/C.2/L.19 (1974), articles 11 and 13, III Off. Rec. 196, 198 (Fiji).
8. A/CONF.62/C.2/L.26 (1974), articles 25 and 26, III Off. Rec. 203, 205 (Bulgaria, German Democratic Republic, Poland and USSR).
9. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provisions 42 and 45, III Off. Rec. 93, 107, 114 (Rapporteur-general) [Main Trends].
10. A/CONF.62/WP.8/Part II (ISNT, 1975), articles 28 and 31, IV Off. Rec. 152, 157 (Chairman, Second Committee).
11. A/CONF.62/WP.8/Part II (RSNT, 1976), article 31, V Off. Rec. 151, 158 (Chairman, Second Committee).
12. A/CONF.62/WP.10 (ICNT, 1977), article 32, VIII Off. Rec. 1, 10.
13. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 32. Reproduced in I Platzöder 375, 403.
14. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 32. Reproduced in II Platzöder 3, 31.

15. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 32. Reproduced in II Platzöder 179, 208.
16. A/CONF.62/L.78 (Draft Convention, 1981), article 32, XV Off. Rec. 172, 180.

Drafting Committee

No documents from the concordance process.

Informal Documents

17. Informal Working Paper No. 1/Rev.1, Provision XXXVIII; No. 1/Rev.2, Provision XLII; and No. 1/Rev.2*, Provision XLIV (all 1974, mimeo.). Reproduced in III Platzöder 210, 226, 244.
18. C.2/Blue Paper No. 14 (1975, mimeo.), Provisions 42 and 45. Reproduced in IV Platzöder 153, 160.

COMMENTARY

32.1. Article 32 emphasizes that warships and other government ships operated for noncommercial purposes have immunity, except as provided in articles 17 to 26, 30 and 31.

32.2. The basic premise of article 32 grew out of article 23 of the International Law Commission's draft articles prepared in 1956. In its commentary on that article, the Commission noted that it "left in abeyance the question whether [government ships operated for non-commercial purposes] should be assimilated, entirely or in certain respects, to warships" (in this respect it followed the 1930 Hague Conference).

Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone (Source 1) expanded the ILC's draft by adding a second paragraph. That text read:

1. The rules contained in sub-section A and in article 18 shall apply to government ships operated for non-commercial purposes.
2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these or other rules of international law.¹

Paragraph 2 emphasized that the rules regarding the enjoyment of the right of innocent passage of these ships, including the rights of the coastal State in that connection, were without prejudice to whatever immunities such ships might enjoy under the Convention or other rules of international law.²

¹ Paragraph 2 was taken verbatim from a proposal by Australia. See A/CONF.13/L.46 (1958), incorporated in the summary record of the 20th plenary meeting, paras. 15–17, UNCLOS I, II Off. Rec. 66.

² Article 21 of the 1958 Convention applied to government ships operated for commercial purposes. This distinction between "commercial" and "non-commercial" carried over into the Sea-Bed Committee and the early sessions of UNCLOS III.

32.3. At the 1973 session of the Sea-Bed Committee, proposals by a group of eight States (Source 2) and by Malta (Source 3) largely repeated the text of the 1958 Convention (including separate provisions covering government ships operated both for commercial and for noncommercial purposes). A proposal by Fiji (Source 4) introduced a new element in a subsection on warships which provided that “nothing in these articles affects the immunities which warships enjoy under the provisions of these articles or other rules of international law” (article 13).

32.4. At the second session of the Conference (1974), the proposals which addressed this subject (Sources 5 to 8) all contained separate provisions on government ships operated for noncommercial purposes and on warships (as well as on government ships operated for commercial purposes). There was little variation in these proposals from the wording of the 1958 Convention and, in the case of warships, from the earlier proposal by Fiji.

As a result, in the Main Trends Working Paper (Source 9), Provision 42 in essence repeated the 1958 Convention, and Provision 45 covered “the immunities which warships enjoy.”

