TERRITORIAL AND HISTORICAL WATERS IN INTERNATIONAL LAW

Centre for Arab Unity Studies

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AHMAD SHUKAIRY

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PREFACE

Mr. Ahmad Shukairy, Chairman of the Executive Committee of the Palestine Liberation Organization, headed the Saudi Arabian Delegation to the International Conference of the Law of the Sea, held in Geneva, from February 24th through April 27th, 1958. He took an active part in the proceedings of the Conference and endeavored to explain policy relative to territorial waters. It is important to bear in mind that Arab states because of their geographical location, attach great importance to any codification of the Law of the Sea. Mr. Shukairy delivered four main addresses at the Conference on the various aspects of the problem.

A second International Conference on the Law of the Sea was held in March 1960, also in Geneva. It was convened in consequence of the fact that the deliberations and dicussions conducted on the limits of territorial waters in the preceding conference had failed to produce positive and constructive results. Mr. Shukairy stressed both in the Conference Hall, as well as in the Committee of the whole, the need to extend the old and antiquated limits of territorial waters commensurate the changing realities of contemporary times.

Mr. Shukairy pressed repeatedly for the adoption of a draft resolution that he and several other Asian and African countries co-sponsored. The resolution would, if adopted, have the effect of widening the confines of a country's territorial waters to twelve miles. He advanced sound and cogent arguments against the counter joint Canadian-United States draft resolution, setting the limits of territorial waters to six miles. The two aforementioned resolutions failed to command the required majority of the Conference and accordingly no standard limits were agreed upon in Geneva.

On November 30, 1959, Mr. Shukairy spoke in his capacity before the Sixth Committee of the General Assembly on the question of initiating a study of the juridical regime of historic waters, including historic bays,

where he spoke in clear terms, quoting pertinent cases and precedents from International Law to support his thesis.

The Research Center of the Palestine Liberation Organization reprints here the texts of all of Mr. Shukairy's statements on these three occasions, with minor alterations and omissions, as welll as the texts of the two draft resolutions of the Second International Conference on the Law of the Sea. They are a good exposition of Arab attitudes on the Laws of the Sea in general and the Gulf of Aqaba in particular.

Statements at
The First International Conference
of The Law of The Sea

FIRST SPEECH

Historical and Political View of The Legal Status of the Territorial Sea

Before entering the subject matter of our discussion, we should beg your indulgence to raise a preliminary point regarding our participation in this highly esteemed conference. We are fully aware that there is no time or place to raise political problems that are foreign to the Law of the Sea upon which we are embarking. We concede that this is no platform to ventilate political conflicts of any nature. But it is out duty in the minimum to see to it that our conduct in a conference of international law should be in line with the principles of international law. It is for this reason that we beg your leave to address ourselves at the outset to the question of participation in an international conference and its relation to the principle of recognition of states. We shall not roam over the whole range of the subject. We will simply confine ourselves to our positions vis-à-vis one invitee and one invitee only.

We do not propose to place before the conference the great bulk of jurisprudence on this issue. We can say outright that international law is not decided on the point. Does participation in an international conference constitute a recognition of a given state attending the conference? The definite answer does not seem to be available in the archives of international law, particularly so when the conference is not of a technical nature. The difficulty becomes more acute when the conference, like ours, is one of a political nature, attended not by experts but by plenipotentiaries. State practice, likewise, does not seem to be consistent on the matter. The United States, for instance, on more than one occasion, considered participation in an international conference as constituting a recognition, and thus made a declaration of reservation. It is due to this state of indecision that we deem it our duty to place on record our unequivocal reservation on the matter. We intend to make it crystal clear that our participation in this conference is not to be construed as a recognition of Israel in any manner whatsoever. For us this is not a formal reservation. The question is of paramount impor-

tance and belongs to the realm of our highest national interests. The reservation is one of substance and legality, and not one of form or modality. Our reservation rests on the legal maxim «*Ex injuria non oritur jus*»: From a wrong no right arises. This is the basis of our reservation and the raison d'être of our non-recognition. That disposes of our preliminary position.

