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COMMENTS

THE CONFERENCE ON THE LAW OF THE SEA: A REPORT

The Conference on the Law of the Sea met in Geneva from February 24 through April 27, 1958.[1] Delegates from 86 nations discussed the draft articles which had been prepared by the United Nations International Law Commission in 1956, after seven years of preparatory work. So much has been written about the failure of the Conference to come to agreement on an internationally acceptable breadth of the territorial sea that there is a tendency to overlook the positive accomplishments of the Conference. The Conference adopted four conventions, one protocol, and nine resolutions. The conventions deal with (1) the territorial sea and the contiguous zone, (2) the high seas, (3) fishing and conservation of the living resources of the high seas, and (4) the continental shelf. These four conventions contain a total of 74 operative articles which, combined, codify most of the recognized law of the sea for times of peace; each article was adopted in the Plenary Session by a majority of two-thirds or more of the nations present and voting. The conventions and the optional protocol (the latter calls for compulsory jurisdiction of the International Court of Justice over disputes arising out of these conventions except where the parties agree upon an alternative method of settlement) are open for signature until October 31. They are subject to ratification by each signatory and each convention will become effective among the ratifying parties only after it has been ratified by 22 of the signatory nations.

From the viewpoint of the United States,[2] far too much attention was given by many delegates to the political aspects of the articles and too little attention to the legal. Many of the new and the underdeveloped States adopted the position that rules established before they were able to influence their formulation should be changed as a matter of progress. They viewed some aspects of freedom of the high seas as a fiction invented by the maritime nations to rob them of their living resources off their coasts.

1 UN records give this date. Actually the Conference was adjourned in the early hours of April 28.

2 These views were presented by the Hon. Loftus Becker, Legal Adviser of the Department of State, to the American Society of International Law on April 26, 1958. The speech is available in 38 Dept. of State Bul. No. 986, p. 832 (May 19, 1958).

On another important problem in discussion and voting, Mr. Becker stated:

> "With these views, there was combined the practice of bloc voting. The entire Soviet bloc came to the Conference instructed to support a twelve-mile limit and never deviated from this position from beginning to end of the Conference. The Arab bloc in its entirety was also pledged to the twelve-mile limit and the members of that bloc had no hesitance in declaring that their position was principally motivated by their desire to close off the Gulf of Aqaba. Argument or persuasion even with the most friendly members of that bloc was wholly wasted. A vote against this principle by any member of the bloc for any reason whatever was regarded as disloyalty to the bloc."
>
> "These, I regret to say, are the practicalities of the development of one branch of international law today. Principle, reason, and persuasion, as well as common security interests of the utmost importance, are subordinated to 'ward politics' of the most ruthless character. Whether we like it or not, this is a political reality of which we must take account."

In spite of these attitudes, the Conference accomplished much of fundamental importance. Its five committees (one on each of the convention topics and a fifth to discuss the problems of land-locked States) thoroughly discussed the draft articles not only from the legal but also from the technical, biological, economic and political aspects of the problems involved and in almost every case found a solution acceptable to the vast majority of nations.

The First Committee was given the responsibility for review of the International Law Commission's articles dealing with the regime of the territorial sea and the contiguous zone. These articles deal with a definition of the territorial sea, means of measuring the breadth of that sea,[3] the straight baseline method for drawing baselines along deeply indented coastlines, the closing line to demarcate a bay, islands in the territorial sea, rivers flowing into the territorial sea, the right of innocent passage through the territorial sea, the criminal jurisdiction of a coastal State over a foreign ship in its territorial waters,[4] freedom of

[3] This does not include a statement of the limit of the territorial sea.

[4] Limited to crimes the consequences of which extend to the coastal State, or of a

foreign ships from civil jurisdiction of a coastal State in relation to persons on board, and rights in a contiguous zone extending twelve miles from the coast. In final form this work became the *Convention on the Territorial Sea and the Contiguous Zone.*

While much of the Convention is declaratory of previously existing international law, certain new principles are also formulated. Article 3 codifies the finding in the *Fisheries Case,*[5] in which the International Court of Justice stated that for the purpose of measuring the breadth of the territorial sea, "it is the low-water mark . . . which has generally been adopted in the practice of States." The Convention incorporates the "straight baselines" method of determining the line from which the territorial sea is to be measured but only in cases in which either the coastline is deeply indented and cut into, or there is a fringe of islands along the coast in its immediate vicinity. This method consists of "joining appropriate points" to form the baseline. Such points are "appropriate," apparently, only if they describe a baseline which follows the general configuration of the coastline and which encloses only sea areas sufficiently closely linked to the land domain to be rightfully subject to the regime of internal waters.