32.5. At the third session (1975), the consolidated text prepared by the informal consultative group on innocent passage (Source 18) repeated the wording of the Main Trends, addressing the immunities enjoyed by “government ships operated for non-commercial purposes” and “warships” in separate provisions.³

In the ISNT/Part II (Source 10), this format was maintained, and the two pertinent articles read:

Article 28

1. The rules contained in subsection A [rules applicable to all ships] and in article 24 [merchant ships] shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

Article 31

Subject to articles 29, 30 and 32 [concerning warships], nothing in these provisions affects the immunities which warships enjoy under these provisions or other rules of international law.

³ Like the Main Trends, the consolidated text also contained a provision on government ships operated for commercial purposes, but added a footnote indicating that:

For some delegations, government ships operated for commercial purposes shall enjoy immunity and therefore measures referred to in provision 40 [concerning civil jurisdiction in relation to foreign ships] shall be applied to such ships only with the consent of the flag State.

Article 28 covered the immunities of the general category of “government ships operated for non-commercial purposes”; article 31 addressed the immunities of warships specifically. In addition, article 27 related to government ships operated for commercial purposes, although the immunities of such ships were not mentioned.

32.6. At the fourth session (1976), following the article-by-article examination of the ISNT/Part II in informal meetings of the Second Committee, the two articles were amalgamated into one article in the RSNT/Part II (Source 11). Article 31 of that text read:

*Immunities of warships and other government ships
operated for non-commercial purposes*

With such exceptions as are contained in subsection A and in articles 29 and 30, nothing in the present Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

In this text, the immunities of warships “and other government ships operated for non-commercial purposes” were treated together. In addition, the scope of the article was limited to “the present Convention,” and the reference to “other rules of international law” was dropped. At the same time, the provision on government ships operated for commercial purposes was dropped from the text.

In the ICNT (Source 12), article 32 retained the provision in identical terms. It remained unchanged in subsequent texts.

32.7(a). The opening words of this article, “With such exceptions . . . ,” imply that the cross-referenced articles contain derogations from the immunity of warships and other government ships operated for noncommercial purposes. This is true as regards subsection A, concerning rules applicable to all ships, and article 30, on noncompliance by warships with the laws and regulations of the coastal State. Article 31, on the other hand, does not deal with immunity as such, but rather with the consequences of its invocation in terms of the international responsibility of the flag State in the circumstances envisaged by that article.

32.7(b). The expression “other government ships operated for non-commercial purposes” was the subject of discussion in the Drafting Committee, as different formulations are found in different articles. In the course of its harmonization process, the Drafting Committee proposed the following formulation for the English text: “warship, . . . or ship . . . owned or operated by a State and used exclusively for non-commercial purposes.”⁴ This formulation was not accepted. Thus, the meaning of “government ships operated for non-commercial purposes” in the English

⁴ A/CONF.62/L.57/Rev.1 (1980), section VI, XIV Off. Rec. 114, 118 (Chairman, Drafting Committee). See further Volume IV of this series, at 420, para. 236.6(a).

text may be unclear.⁵ Article 32 can be read together with article 96 (in Part VII—High seas), which reads:

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

In this connection, the Protocol of 1934 additional to the 1926 International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels declares:

Vessels chartered by States either for a given time or by the voyage, provided they are exclusively used on Governmental and non-commercial service, and the cargoes carried by such vessels, shall not be subject to seizure, attachment or detention of any kind, but this immunity shall not prejudicially affect any other rights or remedies open to the parties concerned.⁶

More recently, this issue has been addressed by the International Law Commission in its work on the jurisdictional immunities of States and their property. Article 16 of the draft articles on that subject reads:

Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship, if at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service.

3. For the purpose of this article, “proceeding which relates to the operation of that ship” means, *inter alia*, any proceeding involving the determination of a claim in respect of:

- (a) collision or other accidents of navigation;
- (b) assistance, salvage and general average;
- (c) repairs, supplies or other contracts relating to the ship;
- (d) consequences of pollution of the marine environment.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the

⁵ Examples of “government ships operated for non-commercial purposes” include uncommissioned warships, fleet auxiliaries, coast guard vessels, supply ships, troop ships, royal and presidential yachts, customs cutters and hospital ships.