A general bird's eye view of the Law of the Sea, as drafted by the International Law Commission, readily reveals that it regulates law in time of peace only. The Commission has refrained from applying its mind to the Law of the Sea in time of war. By itself this is a noble state of mind for which the Commission merits our congratulations. But the draft law is devoid of any provision defining the scope of its application. As is well known, the Law of the Sea has a set of rules applied in time of peace, and a different set of rules invoked in time of war.

It is not our suggestion that the present draft should deal with naval warfare, or with the rights and duties of the belligerents and neutrals. Nor is it our intention to include in the draft any rules on blockage, contraband, and the right of visit, search, and capture. All that we have in mind is an express provision to be inserted in the draft, at the proper place and with the appropriate phraseology restricting the application of the law to the time of peace. It is only under peaceful conditions and we dare say under a normal atmosphere that the provisions of the Law can be applied. It is our humble submission that even when normal relations between two given states do not exist, neither the Law of the Sea nor the Law of the land can be enforced. When recognition is withheld or denied, it is inconceivable how the rights and duties as set out in the draft law could be applied. This is only one instance. We may think of another. In both the territorial sea or the high seas, the existence of a state of war, actual or constructive, creates a new legal situation: a bundle of rules is arrested and another bundle is set in motion. The rules of war move into action, and the rules relative to the time of peace fall into abeyance. Furthermore, the highly respectable doctrine of the freedom of the seas, together with the rights of navigation and free commerce - all these give way to the legitimate exigencies of war. Even what is known as the right of innocent passage, whether in territorial water, in straits, or in gulfs, is held under control or prohibition as the case may be.

It may sound odd to stress this point at a U.N. Conference dedicated to the ideas of peace. Yet our U.N. should not be as naive an organization as to ignore the realities of international life. The brutal fact is that the world has not dwelled in peace since the termination of the Second World War. We only live under the shadow of a grey and shaky armistice. It is a

fact, too, that in the regional arena, there is a genuine state of war in the Middle East and in the Far East. In more than one aspect the present draft does not apply in either. Until such time when peace, peace based upon justice, is restored, the draft law connot be applied in the conflicts of the Middle East or the Far East.

There is also the possibility of a revolutionary liberation movement rising to the level of recognition, hence barring the general application of the present draft. This is not a too far fetched imagination. For the present, the Algerian movement might assume at any moment the status of recognition. There are many other dominated areas in the world that might rise to this honorable status of liberation. There is lastly the possibility of a defensive war, a legitimate war, which disallows the implementation of the provisions of the law. All these possibilities are not politics in the abstract. International law is nothing but an accumulation of these historical events.

It becomes obvious that it should not sound strange to propose the limitation of the law to the time of peace. It would be amazingly strange not to do so. In dealing with the Law of the Sea, all authorities on international law do draw a sharp line of distinction between the law of peace and the law of war. As one illustration, mention may be made of the International Law Association meeting at Vienna in 1926. It has styled its code «The Laws of Maritime Jurisdiction in Time of Peace». That was the title, and this is only one instance. It is, however, noteworthy to remember that the International Law Commission, in its introductory report (paragraph 32) has stated that the draft regulates the Law of the Sea in time of peace only. Again, in its commentary to section III on the right of innocent passage, the Commission pointed out that the whole of these regulations are applicable only in time of peace. So far, so good. But the statements and comments of the Commission are not law. The law is what is incorporated in the law itself.

It is also doubtful whether these comments are admissible as a source of interpretation to the law. To some legal systems they are admissible; to others they are not. It is for this reason at last that such a loophole must be adequately covered. It requires no hard labour. We need only borrow the words of the Commission and wedge them in our law, as a rule of law, and that will be the end of it.