The maximum length of the line which a State could draw across the mouth of a bay to delineate internal waters was subject to great debate. The Convention sets a 24-mile maximum—a distance opposed in debate both by the United States and the United Kingdom as being excessive; the provision was adopted with the support of the Soviet and Arab blocs. The foregoing provision, however, was held not to apply to so-called "historic" bays. It was decided to refer this difficult problem to further United Nations study.

After much discussion, centered in large part upon the question of how to treat warships, several articles on innocent passage of foreign ships through the territorial sea of the coastal State were incorporated into the Convention. The definition of innocent passage, rights of the coastal State to prevent passage which is not innocent, the right to suspend temporarily without dis-

kind to disturb the peace, or because of which assistance of the local authorities is requested by the ship's captain or consular authorities, or crimes which constitute illicit traffic in narcotic drugs.

[5] ICJ Rep. 1951, p. 116 at 128.

crimination innocent passage for the protection of a nation's security (except that there may be no suspension through straits used for international navigation), and freedom of merchant ships against levy by reason only of their innocent passage are all provided for. In general, the articles guarantee the right of innocent passage to "ships of all States."

The Convention provides for a contiguous zone the outer limit of which may not extend beyond twelve miles from the same baseline from which the outer limit of the territorial sea is delineated. Within this contiguous zone, a coastal State may prevent and punish infringements of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea.

Failure to reach a successful conclusion on the breadth of the territorial sea was certainly the most unfortunate result of the Conference, though it cannot be equated with a failure of the entire Conference, as some have concluded. The long and sometimes vitriolic fight between the supporters of a 12-mile limit (primarily the Soviet and Arab blocs) and those who supported a narrower limit was the most dynamic exchange of the Conference. The latter nations were split into several concepts of the proper limit. Among the principal viewpoints were the following: (1) a 3-mile territorial limit with an additional 9-mile contiguous zone of exclusive fishing jurisdiction (Canada); (2) a straight 3-mile territorial limit with no exclusive fishing rights outside (U.K. and U.S., although the latter was willing to accept the Canadian viewpoint in a spirit of compromise); (3) other limits ranging from four to six miles; (4) a flexible 3-to-12-mile limit (principally Mexico and India—amenable, of course, to the Soviet and Arab blocs). The United States offered a spectacular compromise proposal for a 6-mile territorial sea with a 6-mile contiguous zone which included exclusive fishing rights for the coastal State, subject only to so-called "historic rights" for States whose nationals had fished in the area for five years previous. Although this proposal received the greatest support of any, it failed by seven votes to receive the necessary two-thirds majority in Plenary Session. Failing to reach agreement, the Conference referred the question of the territorial limit to the United Nations for further study.

The Second Committee was assigned the ILC draft articles relating to the regime of the high seas. These articles deal with the definition of the high seas, a statement of the freedom of the high seas, nationality of ships, immunities of warships and other

government-owned ships, safety of navigation, piracy, the rights of visit and of hot pursuit, pollution of the high seas, and the law concerning submarine cables and pipelines. The results of this Committee's work were finalized into the *Convention on the High Seas*. As stated in the preamble of this Convention, its provisions are "generally declaratory of established principles of international law." The Convention does, however, introduce a number of significant modifications and clarifications into this area of the law.

The high seas begin where the territorial sea ends. The Convention declares that no country may subject the high seas to its sovereignty and states that freedom of the seas comprises, inter alia, freedom to navigate, to fish, to lay submarine cables and pipelines, and to fly over the high seas. Although the freedoms are broadly stated, their effect may be severely limited if territorial waters are extended beyond three miles, since each of the freedoms becomes more vital as the shore line is approached; for example, about half the world's catch of fish is made within twelve miles of land.

All ships on the sea must sail under one State flag. Although the conditions upon which registration of ships will be allowed remains a question of domestic legislation, the Convention requires that the result of registration should be the exercise of effective control over the ship by the flag State. The Conference clearly desired an increasing degree of control by the flag State over matters of administration, working conditions, and technical safety regulations. In general, a ship at sea is subject to the jurisdiction only of its flag State. One purpose of this principle is to protect ships and crews from undue interference with navigation by being subjected to penal proceedings before strange and foreign courts. In this connection, the Convention clearly rejects the principle underlying the decision in the *Lotus* case, which allowed a French ship's officer to be tried by a Turkish criminal court for a collision occurring on the high seas.

