SOME RESULTS OF THE GENEVA CONFERENCE ON THE LAW OF THE SEA

PART I—THE TERRITORIAL SEA AND CONTIGUOUS ZONE AND RELATED TOPICS

By

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THIS article is the first of two or three in which some attempt will be made to describe and comment on the principal results of the eighty-five-nation [1] Conference on the Law of the Sea, held under United Nations auspices at Geneva from February 24–April 29 last. As the title implies, the series is not intended to be a full or detailed account of all those results. But, as the title also implies (and the point is worth emphasising), there *were* results, and important ones at that. Although the Conference did not reach any agreement on the two principal issues of the breadth of the territorial sea and of exclusive fishery limits (that is, if there are to be any, as distinct from the limits of the actual territorial sea itself), it did draw up four Conventions signed on April 29, 1958, on the general régime of the Territorial Sea and Contiguous Zone, on the general régime of the High Seas, on High Seas Fishing and Fishery Conservation, and on the Continental Shelf. These Conventions, in addition to formal articles, comprise between them some seventy-eight substantive articles [2] covering the whole field of the existing public international law of the sea, as well as some new

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[1] Not all the eighty members of the United Nations attended. On the other hand, a number of non-member States, such as the Federal Republic of Germany, Switzerland, Monaco, San Marino and the Holy See were invited, and came. A number of land-locked States attended, and certain articles in the resulting Conventions were drafted in such a way as to take account of their interests.

[2] Because of certain alterations of format effected in the Conventions by the United Nations Secretariat since their signature, in order to secure uniformity with other United Nations instruments, the publication of the final texts was delayed. This has now appeared here as a White Paper (Cmnd. 584, November, 1958). The original texts (which, of course, involve no differences of substance) were, however, published in the summer of 1958 as a Supplement to this Quarterly.

material (for instance in the Convention on High Seas Fishing and Fishery Conservation). The impression given by so many press reports that the Conference was a "failure" is therefore wide of the mark, and was due to overmuch concentration on certain matters to the virtual exclusion of all others. Actually, the Conference avoided the mistake made by the Hague Codification Conference of 1930, which treated the failure to agree on the question of the breadth of the territorial sea as a reason for not drawing up any agreement about the territorial sea at all; whereas in fact, as the Geneva Convention on the territorial sea shows, there is ample scope for agreement on the régime of the territorial sea, irrespective of its breadth; and although the attitude of States on certain questions—*e.g.*, the exact extent of the right of innocent passage—is capable of being affected by the limits of the area to which the right applies, this was not felt by the Conference to be a factor of sufficiently great importance, or of so decisive a character, as to warrant deferring decisions on all other territorial sea issues until the question of the breadth had been settled.[3]

From the point of view of the codification of international law, the Conference and its results must be regarded as something of a landmark. There have of course been previous major pieces of codification on the inter-governmental level.[4] But these have mainly been confined to two topics—the laws of war and related subjects,[5] and arbitral and judicial procedure.[6] The Geneva law of the sea conventions therefore represent virtually the first codification by international agreement of a major topic of the substantive law of peace.[7] They are also a landmark as representing the fruits of the first international conference on a predominantly legal subject to be held as a result of the work of the International Law Commission of the United Nations, and having as its principal basis of discussion a text prepared by that Commission.[8] The fact that the four

[3] These results were not achieved without difficulty. At one time the Conference was faced with nearly 600 amendments to the basic text, and with only a month of time left. But for the co-operative efforts of all concerned, and the devotion of the United Nations Secretariat under the able leadership of Mr. Stavropoulos as the representative of the Secretary-General, and of Dr. Liang, head of the Secretariat's Codification Division, such results would not have been possible.

[4] There have, of course, been a number of well-known private ventures of high quality, such as the Bustamente, Bluntschli, Fiore and Field codes, and the Harvard Research Volumes.

[5] *e.g.*, the Declaration of Paris of 1856, of London 1909, the Hague Conferences of 1899 and 1907, and the Geneva Conference of 1949 (Prisoners of War, etc.).

[6] *e.g.*, the 1899 and 1907 Hague Conventions on the Pacific Settlement of Disputes; the so-called "General Act"; the Statute of the International Court of Justice.

[7] The 1930 Hague Codification Conference only produced minor, though useful, pieces of work, *e.g.*, on certain points relating to nationality.

[8] This text is fairly frequently referred to in the present article. It is printed as U.N. Document, Supplement No. 9 (A/3159) of 1956, and will also be

Conventions, as finally concluded, not only reflect faithfully the general scheme of the Commission's draft, but also embody a very high proportion of the Commission's articles with only minor or drafting changes, constitutes a tribute to the work of that body over a number of years, and particularly to its special rapporteur on the subject, Professor J. A. P. François (Netherlands). It also demonstrates the extent to which the Commission is broadly representative of world international legal opinion in general—an important factor when it comes to preparing texts on which eighty-five-member conferences are going to work.

Since the two questions of the breadth of the territorial sea and exclusive fishery limits—while they took up a lot of time at the Conference—were left unsettled; and since they are to form the subject of a second Conference,[9] it is not proposed to discuss them here, but to concentrate on other matters—especially as these two subjects would really call for a whole article to themselves. It will furthermore only be possible, for reasons of space, to deal with a selection of the more important questions.

THE REGIME OF THE TERRITORIAL SEA AND CONTIGUOUS ZONE

(A) THE TERRITORIAL SEA

Apart from a couple of introductory provisions dealing with the general concept of the territorial sea as a coastal and coastwise belt of sea, the waters of (and the air space above) which are under the sovereignty [10] of the coastal State, the substantive articles of the territorial sea part of this Convention fall into two main groups: those dealing with questions of delimitation,[11] and those dealing with questions of passage.

found as the final document in Volume II of the *Yearbook* of the Commission for 1956 (Sales No., 1956, V, 3).

[9] A resolution of the Conference referred this matter to the United Nations Assembly for decision at its thirteenth (1958) Session, and the Assembly has now decided to hold such a further Conferencce in March or April 1960.

[10] It is controversial whether a State has sovereignty over its territorial sea in the fullest sense. The point is met in the Convention by a provision to the effect that sovereignty is to be exercised subject to the provisions of the Convention "and to other rules of international law"—implying, incidentally, that the Convention is itself declaratory of existing international law. No corresponding qualification appears in the article on sovereignty over the airspace above the territorial sea, because the Convention does not otherwise deal with airspace at all.

[11] It is a little unfortunate, in view of the absence of any provision on the *breadth* of the territorial sea, that this section of the Convention is entitled "Limits of the Territorial Sea."

(1) *Questions of delimitation*

Baselines

Apart from the topic of the so-called "closing line" for bays, by far the most important issue of delimitation (excepting naturally that of the breadth of the territorial sea) is the question of (to use the more expressive French term) the "ligne de base" from which the breadth of the territorial sea, whatever it may be, is to be drawn. The term "baselines" has tended to become synonymous with *straight* baselines. As the judgment of the International Court of Justice in the *Norwegian Fisheries* case [12] shows however, this is a mistake. A baseline is simply the line (whatever it may be, and whether straight, curved or indented) which is properly to be taken as the inner line of the coastal belt of territorial sea. It may be, and normally is, the coast itself, and in such cases the line of the coast is just as much a "baseline" as any other. It is merely not a straight one, and has no end-points except where it abuts on the frontier of another State—in the case of an island there would be no end-points at all. However, in certain special circumstances, the baseline from which the territorial sea is measured may be a straight water-crossing line which does not actually lie along the coast, although drawn between points which are themselves situated on the coast.[13] The outstanding characteristics of such baselines are (i) that they are water not land lines, *i.e.*, water-crossing not coast-hugging; and (ii) that because they cross water and do not lie along the coast, they enclose an area between themselves and the coast which has the status not of territorial sea but of internal waters.[14]

Article 3 of the Geneva territorial sea Convention lays down "the low-water line along the coast" as being "the normal baseline for measuring the breadth of the territorial sea"; but in Article 4 effect is given to the principles enunciated by the International Court of Justice in the *Norwegian Fisheries* case as being applicable for deciding (a) in what circumstances straight baselines, rather than the coastal low-water line, can be used; and (b) what are the conditions governing the method of drawing *particular* baselines

[12] *I.C.J. Reports*, 1951—see at pp. 128–129 *et seq.*

[13] Or, in proper cases, between points some of which are situated on islands or rocks off the coast.

[14] Variously called also "inland," "interior," or "national" waters; but the first two of these terms are not very apt for waters not situated within the body of the land but in front of the line of the coast, though behind the belt of territorial sea as measured from a straight baseline. The term "national" is misleading in another sense, in so far as it does or might suggest that the territorial sea is not "national," which, subject to qualifications already noticed (see footnote 10, above), it (for all practical purposes) is. The real point about internal waters is that, except where otherwise expressly stated (as in Article 5, paragraph 2—see later), they are not subject to the provisions of the Convention.

where the use of baselines is permissible under (a). As regards point (a), the criterion provided (Article 4, paragraph 1) is that "In localities where the coast line is deeply indented or cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed. . . ." A further, very important paragraph, (4), provides that "*Where the method of straight baselines is applicable under the provisions of paragraph 1*, account may be taken, *in determining particular baselines*, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage"—[italics added]. The significance of the italicised phrases is that they make it clear that economic interests are not *per se* a justification for the institution of straight baselines, thus correcting a very common misapprehension about the effect of the judgment in the *Norwegian* case, namely that it indicated the existence of an economic interest as sufficing in itself to justify the use of straight baselines.[15] Where however (and this is the true effect of the *Norwegian* judgment) the physical and geographical criteria laid down by paragraph 1 of Article 4 of the Convention are present, then the existence of economic interests in a particular region may properly be allowed to affect the way certain individual baselines are drawn. This means in practice that the existence of these interests may justify a rather liberal interpretation of the *conditions* governing the method of drawing individual baselines.

These conditions are set out in paragraph 2 of the Article, which deals with point (b) above-mentioned. This paragraph, following the principles enunciated by the court in the *Norwegian Fisheries* case, provides that "The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the seas lying within the lines must be sufficiently closely linked to the land domain *to be subject to the régime of internal waters*"—[italics added].[16] The significance of the italicised phrase is obvious, and important in view of the fact that the article also reflects the judgment of the Court in not placing any actual limit by mileage on the length of straight baselines. The Court did

[15] As Lord McNair pointed out in the *Norwegian* case ". . . the manipulation of the limits of territorial waters for the purpose of protecting economic and . . . social interests has no justification in law; moreover . . . such a practice . . . would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard."

[16] The International Court had specified two further criteria, one of them (that baselines must lie *inter fauces terrarum*) being founded on the same idea of close relationship with the land. The other stated that "they must be drawn *in a reasonable manner*"—[italics added]. See on this subject the present writer's article in the *British Year Book of International Law* for 1954, at pp. 404–411.

however say that they must be "reasonable and moderate" (Judgment, pp. 140–141, 142 and 156), and this is also clearly implied by the requirement that the waters they enclose should have the character of genuine internal waters. This requirement further implies that straight baselines must not be drawn between points so outlying as not truly to form part of the mainland coast or of an immediately proximate island fringe.

The use of the term "fringe" in paragraph 1 of the article (again with Norwegian echoes [17]) is of interest because it implies, and is intended to imply, that the mere existence of islands off a coast is not a ground for using straight baselines. What is required is a continuous fringe (or, to use the Norwegian term "skjaergaard," *i.e.*, rampart) sufficiently solid and close to the mainland to form a unity with it, or an extension of it in the seaward direction (and see citation from the *Norwegian* case Judgment in footnote 30, below). Correspondingly, the words "In localities where etc.," in the same paragraph, implies that a State would not be justified in making use of straight baselines along the *whole* of its coast, irrespective of the physical and geographical conditions, merely because those conditions warranted the use of baselines in one particular locality. (Another provision of this article, forbidding the use of "low-tide elevations" as departure points for straight baselines, unless crowned with installations that are permanently above sea level, will be considered later in another connection.)

Questions of access

A further very important provision of article 4 (paragraph 5) stipulates that "The system of straight baselines may not be applied in such a way as to cut off from the high seas the territorial sea of another State." [18] Another aspect of the question of access is dealt with by the second paragraph of Article 5, which gives a right of innocent passage through waters enclosed as internal waters by a straight baseline. This is just and equitable, and in the general interests of international maritime communication, for the waters enclosed by a straight baseline are *in front of* the coast, and though ranking as internal waters as a matter of status, are not physically internal in the same way as rivers, lakes, estuaries, and other true inland waters situated within the body of the land and behind the line of the coast. Such "outer" or "frontal" internal waters, are waters which, before the drawing of the straight baseline, were

[17] The International Court stressed very strongly the importance of the Norwegian "skjaergaard" (literally "rock rampart") constituted by a continuous rock and island fringe along the Norwegian coast—see *Report*, pp. 127–130.