At the threshold of our debate, and before attempting an elaborate examination of the draft law, the question arises, how do we approach the task we are undertaking? The draft law embodies matters of high complexity, nicety and importance. Ours is no academic conference. The political aspects are no doubt an important factor in our deliberations. We cannot

immune our minds against being influenced by political considerations. But in essence the conference is not a political congregation in the larger sense. No ideological matters are at issue. No political affiliations or trends are involved. This is not the General Assembly of the U.N. wherein we are deeply entrenched in the usual trenches. We need not be split into the same blocks or groups. Our conference is entirely of a different character and standing. We should belong to our own, to ourselves, where the vital interests, the actual realities of national life and the changing international situations can best be realized. We are here to discuss matters which touch upon the vital interests of states down to the very core of their existence. We are called upon to pronounce ourselves on the legal status of the territorial sea, whether it is one of sovereignty, jurisdiction, or control. We shall handle the Gordian knot of the breadth of the sea, which wrecked the Hague Codification Conference of 1930. We shall deal with the question of the bays, hitorical or otherwise. We shall examine matters of the continental shelf, the fisheries, and the contiguous zone, and what not. We shall treat the right of passage, guilty or innocent. These matters and a host of others shall come before us, not as an exercise but as a challenge, and what a challenge.

Thus, in what spirit should we shoulder our responsibility? To answer the question we must be reminded of the past failures. It is only in the memory of failures that we can hope to achieve success. The present conference is not the first attempt to codify the Law of the Sea. In this human effort many conferences has been held, the last being the Hague Conference of 1930. It failed, notwithstanding that it was styled the «conference on the progressive codification of International Law». It did not realize progress. It is no secret to reveal that the conference collapsed in the territorial sea, not in its depth, but rather on its width. Now, after 28 years, we meet to pick up the threads again.

Yet we meet not on a ground of debris or wreckage, for the International Law Commission, thanks to its labour and patience, has provided us with a draft. Although not perfect and comprehensive, still it commands itself to our collective consideration. We say «collective» willfully and with emphasis, for the Law of the Sea should be the outcome of our collective will as sovereign states, possessing sovereign equality. We are dealing with a topic which forms part of the Law of the Nations, as international law is commonly known. But it must be the Law of the Nations in substance and frame, not by name or fame. It is common knowledge that with certain exceptions, the Law of the Nations was actually the making of a few nations, not all the nations. In fact it was the making of a few states or empires. In the field of international law, the rest of the nations were objects rather than subjects. They did not possess themselves, nor their waters, whether inland

or territorial. Even the high seas and oceans were partitioned and made mare clausum. Indeed, marine supremacy was part and parcel of international law. Its later successor, the doctrine of the open seas, was stimulated by the search for raw materials, markets, colonies, and spheres of influence. The concepts of piracy were excessively emphasized as an umbrella for domination and intervention. Even the destruction of a sovereign state was justified under the so-called system of protection, with a jurisprudence of great bulk and little respect. All that was international law, hardly worthy of the real conception of law.

We fear this has no historical significance. We are still labouring under the same agony of the monopoly of international Law. Let us see the facts as they are. In the words of Hall, an eminent international jurist, «It would be absurd to declare a maritime usage to be legally fixed in a sense opposed to the continued assertion of the both Great Britain and the United States». Colombos, as recently as 1954, declares in his valuable work on international law of the sea that, «The existence of a rule of international law may be established by its general recognition by the chief maritime powers». Colombos further makes another hold assertion, that «It may reasonably be claimed that no novel principle of international maritime law can be considered of universal application unless accepted by Great Britain and the United States». Unfortunately we did not have occasion to explore what the jurists of the other great powers have to say on this point. But these statements and scores of similar tenor base the Law of Nations on the will of one or two nations. This is how a number of chapters in international law have passed on record. Such an international law should discontinue, and we are not to allow it to continue.

One must, however, enter a word of caution. It must be made clear that we do not intend to cast any reflection upon the United States, the United Kingdom, or any other power. We were simply tracing the creation of international law. We were only portraying a trend which we are determined to reverse.

It is to avoid this evil that in Article 13 the Charter of the U.N. has demanded «the progressive development of international law». This phraseology is not meaningless. Full meaning must be accorded with it. Our task is not to develop only, but to develop progressively. It is only when we brush aside the remnants of the antiquated rules of international law that the progressive development can take place. The Law of Nations should be made by the nations and for the nations. It is then, and only then, that we can undertake codification in a progressive manner.