Although the immunity of warships from the jurisdiction of other nations is firmly established in international law, the problem of State-owned ships engaged in commerce has been unsettled and of increasing importance. The *Convention on the High Seas* provides merely that State-owned ships "used only on government non-commercial service" shall have complete immunity from the jurisdiction of other nations on the high seas. By implication, domestic courts are free to decide the question of jurisdiction

over foreign government-owned vessels in commercial service.

The law of hot pursuit of foreign vessels for violation of the laws of the coastal State has been significantly clarified by the extension of the zone from which pursuit may be properly begun to include not only inland waters and the territorial sea (as is allowed by conventional international law) but also the waters of the contiguous zone, in cases of violations of the rights for the protection of which the zone was established. Furthermore, if several ships in a group are involved in the violation, *any* of the ships may be pursued provided that at least one of them is still within the applicable limits when the pursuit is started and provided also that proper signals to stop are given the pursued vessel. Another important feature is that military aircraft may engage in hot pursuit, provided they follow the same rules established for chase by surface vessels.

Another area of new law is the requirement for States to regulate against pollution of the seas by discharge of oil from ships and pipelines, or resulting from exploration or exploitation of the seabed and its subsoil. Ratifying States also agree to take measures against pollution by dumping of radioactive waste or by other activities with radioactive materials or other harmful materials, taking into account the standards and regulations formulated by competent international organizations such as the International Atomic Energy Agency.

The *Convention on the High Seas* provides also that all States are entitled to lay submarine cables and pipelines on the bed of the high seas; subject only to its right to take reasonable measures for the exploration and exploitation of the continental shelf, a coastal State may not impede the laying or maintenance of such cables or pipelines. Coastal States are also obligated to take necessary legislative measures to protect submarine cables and pipelines from willful or culpably negligent damage by persons subject to their jurisdiction.

The Third Committee devoted its efforts to a review of those articles of the ILC draft related to fishing and conservation on the high seas. These efforts were finalized in the *Convention on Fishing and Conservation of the Living Resources of the High Seas.* A preamble notes the danger to resources of the sea in man's increasing ability to meet the need of the world's expanding population for food, and notes the nature of conservation problems as lending themselves to international cooperation. The Convention provides:

> "All States have the right for their nationals to engage in fishing on the high seas subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas."

The reference to the interests and rights of the coastal States refers in particular to a later provision which declares that a coastal State has a "special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea." A coastal State, then, is "entitled to take part on an equal footing in any system . . . of conservation . . . in that area, even though its nationals do not carry on fishing there."

Other articles set out rights and duties of States whose nationals engage in fishing stocks of fish or other living marine resources "in any area . . . of the high seas," whether or not that area is adjacent to its own territorial waters. Primary is the duty upon a fishing State to adopt any necessary conservation measures, or when the nationals of any other States are involved, to enter into appropriate conservation agreements with such other States. The conservation programs are to be formulated so as to make possible the optimum sustainable yield and "with a view to securing in the first place a supply of food for human consumption." The coastal State is recognized as having a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea and therefore to take part on an equal footing in any conservation regime for such area whether its nationals fish there or not. Moreover, because of this special interest, a coastal State is entitled to adopt, unilaterally, under carefully circumscribed conditions as to urgency, scientific findings and non-discrimination, measures of conservation for any stock of living resources in this adjacent area, provided agreement has not been reached with other States concerned within a given period of time.

A key element in this convention is its provisions for the settlement of disputes and the accompanying criteria. Any aggrieved interested State, including those affected by the unilateral conservation measures authorized in certain circumstances, may initiate proceedings before a five-member special commission whose membership is to be subject to agreement of the States in dispute or, failing agreement within three months, by the Sec-

retary General of the United Nations in consultation with the States in dispute, with the President of the International Court of Justice, and with the Director General of the Food and Agriculture Organization of the United Nations. Decisions of the special commission shall be binding on the States concerned. Request may be made by any one of the States concerned to the others to alter the decision of the special commission if conditions thereafter change substantially; if no agreement is reached, any State may again resort to the special commission procedure "provided that at least two years have elapsed from the original award."