[18] There are several localities, particularly in "narrow waters," such as those of the Caribbean and Aegean, and in the Far East, where this could easily occur.

ordinary territorial sea through which foreign shipping had a right of innocent passage, and of access to ports and rivers, etc. Although the drawing of the baseline changes the legal status of these waters, it in no way alters their physical or geographical character.

If a digression may be allowed at this point, yet another aspect of the question of access is dealt with in one of the passage articles of the Convention (Article 16, paragraph 4) which provides that "There shall be no suspension of the right of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas *or the territorial sea of a foreign State*"—[italics added]. This is a question which the pressure for extensions of the territorial sea has rendered still more important than it already was; for even an extension to six miles would have the effect of converting into territorial sea the whole of the waters of a substantial additional number of international straits of the highest importance to maritime communications,[19] which previously could be traversed by navigation along a band of high seas. The phrase italicised in the above quotation was inserted because certain straits are of maritime importance not so much as connecting two parts of the high seas, but as affording access (perhaps the sole access by sea) to another country's ports or waters. It was pointed out by certain delegations at the Geneva Conference that ships do not, after all, normally set out on voyages merely to cruise about the oceans, but for the purpose of proceeding to another port for commercial or other customary purposes. Rights of navigation on the high seas are, in the last resort, useless without rights of access to the ports or localities of destination.

Bays

(i) *The "closing-line."* The main purpose of Article 7 of the Convention, which deals with bays, is to provide for their so-called "closing-line"—set at a limit of twenty-four miles (drawn across the mouth of the bay or at the nearest point within the mouth where the distance across does not exceed twenty-four miles)—this line being of course a straight line, and also a baseline for measuring the breadth of the territorial sea seawards from the mouth of the bay. However, paragraph 6 of the Article provides *inter alia* that its other provisions, including that of the twenty-four mile limit, shall not apply "in any case where the straight baseline system

[19] This may be serious in certain localities as regards air traffic, there being no basic (*i.e.*, general international law) right of innocent passage for aircraft through the air space above the territorial sea, corresponding to that for ships through the territorial sea itself.

provided for in Article 4 is applied." It is therefore essential to be quite clear that the question of a baseline for the particular case of bays (proper), and the separate general question of the use of straight baselines in certain types of localities are wholly distinct questions; and though they may seem to impinge on one another, and even to overlap, they do not in fact do so at all. They are often confused by reason of the fact that both involve baselines, and straight water-crossing baselines, and baselines the waters between which and the coast rank as internal waters. Consequently, it is sometimes asked why there should be any need for special rules about bays, and why the matter cannot be regarded as covered by the rules about straight baselines in general. Such a question is evidence of a serious misunderstanding. A bay proper is a particular type of formation, the nature of which is defined in Article 7—(this will be considered in a moment). This type of formation may occur on any coast, even in localities where the coast is otherwise virtually straight or only gently curved, and where the use of a straight baseline *system* would not be justified according to the criteria set out in Article 4, paragraph 1 (*vide supra*). It is therefore necessary to make separate provision for the case of bays proper, or no closing lines at all could be drawn for bays forming part of otherwise unindented coasts. *Per contra*, where a general baseline system *is* justified because of the general configuration of the coast, baselines may legitimately be drawn across certain indentations, formations or curvatures that would *not* rank as bays. The object of the phrase quoted from paragraph 6 of Article 7 is to formalise this distinction, and also of course [20] to make it clear by implication that the limit of twenty-four miles applicable to the closing line of a bay as such, does not apply where a longer line can be justified as part of a baseline system on a coast possessing the configuration warranting the use of such a system. This paragraph is not entirely free from ambiguity, and could perhaps be read simply as meaning that the mere fact that a curvature or indentation is not actually a bay proper (see below as to this) does not prevent a baseline being drawn across it where the general configuration of the coast justifies it. If this were *all* the paragraph meant, then it could be maintained that when the formation *is* a bay proper, the twenty-four mile limit of closing line applies in all cases, on whatever kind of coast the bay is

[20] Unfortunately—from the point of view of general maritime interests; for it was not possible at the Conference to secure any overall or specific limit by mileage on the length of baselines when their use is warranted by Article 4 of the Convention, though the conditions imposed by paragraph 2 of that Article (see above) do imply a *limited* length, or the baseline would not in practice conform to the criteria indicated.

situated. This interpretation would, however, be difficult to reconcile with the generality of the phrase "The foregoing provisions" with which paragraph 6 opens, and which must include the one on the twenty-four mile limit. In short, where a baseline—justifying situation exists, it is governed by baseline principles: where such a situation does not exist, but there are nevertheless configurations that are bays according to the proper definition of that term, these are governed by the rules for bays.

On the other hand, and this is extremely important, the twenty-four mile rule would itself be meaningless, and lack all real sphere of application, unless it applied in the case of all bays the closing lines of which could not be justified as part of a baseline *system* that was itself justified by the general configuration of the coast. Since the type of coast contemplated by Article 4 is the exception and not the rule, and since in most cases the baseline from which the territorial sea is measured will be the line of low-water mark along the coast, the great majority of bays will be subject to the twenty-four mile limit unless they are "historic" bays—a further exception which paragraph 6 of Article 7 provides for.[21]

As regards the twenty-four mile limit itself, its only virtue (except in the eyes of those who want a twelve-mile limit of territorial sea[22]) is that it *is* a limit and better than nothing. The International Law Commission had ended by proposing fifteen miles, but this was not carried at the Conference. The urge to increase the length of the closing-line of bays (except in so far as it is part and parcel of the urge to extend the limits of territorial and/or internal waters generally) springs largely from a remark made by the International Court in the *Norwegian Fisheries* case,[23] to the effect that "the ten-mile rule has not acquired the authority of a general rule of international law." This dictum, which was in any case *obiter*, and not necessary for the decision in the case (the United Kingdom having conceded all Norway's claims in respect of bays proper, on *historic* grounds), was also of questionable accuracy.[24] But in the *Norwegian* case, the court steadfastly refused to accept any practice as a rule of law solely on the ground

[21] The essence of a "historic" bay is that its waters have the status of internal waters not so much because (as in the case of a non-historic bay) its width at the entrance is sufficiently limited to render it legitimate to draw a line across it, and *then* treat the waters behind the line as internal, but because the reverse process has occurred, *i.e.*, the waters of the bay having from time immemorial been treated as internal by the country concerned, without objection by other countries, a closing line is automatically presumed to exist across the entrance, irrespective of its length.

[22] To whom the distance 12 × 2 may imply some support or recognition for such a limit.

[23] *I.C.J. Reports*, 1951, p. 131.

[24] This matter is fully discussed in the present writer's article referred to in n. 16, above, at pp. 411–415.

that it had been followed by a number of States—even where (as in the case of the line of the low-water mark along the coast as the point of departure for measuring the territorial sea) the practice in question had hitherto been followed by the overwhelming majority of the States of the world, including, except for Norway herself, all the principal maritime States.[25]

(ii) *The concept of a bay proper.* It is necessary to be clear that for the purpose of the applicability of the special rules regarding bays, a bay requires to *be* one, so to speak, not only physically (as to which see later) but also in the political sense, by which is meant that it must be wholly within the territory of one State, so that its coast is not occupied by two or more States. For this reason the first paragraph of Article 7 of the Convention provides that "This article relates only to bays the coasts of which belong to a single State." The drafting of this paragraph is not very satisfactory, but it is certainly intended to reflect the general rule of international law that it is only where the entire bay is situated within the body of one country that any closing line at all can be drawn.[26] In all other cases—with such exceptions as may come within the categories mentioned in the citations given in footnote 26 below—each State bordering on the bay simply has the belt of territorial sea fronting its portion of the coast of the bay; and the rest of the bay is high seas. It is not, in general, open to the coastal States of the bay (even by agreement *inter se*) to draw a closing line and, by claiming the waters of the bay as internal waters, to divide these

[25] See *ibid.* at p. 397, and footnote 1 to that page; also Professor C. H. M. Waldock's "The Anglo-Norwegian Fisheries Case" in the *British Year Book of International Law* for 1951—see in particular at p. 137. See also the authorities in support of the measurement of the breadth of the territorial sea from the actual line of the coast cited by Lord McNair in his dissenting opinion in the *Norwegian Fisheries* case, especially on pp. 161–163 *et seq.* of the *Report.*

[26] Thus Higgins and Colombos, *The International Law of the Sea* (3rd revised ed., Colombos) states (pp. 140–141):

> "§ 153. *Bays bounded by the territories of two or more States.* It is important that a clear distinction should be drawn between bays surrounded by the territory of a single State and those surrounded by the territories of two or more States. There exists a good deal of controversy on the subject, but the correct view is that territorial waters should follow the sinuosities of the coast and that each State whose shores form the land boundary to the bay should have a marginal belt based on the ordinary three-mile limit of territorial waters. This general rule is, as in the case of all other bays, subject to any special agreements or any exceptional claims which a State is able to establish by reason of a continuous usage extending over a long period of time and recognised, either expressly or impliedly, by other States."

The case of the Gulf of Fonseca, along which lie coastal strips of Nicaragua, Honduras and Salvador, is claimed as an example of the latter category of exception.

up amongst themselves. Alternatively, if they make such an agreement, whatever effect it may have as between the parties to it, it can have none as against third States and their vessels, nor can it alter the general status of the waters of the bay outside the respective territorial belts, which will remain high seas.

The reasons are clear, though perhaps not at first sight obvious. As a lesser, though important, factor, a question of access is involved; for with certain configurations it might be very difficult to effect any division of the waters of a bay that would not render access to the ports and waters of one of the coastal States impossible to foreign shipping, except by passing through the internal waters of one of the other States. The desirability of direct access from the open sea whenever possible has already been noticed; and the principle of it is to some considerable extent enshrined in the Convention.[27]

More important is a point of principle involving the whole philosophy of the bay proper as internal waters, on whatever kind of coast it is situated. This is that a true bay, if not unduly wide at the entrance, has the natural character of inland waters because it is situated within the body of the land, and behind the notional line of the coast if this is thought of as being represented and prolonged by a line drawn across or near the mouth of the entrance. On that basis, it is reasonable to regard the waters of the bay, even though they may in some cases be of considerable extent, as having the character of national waters, as virtually part of the land domain, and as coming under the internal régime of the coastal State. But this presupposes that there is only one coastal State, for if there are two or more, the bay as a whole, and as such, obviously does not come within the body of any one of them, nor can it be regarded as being even notionally behind the coastline of any of them; on the contrary it is clearly in front of all their coasts. Consequently the whole *rationale* of what makes and justifies the treatment of the waters of a bay as national is wanting. Indeed, considered politically, such a bay is not a bay at all, though purely as a geographical feature, and neglecting national boundaries, it may have the shape of one.

What must that shape be? Even though a curvature or indentation is situated wholly on the coast of one State, it is not on that account or by reason of being an indentation necessarily a bay in the proper sense of the term. It has long been held both

[27] See further, Higgins and Colombos, *op. cit.*, § 156, pp. 143–144, where there are also some useful observations on land-locked or "inland" seas—a subject not specifically dealt with by any of the Geneva Conventions, though mentioned in the Commentary to Article 26 of the International Law Commission's final (1956) text.

by geographers and by lawyers that, to constitute a bay, an indentation must possess a certain depth of penetration. Only on that basis, that it is genuinely *inter fauces terrarum*, and to a depth sufficient to make it virtually a part of the land domain, is its treatment as national waters justified. A mere shallow depression cannot have that character: geographically, such a depression is simply a wave or bend in the line of the coast and not an independent geographical feature. The question is therefore one of degree. In the *Norwegian Fisheries* case, the United Kingdom, acting on the advice of its naval hydrographers, proposed as one of its formal conclusions [28] a general definition of a bay which, with an additional reference to land-locked waters, was adopted textually by the International Law Commission and now figures, also textually, in paragraph 2 of Article 7 of the Convention, reading as follows: "... a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast." However, in the interests of precision, the Commission went further than this, and proposed a definite criterion for the relationship of penetration to width,[29] and this is now embodied in the Convention as follows: "An indentation shall not, however, be regarded as a bay unless its area is as large as or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Other technical points are embodied in the article, but what it comes to on a rough general description is that, to be a bay, an indentation must penetrate inland to a distance equivalent to at least half its breadth at the mouth. This is not a specially exacting criterion, but it is sufficient to ensure that mere curvatures or only moderate depressions do not rank as bays; and let it be repeated that the point of an indentation *not* ranking as a bay is that no baseline can be drawn across it unless it is situated on the type of coast whose general configuration justifies the use of a general system of straight baselines. As the International Law Commission said in paragraph (1) of their Commentary on the article on bays, a definition of what constituted a bay proper "was necessary in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rules for bays."