In the field of the International Law of the Sea, not only the maritime

powers, not only the sea faring powers, but all coastal and non-coastal states should have an equal say in every aspect of the law. In the last decades a number of states has emerged. They should be co-shares and co-authors of international law. These newly independent states come today to the conference with all their possessions; they come with their territorial sea, with their gulfs and bays, and with their national waters, all dedicated to the security of their land and the prosperity of their people. These states are determined to share in the codification of the Law of the Sea, but not at the expense of their vital interests. In this conference we must compose a balanced harmony between the interests of all, for the benefit of all. We say balanced harmony, for surrender and submission can bring harmony too. No legal conception should override another legal conception. The high seas should not override the territorial waters; neither should innocent passage undermine states' security and territorial integrity. Reverence of the past should be no deterrent to breaking up new untrodden paths - and slogans of legal fiction should have no room in our deliberations.

It is in this spirit that we can approach the draft law before us. When we start analyzing the provisions of the draft law, we must bear in mind that the international community consists today of some ninety states whose vital interests must be reflected in any maritime code.

Those concepts granting chief maritime nations the power to make the Law of the Nations have become obsolete. They exist no more, and have not existed since 1945. In that year and at San Francisco the Charter of the United Nations was enacted as the highest international instrument. The import of Article 103 of our Charter overrides all past concepts that may fall in conflict with the purposes and principles of the Charter. So sovereign equality, ranking in the uppermost of those principles, attacks one of the rotten roots of international law. One or two powers, however powerful they may be, however respectful they may be, can no more make the Law of the Nations, on behalf of the nations, as they did in the past. Thus, on the strength of the Charter, this new organic law of international law, not a single state or group of states can determine what is law and what is not law. Sovereign equality shall dominate, and any superiority or claim of superiority shall remain outside the bounds of this conference.

In the course of our task we may face certain confused aspects of international law that may run counter to considerations of national economy or security. We must not hesitate to set aside such concepts, for when we trace back their genesis and application, we discover that they are no more than the custom and usage of one or two states. To us this is no international law.

This is how we view our role in this conference: one of harmony and cooperation, not obstruction or dictation. Along these lines we pledge our support to the conference, and to ensure its success we stand ready to mortgage our efforts. From the Atlantic to the Persian Gulf, we of the Arab World bring our greetings to the conference, coupled with best wishes for success. The Arab States do not come merely as a voting power. At stake we have vital interests in our vital homeland. The waters of the Atlantic wash our shores on the west. The whole of the Mediterranean on the south is Arab coast; in western Asia, the eastern Mediterranean strikes our shores; the Suez Canal falls in the heart of Arab territory; the Red Sea, the Gulf of Suez, and the Strait of Bab Al Mandab embrace Arab lands at every point: the Gulf of Aqaba identifies itself as inland closed Arab waters under exclusive Arab jurisdiction, as it has been since immemorial time; the Arabian Sea abuts on the southern coast of Arabia; and lastly, the Persian Gulf enclaves the eastern coast of the Arabian Peninsula.

This is the stake we have at the conference. With the whole of Asia, Africa, and Latin America, we have another common stake, highly venerable and precious indeed. We have emerged recently from one battlefield. Our struggle is one; and one is our new sovereignty. We are not here to be made by the law, for we come to make it. We come to the conference, as we do, fully possessed of our territorial waters and islands, our gulfs and bays, our fisheries, and continental shelf. They are now under our sovereignty, not within the alien domain. And here we come to make the law for the dear possessions that we possess with full legitimacy.

At a later stage we shall be able to state our positions in detail on the various aspects of the Law of the Sea. The best wc can end with is our hopeful prayer that harmony and coperation will prevail over our deliberations, and that our efforts will be crowned with success.