⁶ See item I of the 1934 Protocol, 176 LNTS 215. For the 1926 Convention, see 176 LNTS 199; UKTS No. 15 (1980), Cmnd. 7800; M.O. Hudson, 3 *International Legislation* 1838.

carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.⁷

⁷ Report of the International Law Commission on the work of its 43rd session, 46 GAOR, Supp. No. 10 (A/46/10), at 118. [To be reproduced in II YB ILC 1991.] In resolution 46/55 of 9 December 1991, the General Assembly took initial steps regarding its future action on this topic.

Article 95
Immunity of warships on the high seas

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

SOURCES

First Conference

1. Convention on the High Seas (1958), article 8, corresponding to article 32 of the ILC's draft articles. For the antecedent history see Secretariat Reference Guide on article 32. For the discussion at UNCLOS I see Report of the Second Committee, A/CONF.13/L.17 (1958), paras. 21–22, UNCLOS I, II Off. Rec. 94, 96.

Third Conference

2. A/AC.138/53, article 10, paragraph 1, reproduced in SBC Report 1971, at 105, 120 (Malta).
3. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provision 144, III Off. Rec. 93, 107, 130 (Rapporteur-general) [Main Trends].
4. A/CONF.62/WP.8/Part II (ISNT, 1975), article 81, IV Off. Rec. 137, 165 (Chairman, Second Committee).
5. A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 83, V Off. Rec. 125, 166 (Chairman, Second Committee).
6. A/CONF.62/WP.10 (ICNT, 1977), article 95, VIII Off. Rec. 1, 18.
7. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 95. Reproduced in I Platzöder 375, 427.
8. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 95. Reproduced in II Platzöder 3, 54.
9. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 95. Reproduced in II Platzöder 179, 230.
10. A/CONF.62/L.78 (Draft Convention, 1981), article 95, XV Off. Rec. 172, 190.

Drafting Committee

11. A/CONF.62/L.67/Add.5 (1981, mimeo.), at 24.
12. A/CONF.62/L.72 (1981), XV Off. Rec. 151 (Chairman, Drafting Committee).

Informal Documents

13. C.2/Informal Working Paper No. 7, and Rev.1 and 2, (1974, mimeo.), Provision IX. Reproduced in III Platzöder 402, 415 and 429.
14. C.2/Blue Paper No. 9 (1975, mimeo.), Provision 144. Reproduced in IV Platzöder 130, 132.

15. C.2/Blue Paper No. 9/Rev.1 (1975, mimeo.), Provision 144. Reproduced in IV Platzöder 139, 141.
16. C.2/Informal Meeting/9 (1978, mimeo.), article 95 (Peru). Reproduced in V Platzöder 13, 15.
17. C.2/Informal Meeting/63 (1980, mimeo.), article 95 (Peru). Reproduced in V Platzöder 65.
18. C.2/Informal Meeting/68 (1982, mimeo.), article 95 (Peru). Reproduced in V Platzöder 73.

COMMENTARY

95.1. Article 95 reaffirms the long-standing principle that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

95.2. Article 95 is identical to article 8, paragraph 1, of the 1958 Convention on the High Seas (Source 1). The definition of “warship,” which forms article 8, paragraph 2, of that Convention, now appears in modified form as article 29 of the 1982 Convention on the Law of the Sea.¹ The International Law Commission’s commentary on article 32 of its 1956 draft articles stated that the principle of warship immunity was “generally accepted in international law.”²

95.3. At the 1971 session of the Sea-Bed Committee, a provision in a draft ocean space treaty submitted by Malta (Source 2) reiterated that “[w]arships in International Ocean Space [i.e., all parts of the ocean not subject to national jurisdiction] have complete immunity from the jurisdiction of any State other than the flag State.”

95.4. At the second session of the Conference (1974), article 8, paragraph 1, of the 1958 Convention was incorporated in the Main Trends Working Paper (Source 3) as Provision 144. Paragraph 2 of that Provision contained

¹ Article 29 reads:

For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

For the Commentary on article 29 see Volume II of this series, at 248.