[28] Head (6) on p. 122 of the *Report*.

[29] This was based on the advice given to the Commission's special Rapporteur on the topic of the Law of the Sea, Professor J. A. P. François (Netherlands), by a Committee consisting of naval, hydrographic, and geographic survey experts of France, the Netherlands, Sweden, the United Kingdom and the United States, whose report figures in U.N. Document A/CN.4/61 Add.1, of May 18, 1953.

Where penetration is very deep, the feature is usually known geographically as a gulf, firth, loch or fjord: but such features are *a fortiori* " bays " within the meaning of the above definition, *i.e.*, they are subject to the legal régime of bays.

Islands

(i) *The individual island.* Considered from the standpoint of the law of the sea, the importance of an island is that, wherever it may be situated, and whatever (and however minimal) its area, it has its own territorial sea; but that marine formations which are not islands do not generate any territorial sea. It is therefore important to be clear what, in the technical sense, constitutes an island. Neither habitability, nor shape or area, are regarded as relevant. Assuming an island to be *ex naturae* a formation wholly surrounded by water, two criteria alone determine whether it does or does not generate a field of territorial waters—*i.e.*, is in the legal sense an island—namely (a) that the formation must be a natural and not an artificial one (not, *e.g.*, an installation erected on the bed of the sea); and (b) that it must be always above sea-level and visible at all states of the tide. Permanently submerged reefs, banks or shoals obviously cannot generate territorial waters. Formations that are only visible at low-tide, known as drying rocks (banks, shoals, etc.), or as " low-tide elevations," are wholly submerged for varying periods out of the twenty-four hours, depending on the extent of their elevation, but always for a time, twice in a day and night, and possibly for periods aggregating nearly twelve hours in the twenty-four. They too (apart from one exception to be noticed presently) clearly cannot generate a territorial sea. But, in the absence of any special agreement to the contrary, any natural formation (even a mere rock), permanently (even if only just) visible at all states of the tide, generates a territorial sea.[30] However, that which can be conceded to the natural formation—even if sometimes, as in the case of mere rocks, with certain hesitations—obviously cannot be conceded to the artificial construction, whether anchored to or grounded on the sea-bed, since this would enable States to appropriate areas of sea simply by installing such constructions.[31] These are more

[30] As has already been indicated, neither size nor habitability are in themselves relevant. But although small islets and rocks, if permanently above sea-level, necessarily possess territorial waters, it may sometimes, by special agreement, be convenient to ignore them for certain purposes—for instance, in delimiting the continental shelf between the opposite coasts of two States. In drawing the median line between the mainland coasts, distorted and anomalous situations would often be created if account were to be taken of such islets or rocks situated near what would otherwise be the natural median line.

[31] Or to use them as departure points for straight baselines, thereby increasing the area both of the territorial sea and of inland waters.

properly assimilable to anchored light-ships, guard-ships, etc. The disability involved extends equally to the case of the hybrid, consisting of a construction crowning a natural formation which is itself submerged or drying, but where the constructional crown, or most of it, is always visible above sea level, such as a lighthouse, beacon, buoy, etc., built or placed on a drying rock.[32]

The articles of the Geneva Conventions embodying or based on these ideas will be noticed presently. But first, a special case of the artificial construction question, involving an exception, though in another context, must be considered. This involves reverting to a point left over from the discussion of the baseline question. The same philosophy that prevents low-tide elevations from generating territorial waters, also requires that they be not used as end-points for straight baselines—*i.e.*, as departure or destination points. Accordingly, the opening phrase of paragraph 3 of Article 4 of the Convention provides that "Baselines shall not be drawn to and from low-tide elevations . . . ." However, because the matter is of *relatively* small importance,[33] and because the main point is a practical one, *i.e.*, that the end-points of baselines ought to be permanently visible above sea level at all states of the tide, there was added, as a concession to the views of certain countries making extensive use of baselines,[34] a qualification reading as follows: ". . . unless lighthouses or similar installations which are permanently above sea level have been built upon them."[35]

This leads on to the consideration of a qualification to the general rule that a low-tide elevation cannot generate territorial sea. The Convention (Article 11, paragraph 1) permits one exception which has come to be recognised as reasonable, namely, that where a low-tide elevation is situated within what is *already* territorial sea (off a mainland coast, or off the coast of an island permanently above sea level), it can then generate some (as it were) extraterritorial sea. In such a case, the low-tide elevation theoretically has its own territorial sea; but, as the elevation is within what is already the territorial sea of the mainland, or of an island, the practical effect is simply to cause a bulge in the seaward direction of *that* territorial sea. On the other hand, if there is a

[32] See Higgins and Colombos, *op. cit.*, pp. 94–96; and Oppenheim, 8th (Lauterpacht) ed., § 190a.

[33] But only relatively, since this practice tends to encourage the use of outlying base-points, and consequently outlying baselines, leading to undue encroachment on areas of high seas.

[34] Such as Norway. However, it failed of its purpose here, as the Norwegian representative declared himself unable to accept the view that low-tide elevations could not be used as base-points.

[35] This provision is unfortunately ambiguous; does it relate only to cases where such installations were already *in situ* at the date of the Convention? If not, the possibilities of abuse are obvious.

further drying rock, situated—not within the original or basic territorial sea of the mainland or island—but within the extension of such territorial sea (bulge) caused by the presence of the "inner" drying rock, then this "outer" drying rock will not lead to any further extensions of the territorial sea; nor does an "outer" drying rock, so situated, generate any territorial sea of its own. This rule is intended to prevent the practice known as "leap-frogging," which, by making use of a series of drying rocks, banks, etc., extending seawards, might result in artificial or unjustified extensions of natural territorial waters.

The provision of the Convention dealing with this matter (quoted below) is a little unfortunately phrased, inasmuch as it says that, where a low-tide elevation is within what is already territorial sea, "the low-water line on that elevation may be used *as the baseline* for measuring the breadth of the territorial sea"—[italics added]; and it has been suggested that in consequence of this, and in order to avoid a possible contradiction, paragraph 3 of Article 4, discussed a short while ago, which prohibits the use of low-tide elevations as end-points of baselines, ought to be read as subject to a similar qualification—*i.e.*, as not applying to low-tide elevations situated within the territorial sea. This, however, is not the case, and there is no contradiction. It is one thing to permit the use of a low-tide elevation to create *in its immediate vicinity* a moderate bulge in what is already territorial sea. But the effect is of quite another kind, and on an altogether different scale, if such elevations (even if within the territorial sea) can be used as departure points for what may be far-flung baselines ranging perhaps thirty, forty or sixty miles. This would not only cause very extensive increases in territorial sea (and not merely in the immediate vicinity of the low-tide elevation concerned, but at a great distance from it): it would also create entirely new zones of *internal* or national waters out of what was formerly territorial sea, or even (in certain extreme cases) high seas. There is consequently no comparison or real analogy between the two cases.

Because the various ideas and points above discussed are embodied (or implied), if in somewhat oblique form, in the articles of the Convention dealing with islands, it has seemed preferable to consider them first in a general way. The articles themselves may now be quoted, but since their implications should be clear, they need not be further commented on. These articles are as follows:

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

(ii) *Island groups.* The second paragraph of Article 10 implies (though it may also somewhat conceal) the fact that the Convention resolves the question of *groups* of islands, or archipelagos as they are sometimes (though not always correctly)[36] called, by *not* providing any special system for delimiting the territorial sea of such groups on any "group basis." According to this provision, where there is a group or archipelago, each unit of the group has its own territorial sea, measured round it in the ordinary way. If the islands are sufficiently close together, these individual territorial seas will overlap, and a fairly compact stretch of water may thus be created which will constitute a sort of bloc of territorial sea. If however (or where) there is no overlap, because the units of the group are fairly wide apart, the waters between the various areas of the territorial seas will be, and will remain, high seas.

There can be little doubt that the foregoing statement represents general international law as it now stands, despite certain claims to apply a sort of "box" or "group" principle to island groups, the essential feature of which is to join the outermost islands of the group by baselines, and then to treat the group (thus enclosed) as a unit for territorial sea purposes—by drawing the territorial sea not round each individual island, but round the group as a whole—measuring it seawards from the continuous line created by the outer coasts and the baselines joining them. According to this

[36] The term "archipelago" is variously defined (see for instance W. G. Moore's *A Dictionary of Geography*—Penguin Books) as "a group of islands" and "a sea studded with islands." The latter phrase may, however, convey an erroneous impression. The real essence of an archipelago is the concept of a self-contained and relatively compact group, not a loose congeries of islands dotted over a large extent of sea. Alternatively, if an archipelago is to be understood in this latter sense, there can obviously be no case at all for treating its territorial sea on a "group" basis; for there is no real group. A group implies closely connected units, where the extent of land is fairly high in proportion to that of the intervening spaces of sea. If the opposite is the case, there is merely an area of sea with some islands in it.

system, waters behind the baselines and, so to speak, behind the islands themselves, become a kind of "inland sea" consisting of internal, and not even of territorial, waters, let alone of high seas. It is obvious that, except where the units of the group are really close together, this system is capable of leading to great abuses, particularly because of the fact that the "inner" area of sea becomes internal waters. According to certain claims which have been adumbrated (though fortunately not pressed), stretches of sea extending several hundred miles, both in length and breadth, would have become thus "enclosed." On the other hand, where the group is truly compact, the ordinary principle that each unit has its own territorial sea will automatically create (by overlap) what might be called a "group" territorial sea, but with the extremely important difference that the inner zones, behind and between the individual islands, will consist of territorial not internal waters.

The subject of a special régime for island groups was considered at The Hague Codification Conference of 1930; but nothing was adopted for reasons that are of considerable interest, though space forbids their being entered into here.[37] The International Law Commission also, at an earlier stage, considered the possibility of some system which would permit groups to be treated as units, but which, by limiting the maximum permissible length of the baselines that could be drawn between the islands of the group, would not give rise to any serious objection. However, the discussion in the Commission showed that even on this basis it might not be possible to avoid abuses.[38] In the end, the Commission, in its final draft, adopted an article which, though different in form, was substantially identical in effect with that which now figures as Article 10 of the Geneva territorial sea Convention; and as regards groups of islands, the Commission contented itself with a non-committal paragraph in its Commentary.[39]

It is important to distinguish the case of the island group or archipelago proper, from that of the island fringe to, and extension

[37] For an account of this, see the author's article cited in n. 16, above, pp. 416–418; also Professor Waldock's article cited in n. 25, pp. 142–147.

[38] See *Yearbook of the Commission* for 1956, Vol. I, pp. 193–195. It is possible for the distance between the individual islands forming an outer circle to be relatively short, and yet for the radius between the islands and the centre of the intervening waters to be so much longer, that the interior water space is disproportionately large as compared with the total island area.

[39] See paragraph (3) of the Commentary to Article 10 of the Commission's draft, which stated that the problem was "singularly complicated by the different forms it takes in different archipelagos." The Commission went on to recognise the importance of the question, and expressed the hope that if an international Conference were convened, it would study it. At the Geneva Conference, however, no serious attempt was made in support of any other rule than the one that each island, whether isolated or in a group, had its own territorial sea.

of, a mainland coast, which was discussed earlier in connection with coastal straight baselines. The question of a possible special system for the territorial sea of island groups arises, in so far as it need or does arise at all, only with reference to self-contained groups, away from, and not forming a unit or whole with, a mainland coast. In the latter case, it is really as part of, or as one with, the mainland coast that islands are used as end-points for baselines, or are joined by baselines.[40] This concept clearly has no application to self-contained groups not in such special relationship with the mainland.

(2) *Questions of passage*

General scheme of the passage articles

Certain matters involving questions of passage have already been considered, in so far as they arise from, or are connected with, questions of delimitation.[41] The passage section of the Convention deals with the right of innocent passage in four subsections A–D, applicable respectively to "A—All Ships," "B—Merchant Ships," "C—Government Ships other than Warships," and "D—Warships." But the main articles dealing with the principles of innocent passage as such (Articles 14–17 inclusive), all come within the first of these subsections, which is applicable to "All Ships." Consequently, and subject to any special limitations indicated in the articles themselves, the principal provisions of the Convention having reference to innocent passage apply indifferently to warships and other Government ships as well as to merchant ships; and all these categories of vessels not only enjoy the right of innocent passage, but are subject to the obligations of (and to such limitations on) passage as this first subsection (Articles 14–17) provides for.[42]

[40] This is made crystal clear in the passage from the judgment of the Court in the *Norwegian Fisheries* case (p. 127) where it was stated that "the coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coastline, is the outer line of the 'skjaergaard.'" The Court was, of course, in error in implying that the Norwegian coast was in any way unique. There are several similar cases, *e.g.*, the west coasts of Scotland and Canada, and the southern part of the west coast of Chile. See also the remarks of Lord McNair (*Report*, pp. 169–171).