SECOND SPEECH

Refutation of the Uniformity and Competence of the Three Mile Limit

In examining the provisions of the law on the territorial sea, we cannot restrain ourselves from expressing our deep appreciation of the neat and valuable work done by the International Law Commission. The term «territorial sea» adopted by the Commission is a happy choice, for it says what it really means. That it is not universally accepted, is no defect in its merit. The Hague Conference and a number of authorities have accepted the terminology as comprehensive and accurate. Our advantage, moreover, in accepting a uniform term, a standard term, is to get relieved, once and for all, from the international headache of the maritime belt, territorial waters, jurisdictional zone, marginal sea, littoral sea, coastal waters, maritime domain, and a combination of other confusing terms. In connection with these terms, however, the real confusion arises not from the use but rather from the abuse. These terms were applied at will and pleasure to describe three categories of waters: (1) Internal waters, (2) Internal waters and territorial sea, and (3) Waters of the ocean. One can trace many complaints lodged with the Security Council where territorial waters were used to mean exclusively inland waters. The Arab Governments, therefore, welcome this standard term.

In the same manner, we applaud the wise course followed by the Commission in asserting the sovereignty of the state to the territorial sea, to the air space above, and to the bed and subsoil beneath. In essence, the provisions of the Commission on this question are an accurate statement of the existing international law. They are identical with the Hague text and reproduce the principles embodied in many conventions. What is of significance, however, is this effort to close for good the quarrel on the judicial status of the territorial sea, whether it is one of control, servitude, property, jurisdication, or sovereignty. By asserting state sovereignty, the Commission should be congratulated not only for liquidating an academic controversy, but for proclaiming an inherent right, without which the state's very existence is ex-

posed to non-existence. In our opinion, states' sovereignty is indivisible and undistinguishable. Contrary to the view expressed by the Delegation of the United Kingdom, sovereignty of a state is one in its nature and scope. Whether over its sea or land territory, states' sovereignty is one and the same.

Thus, we can safely pronounce ourselves in favour of Articles 1 and 2 of the Draft Law, when a change of style in one or two points is introduced. It goes without saying that we agree to subject sovereignty to «the conditions prescribed» if the conditions prescribed are themselves eventually accepted. In the main, innocent passage stand out as the chief condition in the group of conditions. We do not wish at this stage to elaborate the concept of innocent passage. Nor do we wish to develop the legal arguments which consider innocent passage incidental to international intercourse, and hence falling within the discretion of the state. We will confine ourselves to the analogy made by our colleague of the United Kingdom in asserting that innocent passage is similar to the right of way. The similarity as advocated by the delegation of the United Kingdom is no doubt correct. As to his conclusions, we most respectfully disagree. A right of way, under the English or any other system of law, is to be exercised subject to law, and, we venture to say, subject to equities. A usurper is not entitled to a right of way to the property he usurped. Similarly, an aggressor is not entitled to a right of way through the property of the victim of his aggression. Again, a state condemned with a breach of the peace, with a violation of international law, or with a defiance to the Charter of the United Nations, is not entitled to a right of way in the territorial sea of a state directly affected by these violations. This is how we understand innocent passage, as subject to the security of a state; for security is the base of the pyramid upon which international law stands.

This will bring us to Article 3, the stratum upon which the whole Law is based, namely the breadth of the territorial sea. One can hardly say that we have an article before us. It is an article to avoid the formulation of an article. Yet it is the best or next best that could be achieved under the circumstances. No doubt it was prudent on the part of the Commission to follow such a course in a question that led the Hague Conference to a desperate and miserable failure. The Commission has attempted to approach the question from six different angles, but each time, every proposal was supported by a minority, and each member had to change from one camp to the other, until all members reached a unanimous disagreement. It would be stating the obvious to say that this failure is mainly due to the attitude of the «three mile states». The twenty-eight years that passed since the winding up of the Hague Conference have not softened the ruthless adherence of

a few powers to an outmoded customary rule of law which ceased to respond to the demands of international life.

At the Hague Conference, it was this rule of the three mile limit which shattered the valuable preparatory work done in the course of years. Instead of being a rock of salvation, it proved to be one of destruction. In facing this difficulty, the Commission had to follow new routes of navigation. As a skillful pilot, the Commission deviated to a safety harbour, not too far from the final destination. It remains for this conference, or to put it more honestly, for a handful of states who have thus far created the main obstacles for agreement, to bring this lengthy and tiresome journey to a safe landing.