That definition is based on articles 2, 3 and 4 of the Hague Convention No. VII of 18 October 1907, the International Convention relative to the Conversion of Merchant-ships into War-ships, 205 CTS 319 [French only]; UKTS No. 11 (1910), Cd. 5115; 2 Am. J. Int’l L. Supp. 133 (1908).

² Report of the International Law Commission covering the work of its eighth session (A/3159), article 32 *Commentary*, II YB ILC 1956, at 253, 280. For earlier recognition of the proposition that warships possess immunity see, e.g., 34 *Annuaire de l’Institut de Droit International* 739–45 (1928); International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, 10 April 1926, article 3(1), 176 LNTS 199; and additional Protocol, 24 May 1934, 176 LNTS 215.

a cross-reference to Provision 43, paragraph 1, of the Main Trends (corresponding to article 29 of the Convention, containing the definition of “warships”).

At the third session (1975), the informal consultative group on the high seas included Provision 144 in its consolidated text on the high seas (Sources 14 and 15). That text was modified in article 81 of the ISNT/Part II (Source 4), which dropped paragraph 2 of Provision 144 of the Main Trends altogether. The cross reference became unnecessary, the definition of “warship” in article 29 of the ISNT/Part II applying “[f]or the purposes of the present Convention.”

The provision was subsequently renumbered as article 83 in the RSNT/Part II (Source 5), where the title was added, and as article 95 in the ICNT (Source 6).

95.5. At the seventh session (1978), Peru (Source 16) suggested that article 95 should be placed in a new section entitled “General provisions on ships.” It also proposed that the words “on the high seas” be deleted from the title of article 95, and that the phrase “Without prejudice to the provisions of article 32” be inserted at the beginning of the article.³ That proposal was not accepted.

At the ninth session (1980), Peru repeated its proposal (Source 17). Explaining the suggested amendments, the proposal noted that:

Warships are also subject to the exclusive jurisdiction of the flag State, not only on the high seas or in the exclusive economic zone, *but even in the territorial sea*. The only exceptions in this latter case are those provided for in article 32, i.e. of subsection A, and in articles 30 and 31. Article 95 can therefore also be applied as a general rule, provided that it starts with the words “Without prejudice to the provisions of article 32, warships have complete immunity . . . etc.”

That proposal was not accepted.

The article remained unchanged after that except for drafting changes incorporated on the recommendation of the Drafting Committee (Sources 11 and 12). Those changes were included in the Draft Convention (Source 10).

95.6(a). The provision set out in this article is uncontroverted in international law. In its Commentary on draft article 16, paragraph 2, of its draft articles on the jurisdictional immunities of States and their property of 1991,

³ Article 32 provides:

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Articles 30 and 31 provide an exception to the rule of complete sovereign immunity in the case where a warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea.

the International Law Commission enunciated the rule of State immunity in favor of warships and naval auxiliaries, “even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities.”⁴

95.6(b). Other provisions of the Convention also deal with the immunity of warships. Article 32 addresses the immunity of warships and other government ships operated for noncommercial purposes while exercising their right of innocent passage through the territorial sea. Similarly, article 42, paragraph 5, addresses the international responsibility of the flag State for any loss or damage to States bordering a strait caused by a ship or aircraft entitled to sovereign immunity which acts in a manner contrary to the laws and regulations of States bordering straits governing transit passage through straits used for international navigation, or contrary to other provisions of Part III. The same rule applies to archipelagic sea-lanes passage under article 54. Article 236, entitled “Sovereign immunity,” provides that the provisions of the Convention regarding the protection and preservation of the marine environment do not apply to warships.

95.6(c). Article 96 is applicable in the exclusive economic zone in accordance with article 58, paragraph 2. Warships therefore also have complete immunity in the exclusive economic zone from the jurisdiction of any State other than the flag State.

⁴ Report of the International Law Commission on the work of its 43rd session (1991), Chapter II, article 16 *Commentary*, para. 11, 46 GAOR, Supp. No. 10 (A/46/10), at 118.