[41] See *ante*, p. 79.

[42] This needs to be emphasised, owing to certain peculiarities in the drafting of Articles 21–23 ("Government Ships other than Warships" and "Warships"). Because there were two categories of government ships, namely, those commercially and those not commercially operated; and because it was desired to make the provisions of subsection B (rules specially applicable to merchant ships) also applicable to commercial government ships—whereas in the case of the non-commercial government ships it was only desired to make one of the provisions of subsection B (Article 18—*vide infra*, p. 103) applicable; and since, further, to make mention only of subsection B, or of Article 18, might cast doubt on the applicability of subsection A ("All Ships"): therefore,

The principle of innocent passage

(i) *Origins.* The origin of the principle of innocent passage, which has for long been recognised as an integral part of sea law, is no doubt to be found in practical considerations, *i.e.*, in the interest which almost all countries (even land-locked ones [43]) have in communication by sea, and its necessity as an element of the principle of the freedom of the seas; for, as has been pointed out earlier, it avails little to be free to sail the seas, unless there is also a right of arrival at a destination, and a right to pass through such waters as are necessary or convenient for the purpose. The principle also affords an illustration of that process of international legal development which takes place through the evolution into a rule of law of something the deprivation of which might originally only have been felt as an abuse of rights.[44] Even on the basis that a country has sovereignty over its territorial sea, and might therefore strictly have possessed there a right of exclusion, it is clear that, from a fairly early date, the exercise of any such right, unless on grounds of emergency or in other special circumstances, would have been regarded as abusive. It would also, generally speaking, not have been in the interests of the trade and commerce of the coastal State, and would have been open to obvious retaliation. Thus the right of innocent passage may be regarded as a sort of universal servitude imposed on all coastal States, in the interests both of themselves and of all other States, coastal and non-coastal, and to that extent as an acknowledged limitation on their complete sovereign freedom.[45] This position finds

Articles 21 and 22 stated that the "rules contained in subsections A and B" (and the "rules contained in subsection A and in Article 18") should respectively apply to commercial and non-commercial government ships. It would have been better to use a formula on some such lines as "In addition to the rules applicable to them by reason of subsection A, those contained in subsection B [in article 18] shall also be applicable to commercially [non-commercially] operated government ships." In the case of warships, no distinction between different categories being made, and it being clear that none of subsection B ("Merchant Ships") could be material with respect to them, it was not necessary to do more than state any special rules applicable to warships as such, over and above those applicable to them as vessels coming within the class of "All Ships" under subsection A.

[43] This interest is recognised in paragraph 1 of Article 14 of the Convention (*vide infra*), which refers to "ships of all States, whether coastal or not. . . ."

[44] On this topic as a whole, see Lauterpacht, *The Function of Law in the International Community*, Chap. 14: "The Doctrine of Abuse of Rights as an Instrument of Change."

[45] There are analogies in the legal situation as between upper and lower riparian States traversed by international rivers. It is much to be deplored that, owing to the novelty of the subject, and the haste in which the basic arrangements were made at or near the end of two world wars (Paris Aerial Navigation Convention, 1919, and Chicago Civil Aviation Convention, 1944), no right of innocent passage for aircraft through or over the territorial sea was reserved. The relevant instruments are indeed so worded as apparently to exclude such a right, although a very strong case for it on general legal grounds can be made out. On the air navigation question generally, see Lauterpacht, *op. cit.*, in n. 44 above, pp. 301–303.

expression in paragraph 1 of Article 14 of the Convention, which states that, subject to its provisions, " ships of all States, whether coastal or not,[46] shall enjoy the right of innocent passage through the territorial sea." The phrase " *the* right " of innocent passage is significant, and not a mere drafting accident. This is followed up in paragraph 1 of the next article (Article 15) by a specific injunction to the effect that " The coastal State may not hamper innocent passage through the territorial sea." The Conference omitted (as imposing too sweeping a burden) a provision in the International Law Commission's draft which, while requiring the coastal State to " ensure respect for " innocent passage, would also have required it not to allow its territorial sea to be used " for acts contrary to the rights of other States." [47] The Conference, however, retained a provision (paragraph 2 of Article 15) requiring the coastal State, so far as its knowledge went, to give publicity to dangers to navigation existing or occurring in its territorial sea.

(ii) *Definitions.* Innocent passage is one of those concepts easy to understand, and not too difficult to apply in the concrete case, but liable to give rise to difficulties as soon as attempts are made to define them in precise terms. The root of the difficulty is the need to reconcile the reasonable requirements of navigation with the legitimate interest of the coastal State in protecting its security, and preventing violations of its revenue, sanitary and immigration laws. The Convention, following the scheme of the International Law Commission, attempts to do this by balancing the articles stating and defining the right of innocent passage and the duties of the coastal State in respect of it, by other provisions obliging the vessel in passage to respect the laws of the coastal State, and giving the latter certain specific rights for its protection. At first sight it may seem as if some of these provisions take back what others give; but this is not really the case if the scheme is properly understood. As regards definition, there are two aspects of the right of innocent passage: what is passage, and what is innocence (of passage)?

(a) *Passage.* Paragraphs 2 and 3 of Article 14 define passage as follows:

> " 2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering

[46] *Vide supra*, n. 43.

[47] See Article 16, paragraph 1, of the Commission's final (1956) text. It was felt at the Conference that the coastal State could not possibly be saddled with the responsibility that such a provision might have been held to entail, of inquiring into the objects of each ship's journey, and the ultimate purposes for which the passage was being effected.

internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

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

From these provisions, which must be read together, it follows that although passage *involves* entry into the territorial sea, it must be distinguished from entry as *such*. It is entry for certain purposes only, *viz.*, in effect (taking the normal cases), to pass right through without going to a port or other shore locality; or to proceed to a port, or to pass out from a port. To enter the territorial sea for another purpose may be legitimate (depending on the circumstances), but it is not passage; and therefore whatever justification it may have (and it need not necessarily be lacking in that [48]), this must derive from other sources, and cannot be founded on the right of innocent passage. Again, stopping does not *per se* prevent the operation being one of passage, provided this is incidental to ordinary navigation, or compelled by an emergency or by stress of weather—provided in short that stopping was not the purpose of the entry into the territorial sea. To put the matter in another way, the mere fact that the vessel does actually pass through the territorial sea, in the sense that she enters it at one point and leaves it at another (even without calling at a port or other shore locality), does not make the operation one of passage if passage as such was not its purpose—("Passage means navigation through the territorial sea *for the purpose* either of traversing that sea . . . or of . . . etc."—[italics added]). If the vessel passes through for some other purpose, or if she stops in circumstances other than those mentioned, the operation is not, or ceases to be, passage, and (while not necessarily illegitimate) other grounds of right must be invoked in support of it.

(b) *Innocence of passage.* The foregoing position relative to passage as such (*i.e.*, as to what is passage at all) goes far in practice to rendering the concept of "innocent" passage otiose or relatively unimportant so far as concerns that type of non-innocence that involves action by the vessel in the territorial sea itself, of a kind contrary to the peace, good order or security of the coastal State; for it is obvious that, in the great majority of cases, such action will involve using the territorial sea for purposes other than

[48] For instance a ship might enter the territorial sea out of her normal course because of weather conditions or other emergency circumstances, for the purpose of anchoring and of eventually leaving the territorial sea by the same route, and not of passing through it and leaving at another point. There are other possibilities that need not be particularised here.

those of mere passage, or else that any traversing of the territorial sea that takes place will not be (or will at some point cease to be) exclusively for the purposes mentioned in paragraph 2 of Article 14. It was partly for this reason that certain of the Delegations at the Conference regarded as being wide of the real point the words italicised in the following citation of the International Law Commission's definition, which stated that [49]

> "Passage is innocent so long as a ship *does not use the territorial sea* for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law."

Even more serious objection was felt to the phrase towards the end of this provision, "or contrary to the present rules"—for the Commission's rules (like those of the Convention) contained a provision to the effect that vessels in passage must comply with the laws and regulations of the coastal State, in particular those relating to transport and navigation.[50] The effect of the Commission's definition of innocent passage would therefore have been to "de-innocise" any passage in the course of which any contravention of local regulations, however technical, was committed—for instance ignoring a navigation light, or passing a buoy on the wrong side. But clearly, if such elements are to affect the innocence of the passage as such, consequences detrimental to the freedom of sea communications will follow. This is because the penalty for a passage that is not innocent is that it may be denied altogether; for the right is one of *innocent* passage, and if the passage is not innocent there is no right of passage at all—a view to which expression is given in paragraph 1 of Article 16 of the Convention which expressly provides that "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." It follows that it was necessary to disassociate the idea of non-innocence of passage from that of infringements of local laws and regulations as such. If a vessel infringes such a law or regulation, she may indeed be liable to a fine or other penalty. But her passage does not, merely on that account, cease to be innocent, or become liable to be prevented or denied entirely. The ship must pay, or make satisfactory arrangements for paying, but must then be allowed to proceed. To render a passage non-innocent, there must be something more than a mere infringement of a local

[49] See Article 15, paragraph 3, of the Commission's final (1956) text.

[50] *i.e.*, Article 17, which will be considered in more detail later. It should be noted, however, that under this provision the obligation to conform to local laws and regulations exists only in so far as these are in accordance with the rules of international law.

law or regulation. There must really be something going beyond the mere existence of local laws and regulations as such—something that could be considered as tainting the passage even if there happened not to be any specific domestic law or regulation under which it was locally illegal. These various ideas are reflected in paragraph 4 of Article 14 of the Convention, which reads as follows (and may be compared with the International Law Commission's draft above cited):

> "4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law."

It will be seen that this provision differs from the Commission's draft in three important respects:

> (1) To conclude on the topic just discussed, it provides that passage must take place in conformity with the Convention (and therefore, in effect, with the local laws and regulations, as is provided by Article 17 of the Convention), and with the general rules of international law. It does not say, and is not intended to have the effect, that a failure so to comply will result (though it may) in the passage becoming non-innocent. Innocence, or the contrary, is made to depend wholly on the considerations set out in the first sentence of the paragraph, and not on those in the second, which is only intended to ensure that the innocence of the passage as such (*i.e.*, under the first sentence of the paragraph) affords no ground on which the vessel can claim to be absolved from the need of compliance with the local laws and regulations.[51]
>
> (2) For reasons already indicated in part, the definition of innocence does not relate, or confine the matter, to what the ship does when actually in the territorial sea. But this is not only because, if a ship in the territorial sea acts in the manner contemplated by this sentence, her operation will not even be, or will cease to be, passage (as defined in the two preceding paragraphs): it is also because, according to modern conceptions—or rather perhaps in the light of modern conditions—it may be too narrow a view that a passage is necessarily innocent in relation to the coastal State so long as the vessel commits no prejudicial act while actually *in* the territorial sea. There may be cases where the passage is felt, or appears,

[51] This might mean that her owners could be subjected to penalties, and the vessel herself to delay or even arrest; but that eventual passage, as such, could not be refused.

as prejudicial to the coastal State, though not by reason of anything occurring actually in its territorial sea.[52] In such cases, the Convention would allow the passage to be treated as non-innocent. In this respect, the Convention seems to go beyond existing international law principles as to the meaning of innocence of passage, according for instance to the formulation given by the International Court of Justice in the *Corfu Channel* case (as to this, see n. 53 below). On the other hand, the Convention makes it quite clear that the prejudice must be to the coastal State—("Passage is innocent so long as it is not prejudicial to the peace, good order or security *of the coastal State*"). The fact that it may be prejudicial to some third State does not affect its status as innocent passage in relation to the State whose waters are being traversed.

(3) Finally, as compared with the Commission's draft, which confined the case to prejudice to the "security" of the coastal State, the Convention adds "peace" and "good order."