Finally, one article is devoted to "the regulation of fisheries conducted by means of equipment embedded in the floor of the sea." A coastal State may undertake to regulate these fisheries where they "have long been maintained and conducted by its nationals." However, such regulation must not discriminate against non-nationals "except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals."

The Fourth Committee dealt with the problems of the continental shelf—an area of international law which has developed significantly since 1945. In that year President Truman issued a proclamation which, reciting the world-wide need for new sources of petroleum and other minerals and the need for the conservation and prudent utilization of the newly found resources under the continental shelf, declared these resources of the continental shelf which is contiguous to the coasts of the United States as subject to its jurisdiction and control. The proclamation stated that the character of the high seas above the continental shelf was in no way affected by the proclamation. Other States, following the United States lead, were not so careful to make the distinction between jurisdiction over the continental shelf and the high seas above it. The claims of Peru, Chile and Ecuador to complete sovereignty over the continental shelf and the waters above to a distance of 200 miles from their coasts date from this period.

The *Convention on the Continental Shelf* limits the claims of coastal States to jurisdiction over the shelf and regulates the exercise of rights to these resources in the wider interests of the international community. The term "continental shelf" is defined by the Convention as being "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres," or to any greater depth where exploitation is a practical possibility. The coastal State

exercises sovereign rights over the continental shelf "for the purpose of exploring it and exploiting its natural resources;" no one may undertake activities of that nature without the express consent of the coastal State. The natural resources reserved to the coastal State are defined as "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species." While oysters and sponges would come within this definition, crustacea such as lobsters and shrimp would not.

The Convention makes the same distinction between the seabed and the superjacent waters as did the Truman Proclamation. Article 3 states that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters."

In the exploration and exploitation of the continental shelf the coastal State must not unjustifiably interfere with navigation, fishing or the conservation of the living resources of the sea, nor interfere with scientific research carried out with the intention of open publication. Subject to those limitations, and to the absolute prohibition of interference in the use of recognized sea lanes vital to international navigation, the coastal State may construct and operate installations and other devices necessary for the exploration and exploitation of the continental shelf, and may establish safety zones up to 500 meters around them for their protection. The coastal State is expected normally to approve requests for pure scientific research into the characteristics of the continental shelf, subject to the proviso that it may participate in the research and require that the results be published. The coastal State may not impede the laying or maintenance of submarine cables or pipelines on the continental shelf, although it may take reasonable measures to protect its right to explore and exploit the natural resources of the shelf.

The Convention also provides formulae for settlement of boundary disputes where the continental shelf is adjacent to the coasts of two or more countries and where those countries are unable to agree to the boundaries by mutual consent.

The Fifth Committee was created to deal with the special problems of the land-locked States. These States attended a pre-Conference meeting in Geneva and formulated a program designed to obtain fuller rights for their countries on the high seas. They failed, however, to obtain the support of the coastal nations for a declaration that international law includes a right for land-

locked States of free access across neighboring States to the high seas. Instead, the Conference inserted into the *Convention on the High Seas* an article drafted by the Fifth Committee, stating, "In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea." This free access is not granted as a matter of right, but shall be made by common agreement between the land-locked States and their neighboring coastal States. Free transit through the coastal State is to be granted on a basis of reciprocity, and the coastal State should accord ships flying the flag of the land-locked State treatment equal to that accorded their own ships, or ships of any other States, in regard to access to seaports and the use of such ports.

In several other articles throughout the conventions on the high seas and on the territorial sea and contiguous zone, special reference is made to the equality of rights of both coastal and non-coastal States. For instance, the provisions of the articles concerning the right of innocent passage relate to "ships of all States, whether coastal or not. . . ." The freedoms of the seas are likewise guaranteed to both coastal and non-coastal States, and again, the right to sail ships under its flag on the high seas. With these rights, of course, go all the duties to comply with the regulation of the rights which are actually exercised by the land-locked States. Thus, if their citizens engage in fishing, they must comply with the regulations set down in the *Convention on Fishing and Conservation of the Living Resources of the High Seas*; if they sail ships under their flag, they must meet the standards established by the *Convention on the High Seas.*

Assuming the ratification of the work of the five committees as adopted in Plenary Session, the Conference will become a major milestone in the development of the law of the sea. The conventions leave only two issues of great importance unresolved —the breadth of the territorial sea and jurisdiction of coastal countries over fisheries beyond that limit. The Conference requested the General Assembly to study the advisability of convening a second international conference for further consideration of the unsettled questions.

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