We think we owe no apology in stressing the significance of this question and its direct effect on the final destiny of the conference. This is not a theoretical topic. Neither are we in a legal forum, as the British delegate has endeavoured to show to the conference. Juridical as it may be, primarily it involves political and national issues of the highest order. Our colleague of the United Kingdom must be reminded that it was the International Law Commission that recommended the examinations of the law from the political, economic, and other aspects. Again, the General Assembly resolution which gave birth to this conference has expressly referred to the various aspects that should guide our deliberation. It would be *ultra vires* our organic competence for the United Kingdom to say that this conference is a legal forum. We cannot share this misconception. We stand in a general forum that comprises all national and international aspects.

Furthermore, our colleague of the United Kingdom be-littled the value of discussing the origin of the breadth of the territorial sea. It is no wonder, for to unearth its origin would vitiate the position of the «three mile states». The width of the territorial sea, by origin and application, occupies a central standing in international jurisprudence. By its rationale and origin, the concept of the domain of the state over its territorial sea is a rule of protection. It was conceived in self-defense, the most ancient right and duty of a community, whether organized or primitive. It is to defend the state, its people, its economy, and the various interests of national life, that the belt of the territorial sea was universally recognized. In the course of his analysis of the idea of the territorial sea, a distinguished western statesman rightly observed that «The sovereign of the land (is entitled) to protect his subjects and citizens against attack, against invasion, against interference and injury..., to protect their revenues, to protect their health, and to protect their industries». That was the justifying necessity in appropriating a portion of the sea, not capable of actual ownership, and assimilating it to the regime of the land.

But this dominating necessity for defense is not static in its scope. Ne-

cessity is to be measured by all the demands of necessity. And here, each age, every generation has its demands. The breadth of the territorial sea is not immune to evolution. In fact it has actually undergone the process of evolution. It has responded to the call of progress. The clock, then, was not put back three or four centuries as our colleague of the United Kingdom has complained. Nor was the progress achieved a retrograde or reactionary step as he described progress to be. In the early infancy of the theory of the width of the territorial sea, the distance of two days navigation from shore was the domain of the coastal state. In the words of Grotius, the father of international law, this was «the empire of a portion of the sea», which should be measured by the power of the littoral state. This estimation was not only a jurist's inspiration, or, if you please, imagination. It became the conventional international law of the time. In the treaties and domestic legislation of the 16th and 17th Centuries, the extent of the territorial sea was determined by the range of the visual horizon. To reconstruct a picture of that era we need only recall the words of Jefferson as Secretary of State of the United States. In 1793, the great American statesman declared, in an official note, that «The greatest distance to which any respectable assent among nations has been at any time given has been the extent of human sight, estimated at upwards of twenty miles..».

This is how the limit of the territorial sea started. We hope it is no offense to remind our colleague of the United Kingdom that the limit of the territorial sea, starting with two days navigation and later replaced by the visual range, had undergone another progress. This time it was the cannon range. It was Bynkershoek, a distinguished Judge of the Supreme Court in Holland, who translated the theory of Grotius on the territorial sea to extend as far as the cannon range. And it was for an Italian jurist, Galiani, to put the cannon range at a three mile limit. Thus, the extent of effective dominion of a state over the coast, though surrendering to progressive evolution in its measurement, constituted the limit of the sovereignty of the state. Perhaps our distinguished colleague of the United Kingdom may find it pleasant to describe the change from two days navigation to vision range, and later to cannon range as a reactionary, retrograde institution.

Neither was it a reactionary movement when this idea of the cannon range passed from jurists to judges. Anglo-American courts have related the three mile limit to the cannon range as can be shown from a lengthy line of precedents. In delivering his decision in the Anna case, Lord Stowell declared that since the introduction of fire-arms, the boundary of the territorial waters «has usually been recognized to be about three miles from the shore».

In the case of the Whitstable Fisheries, decided in 1865, Lord Chelms-

ford declared that the state is «considered to have territorial property and jurisdiction in the seas which wash its coast within the assumed distance of a cannon shot from the shore».

Again, in 1832, in the Alleganean case, the Court of Commissioners of the United States considered that the width of the territorial sea is «the distance that can be defended by the artillery upon the shore».