As a result of this drafting, there can be little doubt that the effect of the Convention, if compared with the general international law position, is more restrictive of the right of innocent passage, for it enlarges the concept of what is *non*-innocent. The phrase "peace, good order or security" is a wide one, capable of affording a variety of plausible pretexts for prohibiting or impeding passage. There is also danger, from the point of view of pure passage rights, in the failure to confine the concept of prejudice to the coastal State to acts committed in, or to what occurs while the vessel is actually passing through, the territorial sea, even admitting the theoretically valid argument that, if the notion of prejudice were so confined, the concept of innocence would add little to what is already implied by that of genuine passage.[53] It is therefore all the more necessary to insist that, however it arises, a clear and direct prejudice to the

[52] It would be possible to give examples, but as the issue is controversial and has political implications, it is perhaps preferable not to do so in what is intended mainly as a work of exposition. However, it can be said that the obvious weakness of any criterion that relates innocence to the object of the journey is that while the achievement of this object and the completion of the journey may thereby be rendered more difficult, yet in the great majority of cases these ends are unlikely to be frustrated altogether, or to be rendered unrealisable merely by denial of passage through a particular stretch of territorial sea.

[53] The concept of innocence adopted by the Conference and embodied in the Convention is also not altogether easy to reconcile with the findings of the International Court of Justice in the *Corfu Channel* case (Merits), *I.C.J. Reports*, 1949, at pp. 30–31 *et seq.*, in which the Court appeared to attach more importance to the manner than to the object of the passage. As to this, see the present writer's article in the *British Year Book of International Law* for 1950, at pp. 28–31.

coastal State itself must be demonstrated; and to construe that idea strictly and even somewhat narrowly. Otherwise, for instance, passage could be refused on the ground that the coastal State disapproved generally of the object of the voyage, or that the voyage might lead to consequences, or might start a chain of events, that might have repercussions that would be prejudicial to, or might indirectly affect, the coastal State. On that basis little would be left of the right of innocent passage.

Fishing vessels

It is not always realised that fishing vessels enjoy the right of innocent passage just as much as other types of ships, and that its exercise, when proceeding out to or returning from distant waters, may be important to them.[54] Although normally precluded from fishing in the territorial sea of another State, they are entitled to pass through it, provided they comply with the laws and regulations of the coastal State, particularly (in their case) as to stowage of fishing gear. As Article 17 of the Convention obliges all ships in passage so to comply, and as Article 14, defining the right of innocent passage, figures equally in the subsection relating to "All Ships," no special provision about fishing vessels was really necessary. However, the Convention (Article 14, paragraph 5) contains one, reading as follows:

> "5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea."

This provision, which was inserted at the instance of a group of States especially interested in coastal fisheries, is defective in a number of respects, at any rate from a drafting point of view:

(a) It was strictly unnecessary, as already indicated.

(b) By depriving the passage of its innocence, if there is failure to comply with certain local regulations,[55] the paragraph falls into the error described on page 94, above, and is quite inconsistent with paragraph 4 of Article 14, which, as already indicated, deliberately disassociates non-innocence from failure to comply with local laws and regulations. It is also inconsistent with that paragraph

[54] Deep-sea fishing vessels, though capable of distant operations, are normally vessels of comparatively small tonnage, often out for weeks at a time in what are liable to be very stormy waters. They may need the shelter of a lee coast, and, when returning home heavily laden, may need to take short cuts.

[55] The irony is that actual *fishing* in the territorial sea while in passage would not in itself, on the language of this paragraph, affect innocence. The non-innocence would result from failure to comply with regulations designed to prevent fishing, such as those respecting stowage of gear.

inasmuch as, however illegal it may be for a fishing vessel to pass through the territorial sea with gear unstowed, or even to fish while doing so, such acts cannot (on any reasonable view) be regarded as prejudicial to the "peace, good order or security" of the coastal State. They may be punishable, but are not grounds for denying passage.

(c) While this provision may have its uses, as making it quite clear by implication that fishing vessels do enjoy rights of innocent passage, this was not the primary object of its sponsors. That object was, rather, to place a special and more onerous meaning on the concept of innocence in relation to fishing vessels as compared with, say, merchant ships. The danger of the provision is that it could be used so as to tend in practice to the total exclusion of fishing vessels, even from passage—for instance if the local regulations about stowage of gear were made so onerous that, except when driven in by stress of weather or emergency, it would be less inconvenient for the vessel to remain out than to comply with them.

Submarines

The final paragraph of Article 14 provides that "Submarines are required to navigate on the surface and to show their flag." This provision is equally open to the criticism of being superfluous and unnecessary in a section relating to "All Ships," and containing an article obliging them generally to comply with local laws and regulations.[56] But it is not subject to the same defect of making the innocence of the passage dependent on compliance with this particular requirement. In short, a submarine that traverses the territorial sea submerged or not showing her flag may possibly not be in innocent passage, but this will not be *because* she is submerged or not showing her flag.

The paragraph has its uses however, inasmuch as it makes it clear by implication that warships are comprised in the category of "All Ships" to which Articles 14–17 of the Convention apply; and consequently (a) that they do enjoy the general right of innocent passage under paragraph 1 of Article 14—a point to which further reference will be made later; and (b) that in the exercise of this right they are subject to the remaining provisions of this subsection, including (under paragraph 4 of Article 14, and under

[56] Much of the loose drafting of this and other provisions of the Convention is attributable to the suspicion with which, in the present climate of opinion, any proposals for improvement coming from the major western maritime and deep-sea fishing countries are liable to be received. This often inhibits the putting forward of proposals known to be technically desirable and meritorious.

Article 17) the requirement of compliance with the provisions of the Convention, the rules of international law, and the laws and regulations of the coastal State enacted in conformity with international law. This position is not altered by the fact that a warship's immunity from the local jurisdiction may render the enforcement against her of particular laws and regulations impossible in the last resort—a point which is in fact made clear by the single article (Article 23) comprising the subsection on "Warships" as such. This provides that if a warship fails to comply with local regulations concerning passage, and disregards any specific request for compliance, "the coastal State may require the warship to leave the territorial sea." [57]

Rights of the coastal State

In the course of discussing the right of innocent passage, mention has already been made of two of the principal rights of the coastal State, namely (paragraph 1 of Article 16) to prevent passage that is not innocent by definition; and (Article 17) to require compliance with its laws and regulations (particularly those relating to passage and navigation), provided however that these are themselves "in conformity with these articles and other rules of international law": in other words the coastal State is not free to apply any laws or regulations it pleases; and in particular could not require compliance with regulations destructive of the right of passage itself, or restrictive of it beyond such bounds as may result from the Convention. Even with this safeguard the Article is quite wide enough, and it may be worth mentioning that at one stage the International Law Commission had attempted to restrict it to certain categories of laws and regulations particularly relating to traffic and navigation. As is so often the case however, the attempt to particularise led to difficulties,[58] and it was in any case clearly necessary to employ language covering such things as customs and health regulations also.

A subsidiary right of the coastal State (strictly superfluous because covered by the Article 17 rights) is stated in paragraph 2 of Article 16, namely, in the case of ships proceeding to internal

[57] There is a certain element of futility about this provision, since assuming (and for the purposes of the Article the assumption must, initially at any rate, be made) that the ship is in passage, it is precisely her object to leave the territorial sea after passing through it, and her route will already normally be the shortest possible. This Article was never really intended to figure as the only provision of subsection D ("Warships"). In the Commission's text it was accompanied by another, which however, in the circumstances described below (p. 102 and n. 66), was not adopted by the Conference.

[58] These are fully described in the Commentary to Article 18 of the Commission's final (1956) text.

waters, to take such steps as may be necessary "to prevent any breach of the conditions to which admission . . . to those waters is subject."

Finally, a third major right forms the subject of paragraph 3 of Article 16, which reads as follows:

> "3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

The right of suspension thus given is therefore subject to eight important qualifications, namely, (i) it is subject to the provisions of paragraph 4 of the Article (international straits—see below); (ii) it must be non-discriminatory as between foreign vessels, *i.e.*, suspension, if it occurs, must apply to *all* foreign (though not necessarily to national) vessels; (iii) it must be temporary, and not involve the permanent or semi-permanent closure of areas; (iv) the areas concerned must be specified, which carries an implication of some limitation on their extent under all but the most unusual circumstances; (v) the suspension must be for the protection of the coastal State's security, and not for some other or lesser purpose; (vi) it must be essential for that purpose, and not merely desirable or convenient; (vii) due notification of the suspension must not only be given, but published; and (viii) suspension can only take place after publication—it cannot be effected first and published later. Experience has shown these safeguards to be necessary.

International straits

No difficulty or special question arises over "international straits" through which there runs a channel of high seas, so that they can be traversed without passing through either of the riparian States' territorial waters. But if the straits are sufficiently narrow to consist entirely of territorial waters, or if, though there are some high seas, the only navigable channel runs through one of the riparian States' territorial waters, the case may be different; and in this connection one of the most important provisions of the Convention, which figures as paragraph 4 of Article 16, provides a definite exception to the right of suspension given by paragraph 3. Paragraph 4 reads as follows:

> "4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international

navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

The effect of this provision, and the reasons for it, have already been discussed [59] and need not be enlarged on further, except to say that so far as international straits connecting parts of the high seas are concerned, the paragraph embodies a universally recognised rule of general international law, specifically affirmed by the International Court of Justice in the *Corfu Channel* case. The relevant passage is worth recalling [60]:

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

The Court went further than this, for after stating that because (but only because) of the strained relations between Greece and Albania, the latter, "in view of these exceptional circumstances, would have been justified in issuing *regulations* in respect of the passage of warships through the Strait"—[italics added], it continued "but not in *prohibiting* such passage, or subjecting it to the requirement of *special authorisation*"—[*ibid.*].[61] Nor did the Court accept the Albanian contention that this only applied to certain kinds of straits, and did not apply to those which were of "secondary importance," or which were mainly used "for local traffic" and did not constitute the only, or "a necessary," route between the two parts of the high seas concerned. The Court equally rejected any test founded on "the volume of traffic passing through the strait," and finally said [62] that

> ". . . in the opinion of the Court the decisive criterion is rather its [*i.e.*, the strait's] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation."

It was for reasons of a similar order that the Conference rejected proposals for restricting the type of straits to which paragraph 4 of Article 16 would apply, and refused equally to accept the introduction of the term "normally" before "used for international navigation."

[59] *Supra*, p. 78.
[60] *I.C.J. Reports*, 1949, at p. 28.
[61] *Ibid.*, p. 29.
[62] *Ibid.*, p. 28.

As regards the extension to include straits connecting a part of the high seas with the territorial sea of another State (*i.e.*, a State other than the riparian States of the strait), the feeling was that the issue of principle involved was almost exactly the same—namely, ships sail to reach a destination, and should be allowed access to it through the normal geographical approaches, even if this involves passage through the territorial sea of another country.

Passage of warships through the territorial sea

It is clear that where the territorial sea in question is part of an international strait as defined in paragraph 4 of Article 16, the effect of that provision is to give, or rather to declare, the general international law rule of an absolute right of passage through such straits in all circumstances,[63] and without right of suspension on the part of the riparian States, both for merchant ships and warships[64] (since this provision figures in the subsection on "All Ships" which, as has been seen, covers warships). Furthermore, and for the same reason, it is clear that this subsection covers equally a right of innocent passage for warships through ordinary territorial sea not part of an international strait. The only difference is that, in this latter case, the coastal State's right of suspension will, subject to the provisions of paragraph 3 of Article 16, exist. The International Law Commission's draft had, however, proposed to make a distinction between warships and merchant ships in respect of passage through "ordinary" territorial sea (though not where passage through territorial sea forming part of an international strait was concerned[65]). This distinction was embodied in a provision specially applicable to warships, according to which, although they should normally be granted passage through the territorial sea, the coastal State had the right to make such passage subject to prior authorisation or notification. At the Conference, however, this provision did not obtain the necessary two-thirds majority; nor did a modified version suppressing authorisation but retaining prior notification.[66] Consequently, the position is that

[63] Without suggesting that such a right does not equally exist in time of war, it may be mentioned here that the International Law Commission only purported to do a draft of the international maritime law of peace; and the Conference proceeded on the same basis. This is not to say that many (indeed most) of the articles would not be equally applicable in time of war. But the Conference did not attempt to deal with that question one way or the other.

[64] And, naturally, for government ships other than warships; but in their case this is specifically stated in Articles 21 and 22, for reasons already explained (see n. 42, above).

[65] The point is fully explained in paragraphs 3 and 4 of Article 24 of the Commission's final (1956) text.

[66] A separate vote was asked for on the words "previous authorisation," and these words failed to obtain the required majority. Without them, the

the Convention creates no *special* régime for the passage of warships, and does not place upon them any special disabilities as compared with merchant ships, or subject them to any conditions or restrictions to which the latter are not subject, but gives them exactly the same rights.

Rules applicable only to merchant ships and to government ships (whether commercially or non-commercially operated)

Charges. Article 18 of the Convention (which, in addition to being applicable to merchant ships as one of the provisions of subsection B of the section on innocent passage, is also (by virtue of Article 21, and of paragraph 1 of Article 22) applicable to government ships, both commercially and non-commercially operated),[67] provides that no charges may be levied on ships in respect of mere passage as such through the territorial sea, and may be levied only (and on a non-discriminatory basis) for specific services rendered to the ship.[68]

Rules applicable only to merchant ships and to commercially operated government ships

(i) *Criminal jurisdiction in respect of ships in passage.* The question of the exercise of criminal jurisdiction by the authorities of the coastal State, on board or in respect of a ship in passage—a matter which is covered by Article 19 of the Convention—obviously cannot arise with reference to warships and non-commercial government ships, because of their total immunity from the exercise of any local jurisdiction. But it does arise with reference to merchant ships; and the Convention (Article 21) also applies the same rules to commercially operated vessels (because the increasing tendency to own and operate such vessels [69] would otherwise render too large

requirement that "normally" passage should be granted became otiose, so that the Article needed redrafting. The delegations which had voted against the requirement of previous authorisation, being willing to accept the requirement of previous *notification*, offered a revised form of the Article, providing simply that the coastal State might make the passage of warships subject to previous notification. The supporters of the requirement of previous authorisation, however, refused to accept this, and voted against it, with the result that Article 24 of the Commission's draft disappeared altogether. This outcome gives effect to the United Kingdom view of the law.

[67] See as to this n. 42, above.

[68] It may be opportune to mention here that, for the avoidance of any doubts, paragraph 2 of Article 22 specifically provides that, except as may result from the application of subsection A ("All Ships") and of Article 18, nothing is to affect the immunities which non-commercially operated government ships enjoy by international law. It was thought otiose to make a corresponding statement in respect of warships, despite the fact that subsection A also applies to them.

[69] Totalitarian and other tendencies now cause a considerable and perhaps increasing percentage of commercially operated tonnage to be government owned, or to have government or para-governmental status. In the case of some countries, the entire merchant shipping fleet is in this position.

a proportion of commercial shipping immune from the exercise of the local jurisdiction).

With reference to the exercise of criminal jurisdiction in respect of a passing ship, three main situations exist: (*A*) a crime is committed on board a ship while actually in passage (but also while *simply* in passage) through the territorial sea; (*B*) the ship is in passage through the territorial sea after leaving a port or internal waters, and it is desired to effect an arrest or carry out an investigation on board in respect of something that occurred in port or in internal waters, or before the vessel left; (*C*) the crime was committed before the vessel entered the territorial sea, and she is either merely passing through the territorial sea, or (a fourth case really) enters internal waters. With reference to each of these situations, the Convention provides rules which reflect perhaps not so much strict international law, as what has come to be accepted as normal international practice, based on considerations of convenience, comity and common sense.

Case (*A*). This is dealt with by paragraph 1 of Article 19 as follows:

> "1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
>
> (a) If the consequences of the crime extend to the coastal State; or
>
> (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
>
> (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
>
> (d) If it is necessary for the suppression of illicit traffic in narcotic drugs."

The somewhat unfortunate term "should not" in the first line of this provision is intended to reflect the fact that the rule enunciated represents standard international practice rather than strict international law. That it does represent such practice is fairly certain in the case of sub-heads (a), (b) and (c) of this provision, which derive from the view that, in general, matters affecting mainly the internal discipline of the ship, and not affecting the coastal State or its territorial sea, ought not to be made a ground for holding up or interfering with a ship purely in passage. These three cases also have another feature in common, namely they are all cases in

which, *ex hypothesi* the existence of the crime, or of a situation calling for intervention, will in any event be known to the coastal authorities. But they are equally almost the only types of cases in which this will necessarily be so. In all or most others, those authorities—at any rate as regards a ship in simple passage through the territorial sea—would be unlikely to know anything about the matter unless their attention was specifically drawn to it. Current international practice as set forth in these sub-heads is largely a reflection of this fact.[70] Sub-head (*d*) is quite another matter. It represents an addition made at the Geneva Conference at the instance of a number of Asian States. This addition was morally impossible to object to, but it is none the less technically unfortunate. It does not reflect current international practice, and does not have the same features as are common to the other cases.

Case (*B*). Paragraph 2 of Article 19 provides that "The above provisions do not affect the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters." This is in accordance with existing law and requires no comment. The point is that if a crime has been committed or anything needs investigating, this will, in the vast majority of cases, be in connection with events having occurred—whether on board the ship herself, or on land—while the ship was in port or other internal waters. Some States, it is true, have applied even in their ports and internal waters a practice limiting the exercise of their jurisdiction to the same three classes (a)–(c) that are accepted for Case (*A*) above; but this is voluntary, and it does not appear that international law imposes any such restriction, though it is probable that even in port the local authorities of most countries would not concern themselves with matters occurring on board affecting solely the internal discipline of the ship.[71]

[70] The history of the matter is that the International Law Commission, from whose draft these three sub-heads are derived, took them from the draft Convention on territorial sea and passage questions which emerged from a committee of the 1930 Hague Codification Conference, though the draft was not adopted by the Conference itself. Somewhat similar principles had already been adopted by the Institute of International Law in Article 7 of its project on the territorial sea drawn up at its Stockholm Session in 1928 (see p. 125 in the volume of the *Collected Resolutions of the Institute*, 1873–1956 (*Editions juridiques et sociologiques, S. A. Basle*, 1957); and see generally *Higgins & Colombos*, *op. cit.* in n. 26, above, § 276.

[71] See Oppenheim, 8th (Lauterpacht) ed., Vol. 1, pp. 502–503; and see also Articles 32–34 of the Institute of International Law's 1928 (Stockholm) project on the Régime of Ports and Internal Waters (*loc. cit.* in n. 70 above, pp. 109–110).

The first two paragraphs of Article 19 are followed by two paragraphs providing first, that if the captain of the ship so requests, the local authorities must notify the local consular authority of the flag State before taking any steps (except that under emergency conditions the steps taken may be simultaneous with the notification), and must facilitate contact between the consul and the ship; and secondly that in considering "whether or how an arrest should be made," the local authorities must "pay due regard to the interests of navigation."

Case (*C*). The final paragraph of Article 19 provides that:

> "5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters."

It is important to note that this provision does not assert that jurisdiction in respect of a crime committed before the ship entered the territorial sea, necessarily would be properly exercisable by the local authorities, even if she entered internal waters. Whether it would or not depends on general international law issues, such as arose in the *Lotus* case,[72] concerning the conditions in which countries can legitimately exercise jurisdiction in respect of offences committed outside their territory or territorial sea.[73] All that this paragraph really does is to provide that jurisdiction may not be exercised in such a case in respect of a ship in pure passage through the territorial sea. This really follows *a fortiori* from Case (*A*), for a crime committed before the ship entered the territorial sea can *ex hypothesi* hardly come under sub-heads (a) or (b) of paragraph 1 of Article 19. If there is a request for assistance such as is contemplated by sub-head (c), then *cadit quaestio*; while in the interests of maritime communications, sub-head (d) should certainly not be extended so as to apply to offences committed before entry into the territorial sea.

(ii) *Civil jurisdiction in respect of ships in passage.* There are two main cases—(1) civil jurisdiction in respect of a person on board; and (2) civil jurisdiction in respect of the ship herself.

[72] P.C.I.J. Reports, Series A, No. 10.

[73] See on this whole subject the very illuminating recent article by Professor R. Y. Jennings "Extraterritorial Jurisdiction and the United States Anti-trust Laws" in the *British Year Book of International Law* for 1957, pp. 146 *et seq.*

Case (1). Paragraph 1 of Article 20 of the Convention provides that the coastal State "should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship." The "should" is unfortunate from a drafting point of view, but is due to the same cause as that noticed above in relation to Case (*A*) of criminal jurisdiction. The following passage from Higgins & Colombos [74] makes the position quite clear:

> "§ 278. *Civil jurisdiction over passing ships.*—If the exercise of criminal jurisdiction appears justified in such cases, it is certain that a State's claim to enforce its civil jurisdiction in similar circumstances would be unwarranted; the ship that ploughs these waters in the pursuit of her legitimate trade and navigation should be left alone in all matters of her internal government. In other words, whilst there is no legal provision in existence exempting foreign vessels from the operation of the domestic laws of the country in whose territorial waters they find themselves, there is a rule of international comity and practice which prohibits the exercise of the local jurisdiction on all acts of internal discipline of the vessel, and on all civil acts governing and regulating the rights, duties and obligations of all persons on board so long as the peace and tranquillity of the littoral State are not affected and its aid has not been requested by the master of the ship or the Consul of her country."

Case (2). Paragraphs (2) and (3) of Article 20 provide that except in the case of a ship lying at anchor in the territorial sea, or passing through it after leaving territorial waters, a ship in passage may not be arrested, nor may execution be levied against her, on civil account, except in respect of obligations assumed, or liabilities incurred, expressly for the purpose or in the course of the passage through the territorial sea.

The provisions of Article 20 of the Convention follow almost exactly those of the corresponding Article in the International Law Commission's draft; and in their Commentary [75] the Commission explain the stages through which the matter passed in their hands. As in the case of the article on the exercise of criminal jurisdiction, the draft was derived from that produced at the 1930 Hague Codification Conference.[76] When it was presented to the Commission that the draft failed to take account of the provisions of the Brussels

[74] *Op. cit.* in n. 26, above, p. 241.
[75] See Commentary to Article 21 of the Commission's final (1956) text.
[76] See n. 70, above.

Convention of 1952,[77] the Commission, without actually reproducing the text of that Convention, altered their draft with the aim of making the two generally consistent. This, however, the Commission stated, "did not satisfy a number of Governments. It was pointed out that to attempt to summarise the [Brussels] Convention in the draft articles . . . would probably create even greater difficulties . . . in view of the impossibility of dealing with the whole substance of the Convention in the rules. The Commission recognised the soundness of that comment. In addition certain members [of the Commission] pointed out that the Brussels Convention which recognises the right of arrest in many more cases than the Commission had done in its 1954 draft, affected innocent passage to what seemed an unjustifiable extent." The Commission then expressed the view that possibly the Convention, "which regulated arrest within the full jurisdiction of the State, had been directed more to arrest in port than to arrest during passage through the territorial sea." The Commission accordingly decided to restore their original draft. At the Conference, the view that, if applied to the case of passage pure and simple, the terms of the Brussels Convention were somewhat restrictive, prevailed.[78] It was also pointed out that only a small number of States had actually ratified the Brussels Convention. The position of these was considered to be safeguarded by the inclusion of a general clause, figuring as Article 25 of the territorial sea Convention, to the effect that its provisions were not to "affect conventions or other international agreements already in force, as between States Parties to them."

(B) THE CONTIGUOUS ZONE

(1) *Extent and Character of the Zone*

Origins

Part II of the Convention on the territorial sea, deals in a single article (Article 24) with the so-called "contiguous zone," in which the coastal State may exercise certain powers of control outside its territorial sea. In paragraph 2 of this Article, the maximum extent of the zone is stated as follows:

[77] The Brussels Convention of May 10, 1952, for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships.

[78] While it is desirable to interfere with passage as little as possible, and the articles of the Convention on the exercise of civil and criminal jurisdiction in respect of passing ships are well designed to that end, there are other aspects of the matter that must be borne in mind. For instance, it is equally of importance to ships to be able to obtain supplies, repairs and services wherever they go, and unless adequate safeguards and means of recourse are available to the suppliers of these facilities, they may not always be forthcoming.

> "The contiguous zone may not extend beyond twelve miles measured from the baseline from which the breadth of the territorial sea is measured."

No country is of course obliged to claim any contiguous zone.[79] Nor, if it does so, is it obliged to claim the maximum distance permissible. What the above-quoted provision makes quite clear is not only that this maximum is twelve miles measured from the coast, or from straight baselines where permissible, but that it so to speak includes, and is not *additional to*, the territorial sea, as also so measured. At the Conference, some Delegations sought to maintain that countries were invariably entitled to a contiguous zone of up to twelve miles, whatever they claimed as territorial sea. Thus, on the basis of a twelve-mile claim of territorial sea (which was the maximum definitely put forward at the Conference),[80] there would (according to this view) be a total permissible maximum of twenty-four miles in which the coastal State could exercise rights of some kind with respect to foreign shipping.

This view, as so put forward, was however quite unhistorical, and took no account of the way in which the contiguous zone doctrine came into being. It was precisely the existence and, at that time, the very general acceptance of a three-mile territorial sea, coupled with the feeling expressed by a number of States, that this distance (while adequate as a belt in which the coastal State enjoyed full sovereign rights) was not sufficient under modern conditions [81] to protect certain specific interests of the coastal State (in particular its revenue and health regulations), that gave rise to claims for some additional "contiguous" zone, in which limited powers of control could be exercised. All this was evidently predicated upon, and indeed had its *raison d'être* in the fact of a relatively narrow breadth of territorial sea.[82] Indeed, the close connection between

[79] And there are still some, such as the United Kingdom who do not.

[80] And also the International Law Commission's *ne plus ultra*. In paragraph 2 of Article 3 of its final (1956) text, the Commission stated its view to be that "international law does not permit an extension of the territorial sea beyond twelve miles." This has been interpreted by some as an implied sanction for any distance up to and including twelve miles. That such was not the intention is, however, clear from paragraph 3 of the same Article, and from the Commission's Commentary. The primary object of paragraph 2 was to invalidate once and for all such claims as those to 50, 100, or even 200 miles of territorial sea.

[81] The use of fast motor-boats and other scientific aids to smuggling was said to render the task of the coastguard services very difficult on the basis of a control limit of three miles only. But the coastguard services now also have fast motor-boats, aeroplanes, and scientific aids such as radar. Nor does there seem to be any greater degree of smuggling into countries such as the United Kingdom, which do not claim or make use of any contiguous zone.

[82] Even though, as from about the end of the First World War, an appreciable number of countries began to claim more than three miles, these claims were still relatively narrow, and, with the single exception of the Russian claim

the two was demonstrated at the 1930 Hague Codification Conference; for the refusal of some of the major maritime Powers to accept the principle of a contiguous zone at that Conference was at least one of the factors—and a major one—leading to the failure to agree on the breadth of the territorial sea. It is clear therefore that if at the Hague Codification Conference there had in fact been agreement, not only on the breadth of the territorial sea, but also to extend it beyond three miles, then, to the extent of such extension so to speak, the need for a contiguous zone would automatically have been satisfied through the far greater rights and powers exercisable in actual territorial sea. It follows that suggestions to the effect that there should always be a contiguous zone whatever the breadth of the territorial sea, are more likely to represent indirect attemps at *de facto* extensions of that sea than claims based on any genuine need. In any event, paragraph 2 of Article 24, as cited above, makes it quite clear that the maximum breadth of the continguous zone is nine miles (on the basis of a three-mile territorial sea). This would be reduced to six and three miles if the territorial sea were six or nine miles in extent; while on the basis of a twelve-mile territorial sea, the contiguous zone would be swallowed up altogether and would cease to exist.

In conclusion on the subject of the origins of the doctrine, it may be said that Article 24 of the Geneva Convention concretises a practice which, during the last 30–40 years has become very widespread, not to say quasi-universal, and which has received a very general measure of tacit recognition as being legitimate, although there are still some countries, such as the United Kingdom, which neither themselves claim a contiguous zone,[83] nor have explicitly recognised the validity of such a claim on the part of other countries. However, signature of the Geneva Convention containing Article 24 would seem in any event to imply recognition of the *principle* of the contiguous zone.

Delimitation of the contiguous zones off opposite or adjacent coasts

A further limitation on the total extent of the contiguous zone is provided for by paragraph 3 of Article 24, which applies the median line principle for delimiting the contiguous zones off opposite or adjacent coasts, thus following the same system as is provided

to twelve miles, dating from 1905, and caused by the Russo-Japanese war, they did not exceed six miles. The much earlier Scandinavian claim to four miles, based on historic grounds, was even more moderate.

[83] The claim that the United Kingdom Customs and Revenue Acts allow of the exercise of jurisdiction outside the three-mile limit arises from a misinterpretation of these Acts, and a misapprehension as to the technique of drafting United Kingdom legislation. In fact no jurisdiction under these Acts is exercised in respect of *foreign* ships outside the three-mile limit.

by Article 12 of the Convention for the territorial sea itself.[84] Only in this way is it possible to avoid encroachments by one country on the actual or potential field of the territorial sea or contiguous zone of another—to an extent which, in the case of certain geographical configurations, would wholly or largely absorb the area concerned, or lead to the other country's territorial sea or contiguous zone being cut off from direct access to the high seas. The principle involved is the same as that which underlies the prohibition already discussed,[85] contained in paragraph 5 of Article 4 of the Convention, and directed against drawing straight baselines in such a way as to cut off the territorial sea of another country.

Legal Status of the Zone

The legal status of the contiguous zone is made quite clear by the preambular part of paragraph 1 of Article 24, which provides explicitly that "In a zone *of the high seas* contiguous to its territorial sea, the coastal State may exercise the control necessary to . . ." etc.—[italics added]. The contiguous zone is therefore not merely a separate and different thing from the territorial sea: it is part of the high seas, and its basic juridical status is that of high seas. This point was also made clear by the International Law Commission in paragraph (1) of the Commentary to Article 66 of their draft from which the substance of Article 24 of the Geneva Convention is reproduced almost verbatim. The Commission said:

> "International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State, which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties."

An attempt was made by the present writer, in an article written some two or three years before the Geneva Conference,[86] to elaborate the legal consequences of this position as regards contiguous zone

[84] The same idea appears again in Article 6 of the fourth of the Geneva Conventions—on the Continental Shelf—as regards delimitations of the continental shelf off opposite or adjacent coasts. Lack of space has unfortunately prevented adequate discussion in this article of several interesting and important technical questions of methodology in delimitation.

[85] See p. 78, above.

[86] *British Year Book of International Law* for 1954, pp. 378–379.

rights; and since this view is indirectly reflected in the language of the Convention, as will presently be seen, it may be worth quoting the relevant passages *in extenso*:

> "... while international practice may sanction or tolerate the exercise of certain rights by coastal States in a zone adjacent to their territorial sea, these rights are of a different juridical order from those they are entitled to exercise in the territorial sea. They are in fact not so much rights, as powers —which the coastal State may lawfully exercise if it can, but which foreign vessels are not fundamentally obliged to submit to, except in so far as they must.
>
> . . . . . .
>
> The contiguous zone is, and remains, part of the high seas. It is not (like the territorial sea) under the general jurisdiction, sovereignty and dominion of the coastal State, or indeed under such jurisdiction, sovereignty or dominion at all, in any sense; nor do the laws and regulations of the coastal State run there in the way that they do in the territorial sea (as in the land territory of that State). It must follow—and this is the important point—that foreign vessels in the contiguous zone are not basically *subject* to the laws of the coastal State, or bound to conform to them, as they would be if it were the territorial sea; nor are they, in principle, obliged to submit to the control of the authorities of the coastal State, as they would be in the territorial sea. International practice allows, or—more probably—tolerates, that the coastal State should exercise certain limited powers of control in the contiguous zone in order to enable it to prevent *eventual* infringement *within its territory or territorial waters* of certain of its laws."

The matter might be summed up by saying (i) that what a State exercises in its territorial sea is *dominium* or at least jurisdiction; whereas what it exercises in the contiguous zone is a limited right of police: and (ii) that when a State exercises jurisdiction in its territorial sea, it is exercising powers conferred upon it by its own laws in an area which international law regards as (for all practical purposes) belonging to it; whereas the powers a State exercises over *foreign* shipping in the contiguous zone, like all other powers exercised by a State on the high seas in respect of non-national persons or vessels, are derived from international law and not from the coastal State's national law, even though the latter may purport to confer them. But such national law powers would not suffice *internationally* in the contiguous zone, except if and in so far as international law sanctioned their exercise; whereas in the territorial sea no specific international law warranty is needed for the general

exercise of jurisdiction, the right to which automatically follows from *dominium*.[87] In the territorial sea, therefore, international law operates as a restraining rather than as an enabling force—it may restrict: it does not need to permit—whereas on the high seas (including the contiguous zone) the restriction is always and automatically there, except in so far as international law may relax it. This situation is clearly reflected in the provisions of Article 24 next to be considered.

(2) *The Nature of Contiguous Zone Rights*

Legal character of these rights

Paragraph 1 of Article 24, the preambular portion of which has already been quoted and, in part, commented on, reads as follows:

> "1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessory to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territory or territorial sea."

Leaving aside for later comment the references to " customs, fiscal, immigration [and] sanitary regulations," it may be said at once that the specific character of this enumeration (and it would be the same even if the list had been, or were by subsequent agreement to be, extended) indicates clearly the absence of any *general* jurisdictional rights of the coastal State in the contiguous zone, and the limitation of such rights to certain stated purposes—purposes which, as will be seen later, have certain common features, and are distinguished by a common *rationale*. Before this is discussed, however, the implications of certain other phrases must be noticed:

" . . . the coastal State may exercise the *control* necessary to . . .," etc. It is therefore control, not jurisdiction, that is exercised. The power is primarily that of the policeman, rather than of the administrator or of the judge. Although the two ensuing

[87] A State's domestic law may in fact contain provisions regarding the exercise by it of certain powers in the contiguous zone. This may be necessary constitutionally or legally under the local system in order that such powers may be exercised lawfully so far as the local law is concerned. Nevertheless, such legislation cannot of itself confer *internationally* on the coastal State jurisdictional rights on the high seas, of which any contiguous zone forms part. *Per contra*, a State's right of jurisdiction in its territorial sea is inherent. Its exercise there is, in principle, valid internationally irrespective of specific local legislation, although such legislation may be *domestically* necessary in order to validate the act from the point of view of the municipal law, and to prevent the State and its authorities from being liable to challenge or proceedings in the local courts.

sub-heads (a) and (b) of the paragraph envisage punishment as well as prevention, yet taken as a whole, the power is essentially supervisory and preventative.[88] The basic object is anticipatory. No offence against the laws of the coastal State is actually being committed at the time. The intention is to avoid such an offence being committed *subsequently*, when, by entering the territorial sea, the vessel comes within the jurisdiction of the coastal State; or else to punish such an offence already committed when the vessel *was* within such jurisdiction. This is made clear by the next phrase calling for comment:

"Prevent [Punish] infringement . . . *within its territory or territorial sea.*" At the Conference, proposals were made to eliminate the words italicised; but, although these got a certain way, they were not in the end accepted, and the text was therefore left as it stood in the International Law Commission's draft. In view of this, and of what has been said above, it would seem that the following distinction can be drawn between the powers the coastal State can exercise under heads (a) and (b) of this paragraph, respectively. Head (b) speaks of exercising in the contiguous zone the control necessary to "punish" infringements of the coastal State's regulations, committed within its territory or territorial sea. But since an incoming vessel, while she is still only in the contiguous zone, can *ex hypothesi* not yet have been guilty of such an infringement, even if intending eventually to commit one, it is clear that head (b) can only apply to *outgoing* vessels, after they have left the territorial sea, and in respect of infringements already committed when they were there, or in port or other inland waters. The control necessary to "punish," etc., must clearly include a power of arrest and conduct into port.

On the other hand, the question of *prevention* cannot arise with respect to an outgoing ship when in the contiguous zone. Her deeds, whatever they may be, are behind her, so to speak. It is therefore clear that just as head (b)—punishment—can only apply to outgoing ships, head (a)—prevention—can only apply to incoming ones. But what are the ("necessary") powers of control which the coastal State can exercise in the case of an incoming ship, or rather, do they, in particular, include arrest and conduct into port? So far as arrest, as such, is concerned, the answer must be in the negative. Whatever the eventual designs of the vessel, she cannot *ex hypothesi* at this stage have committed an offence

[88] This usage as well as the (now) more customary "preventive" is sanctioned by the Concise Oxford Dictionary.

"within [the coastal State's] territory or territorial sea."[89] There is consequently nothing in respect of which an arrest, as such, can be effected. Clearly the suspicion, even if well founded, that she may be about to do so—while it might justify her arrest on suspicion once she had come within the territorial sea—could not (within the language of this provision) justify her arrest in the contiguous zone. Otherwise, the whole effect of these limitations on the coastal State's powers would be rendered nugatory.

As regards ordering, or conducting, the vessel into port under escort, the case is less clear. Though formally distinct from arrest,[90] enforced direction into port is, in the circumstances, almost tantamount to it, and should therefore in principle be excluded: any necessary inquiries, investigation, examination, search, etc., should take place at sea while the ship is still in the contiguous zone. Only if weather or emergency conditions rendered this impossible, could the control "necessary" to prevent infringements, etc., properly be regarded as extending to such measures as ordering the vessel into port or other sheltered waters, or escorting her there.[91] In case this may seem to be unduly restrictive, it must be observed that only by insistence on such limitations is it possible to prevent coastal States from treating the contiguous zone as virtually equivalent to territorial sea.

Hot pursuit starting from within the contiguous zone

Since the whole point of the doctrine of hot pursuit is that the pursuit of a foreign ship on the high seas is unlawful,[92] but may, under certain conditions, become lawful if it was started within the territorial sea and uninterruptedly continued onto the high seas, it ought to follow—and in logic does follow—that since the contiguous zone is itself high seas, hot pursuit cannot commence from within it. However, although this view was urged on the

[89] Even if the vessel's behaviour in the contiguous zone amounted to an "attempt," and as such to what would in principle be an offence, the attempt would still at that stage not have been carried out in the coastal State's territory or territorial sea.

[90] The formal symbol of arrest, apart from declarations, is the placing of a crew on board by the authorities of the coastal State. The vessel will then be taken in by this crew or under their orders. This will not necessarily occur when the vessel goes in under escort. The same distinction between "capture" and proceeding to port under escort for contraband control is made in prize practice.

[91] According to modern prize practice, similar considerations and certain others justify the taking of vessels into port for contraband control instead of searching them at sea—see *The Zamora* [1916] 2 A.C. 77, and Colombos, *Law of Prize*, § 229.

[92] Apart, naturally, from such special cases as the suppression of piracy, and of the slave trade (as to which see Article 22 of the Geneva High Seas Convention, to be considered in a later article), and the exercise of belligerent rights in wartime.

International Law Commission,[93] the Commission did not accept it, and adopted a provision [94] which now figures (subject only to consequential changes) as part of Article 23 of the *second* of the Geneva Conventions, that on the High Seas.[95] The relevant passage in Article 23 reads as follows:

> "If the foreign ship is within a contiguous zone, as defined in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established."

The feeling, both in the Commission and in the Conference, was that even though there might be theoretical objections to allowing hot pursuit starting from within the contiguous zone, this represented a natural accompaniment of the contiguous zone principle if confined (as in the above-quoted provision it is) to the case of infringements of the particular class of laws (customs, fiscal, etc.) to which the contiguous zone principle applies. It was also felt that this ancillary right was necessary to the exercise of effective control, and that, without it, the purposes of the contiguous zone might be frustrated. (That may be so, but if it is, it renders it all the more important that the principle itself should be confined strictly within the limitations prescribed and implied by Article 24 of the territorial sea Convention.) Certain words in the above-quoted provision require particular notice however:

". . . may . . . be undertaken if there *has been* a violation of the rights . . .," etc. The words italicised make it clear by implication that the right of hot pursuit only applies in respect of outgoing ships as regards violations already committed by them in the coastal State's inland waters or territorial sea.[96] It can *ex hypothesi* have no application to an incoming vessel; and this seems to endorse the view expressed by the present writer in the article already referred to,[97] to the effect that any such vessel which, without actively *resisting* forcibly the coastal State's controls, *avoids* them, by flight, may not be pursued onto the high

[93] *e.g.*, by some governments, and by the present writer in the Commission itself—see *Yearbook of the Commission* for 1956, Vol. I, pp. 50–52 and 81–82.

[94] Article 47 of the final (1956) text.

[95] Because of its close connection with the topic of the territorial sea and contiguous zone, this particular matter is being dealt with in the present article; but the general topic of hot pursuit will be considered in the next article, on the High Seas Convention.

[96] Significantly, this passage refers only to actual and not suspected violations, in contrast to the wording of the earlier part of Article 23 of the High Seas Convention which deals with hot pursuit from within the territorial sea, and says that such hot pursuit may be undertaken when the authorities of the coastal State "have good reason to believe" that a violation of its laws has taken place.

[97] See reference in n. 86, above, p. 380, head (c).

seas from within the contiguous zone.[98] The International Law Commission, in commenting on the provision in their draft from which the above-quoted passage from Article 23 of the Geneva Convention on the High Seas was taken,[99] made it quite clear that hot pursuit could not be exercised in respect of acts committed only within the contiguous zone itself,[1] as opposed to those already committed in inland or territorial waters; and the Conference, in adopting this provision, must be taken to have accepted that view. It was expressed as follows:

> "Some members of the Commission were of the opinion that since the coastal State does not exercise sovereignty in the contiguous zone, no pursuit commenced when the ship is already in the contiguous zone can be recognised. The majority of the Commission did not share that opinion. It admitted, however, that the offences giving rise to hot pursuit must always have been committed in internal waters or in the territorial sea: acts committed in the contiguous zone cannot confer upon the coastal State a right of hot pursuit."

The particular purposes for which contiguous zone rights may be exercised

These are stated by Article 24 of the territorial sea Convention to be the enforcement of "customs, fiscal, immigration [and] sanitary regulations." The protection of the coastal State's revenue laws, and health and quarantine regulations, has always been regarded as a reasonable and proper object of contiguous zone rights, and this calls for no special comment. Moreover, it is easy to see the practical considerations which may render this necessary in the case of these particular matters.[2] Immigration is not such a clear case, and the International Law Commission, which had originally included it, took it out of its final text on the ground that "such control could and should be exercised in the territory of the coastal State and that there was no need to grant . . . special

[98] It was further suggested (*loc. cit.*, p. 379) that because of the differences in the legal status of the territorial sea and the contiguous zone (*vide ante*), foreign vessels in the contiguous zone are not under the same obligation as they would be in the territorial sea to submit *voluntarily* to the controls of the coastal State. They may not resist these forcibly, but may evade them if they can.

[99] See n. 94, *supra*.

[1] Strictly, this begs the question; for the coastal State has no (international) right to legislate in respect of foreign shipping on the high seas, except in so far as international law specifically permits. Acts "committed" in the contiguous zone could not therefore, in *general*, be breaches of any law the coastal State was internationally entitled to apply there.

[2] See n. 81, *supra*. Health regulations may also, though for different reasons, require to be applied while the vessel is still well out at sea.

rights for this purpose in the contiguous zone."[3] This is undoubtedly correct. Moreover, the inclusion of immigration is undesirable as affording a very possible pretext for types of control (or control for purposes) not really contemplated by Article 24. But the subject of immigration arouses strong feelings and is seldom dealt with quite dispassionately.

Similar considerations apply, but even more forcibly, to the inclusion of " security " as a contiguous zone subject-matter. This does *not* figure in Article 24. Proposals to include it, successful at the committee stage, were not adopted at the final plenary stage of the Conference. The International Law Commission had equally rejected such inclusion in its draft, on the ground that " the extreme vagueness of the term ' security ' would open the way for abuses," and that " the granting of such rights was not necessary," because the " enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State."[4] It was also agreed in the Commission that where any question of self-defence against attack arose, it would in any case always be open to the coastal State to take such measures as might be necessary to protect its security; and a passage was included containing a reference to the general principles of international law about self-defence, and to the United Nations Charter.[5]

The contiguous zone and the question of fishery limits

The fundamental rule is that, except under a general convention, and *vis-à-vis* the other parties to it, or as against the party or parties to a bilateral or restricted plurilateral agreement, a coastal State can only exercise exclusive rights of fishery within what is legitimately its territorial sea. It is indeed precisely the fact that, apart from convention or other agreement, such rights cannot be exercised outside the territorial sea—even in the " contiguous zone " (for everything outside the territorial sea is *res communis*, where a general right of fishing exists for the vessels of all nations[6]): it is precisely this position which has been one of the principal factors actuating many of the States that have sought extensions of the territorial sea; for except on a conventional basis, it is only by this means (assuming the extension of the territorial sea to be itself valid) that extended exclusive fishery rights can legitimately be obtained. Under general international law, and despite certain recent claims and attempts, there is no warrant for the

[3] See paragraph (7) of the Commentary to Article 66 of the final (1956) text.
[4] See paragraph (4) of the Commentary to Article 66 of the final (1956) text.
[5] See *ibid.*
[6] This common and general right is specifically affirmed in Article 2 of the Geneva High Seas Convention, quoted in n. 7, below.

establishment by coastal States of exclusive fishery limits separately from the proper limits of territorial waters, or for the assertion of exclusive fishery rights in areas going beyond these.

Now it is obvious that States can, if they so wish, agree by convention, for application *inter se*, that each of them will be entitled as against the others (though not as against third States) to exercise and enforce exclusive fishery rights up to a distance off the coast going beyond the limits of the territorial sea. But what needs to be emphasised here is that this would have nothing to do with the "contiguous zone" principle as formulated in Article 24 of the Geneva territorial sea Convention, and as discussed above. For several reasons, the two ideas are quite distinct, and if in any locality, and *vis-à-vis* certain States, a special exclusive "fishery zone" were to be established on a conventional basis, it would be quite a different type of zone in respect of its juridical characteristics from the contiguous zone of Article 24, even though it might *physically* be coterminous with the limits of the actual contiguous zone concerned. The following points in particular call for notice:

(i) Merely to add a new class—*i.e.*, of fishery laws and regulations—to the existing classes of customs, fiscal, immigration and sanitary regulations already figuring in Article 24 would not of itself confer any exclusive fishery rights outside the territorial sea; for this provision, as has been seen, relates solely to the use of a contiguous zone for the purpose of preventing and punishing infringements of the relevant regulations occurring *within* the coastal State's territory or territorial sea. Quite a different provision would therefore be required for any exclusive fishery rights *outside* that sea, and merely to add fishing to the existing list would not achieve this object.

(ii) In two or three important respects the type of subject-matter covered by the regular contiguous zone provision, and falling within the existing concepts of what are appropriate subjects for contiguous zone rights, differs from the notion of exclusive fishery rights outside the territorial sea, and from the kind of concept any such rights would involve:

> (a) In the first place, existing contiguous zone rights are, precisely, *non-exclusive*. They involve the exercise in certain respects of supervision and control over foreign vessels in the zone, but in no way the exclusion of these vessels from the zone, nor the prohibition of any normal and legitimate activity on the part of such vessels, including of course fishing. A special fishery zone would introduce the (in this field) wholly novel notion of exclusivity, and would involve not merely

controlling, but wholly preventing, certain activities, and indeed excluding certain foreign vessels entirely (except if in pure passage) from what would still remain areas of the high seas.

(b) Existing contiguous zone rights and concepts involve no *proprietary* element. They are in essence policing rights, exercised in an area in which the coastal State asserts no *dominium* and makes no proprietary claims. An exclusive fishery zone, even if it involved no assertion of proprietary rights in the actual waters concerned, would certainly involve the assertion of such a right in respect of the fish and other marine products present in these waters; and even if theoretically no *dominium* were claimed, the enforcement of exclusive fishery rights in the zone would, of its nature, be tantamount to an exercise of *dominium* for that particular purpose.

(c) Thirdly, existing contiguous zone rights (customs, immigration, sanitation, etc.) have a common element inasmuch as they all involve the protection of the *public* laws and interests of the coastal State in certain spheres, and do not directly serve or protect any private right or interest. This would not be the case with an exclusive fishery zone, which would primarily and directly serve and protect the private or individual interests of the particular persons or corporations engaged in fishing—a position which would not be at all altered by the fact that the activities of such persons or corporations might be an important factor in, or otherwise serve, the national economy.

(iii) There is, in conclusion, the fact that normal contiguous zone rights must now probably—with certain reservations as to detail—be regarded (within the limits discussed above) as being recognised general international law rights *de lege lata* and not merely *de lege ferenda*; whereas it is clear that by their very nature (*cf.* Article 2 of the Geneva High Seas Convention [7]) exclusive rights of fishery in areas of the high seas cannot derive from, or constitute, any general international law principle. They

[7] This provision, the language of which is significant in the present context, reads as follows:

"The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation:
(2) Freedom of fishing:
(3) Freedom to lay submarine cables and pipelines:

are indeed contrary to a well-established existing general international law principle, that of the freedom of the seas as *res communis*, and they would constitute a derogation from it. Such a derogation could only be legitimate if specifically authorised by convention, and then only to the extent covered by the terms of the convention. Furthermore, the derogation would only apply in favour of, and against, the actual parties to the convention—that is to say, only those coastal States that had become parties to the convention would be entitled to establish exclusive fishery limits outside their territorial sea, and these limits would only be valid and enforceable as against those non-coastal States which, by becoming parties, had accepted the principle of exclusive coastal fishery rights in high seas areas.

The general conclusion suggested by the above comparison between the concept of an exclusive fishery zone and that of the ordinary "contiguous zone," and between the rights appertaining, or that would appertain, in respect of each, is that the differences between the two are very considerable and indeed fundamental. This is not a reason why certain exclusive fishery rights outside the limits of territorial waters cannot be established on a conventional basis. But it is a reason why, if that is done, it should not be done by means of an amendment or extension of the existing contiguous zone article in the Geneva territorial sea Convention. That would be to import into that provision notions alien to its present conceptual foundations. If a right to establish exclusive fishery limits outside the territorial sea is to be accorded, and whatever the conditions attached to the exercise of such a right, it should be done as a separate matter—for separate it is.

(4) Freedom to fly over the high seas.

"These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."