Furthermore, this criterion has found expression in many of the international treaties that were concluded during the 18th Century. If we can hope, as we do, to convince the representative of the United Kingdom to accept this contention, mention may be made of the treaty of 1786 between France and the United Kingdom. It was the range of the cannon shot that determined the range of the coast.

Yet, the stage is now set for another progress, or to put it in the words of the Charter, for another progressive development. The growth of national demands, coupled with the expansion of international relations, is bound to have a corresponding growth and expansion in juridical thinking. The Law of the Nations is no exception. Evolution is bound to take its course and dictate its will. The principle of protection which justified the creation of sovereignty over the waters of the sea is facing new demands which must be satisfied. New threats and more menacing dangers have emerged. Vast economic interests have been unfolded. With the advance of science and technology, human experience has increased a hundredfold since th three mile system was first formulated. Driven by the force of necessities, states have started to repudiate this limit as a yardstick to measure the range of their defense and the extent of their national and economic interests. Hence, we find one state after the other exercising dominion over a wider limit.

It is true, as was rightly remarked by our colleague of the United Kingdom, that non-observance does not alter the law. But the matter is more than a simple non-observance. It is a successful revolution that has received recognition. It is a wholesale repudiation by the states whose custom and usage make the law. It is an avalanche of non-observance that created a new system worthy of observance. After all, this is how international law is made. This is how Britain has fought for the liberty of the open sea, after it had been striving for marine supremacy. An international custom is overthrown by international custom, and state practice is set by state practice. In this case, a bulk of state practice, legislation, and international usage has grown in favour of an extension of the limits of the territorial sea.

Thus under Cuban legislation, the territorial waters were made to extend as far as four leagues from the coast.

In the Soviet Union a decree was published in May, 1921, in which the territorial waters were declared to extend to a twelve mile limit. In fact, the Imperial Russian Government, as far back as 1909, had determined the Russian territorial waters at twelve miles.

In Honduras, Article 153 of their Constitution of 1936 declares «To the state appertains the full dominion, inalienable and imprescriptible, over the waters of the territorial seas to a distance of twelve kilometers from the lowest tide mark..».

In Norway, by «Royal Resolution» of February 22, 1812, it is provided that the limit for territorial waters shall be calculated up to one nautical mile.

In the United States, while there is no general statute defining the limits of territorial waters, Sections 2760, 2867, and 3067 of the Revised Statues fix the limit of the jurisdiction of American customs officers at twelve nautical miles.

In the United Kingdom, under Act 9 of George II, and Acts 24, 39, and 40 of George III, the jurisdiction of British officers in all quarantine cases covers a zone extending up to four marine leagues.

In France, under the law of March 27, 1817, the customs' marine zone reaches out two myriameters from the coast.

In Italy, by a Royal Decree of August, 1914, the limits of the territorial waters were fixed at six nautical miles from the shore.

In Mexico, under the decree dated August, 1935, the territorial waters were set at nine nautical miles. In fact, under the «Treaty of Peace, Amity, and Boundaries» concluded between Mexico and the United States in February, 1848, the territorial waters of both countries were fixed at nine nautical miles. The significance of this fact arises from the recognition by the United States of a limit beyond the three mile rule as far back as the middle of the 19th Century.

As far as the countries of the Middle East, the extension of the territorial waters started almost half a century ago. In a note verbale of October, 1914, the Ottoman Empire, which at the time comprised many of the modern Arab states, the territorial waters were fixed at a limit of six miles.

All this goes to substantiate the first conclusion of the Commission which recognizes that international practice is not uniform as regards the delimitation of the territorial sea. Equally, the precedents we have cited from Anglo-American sources, illustrative and not exhaustive as they are, go to show that the three mile limit is not a rule of international law. The argu-

ment, therefore, of the United Kingdom and the United States that the three mile limit is an existing rule of law, cannot be seriously contended, nor could it be honestly defended. Even the most ardent supporters of the three mile limit recognize that with the present state of affairs, such a rule does not command universal recognition, and hence cannot be considered a rule of customary international law. At the Hague Conference, only seventeen have expressed their position in favour of the three mile limit. This will suffice to show that the three mile limit, once a rule of law, has ceased to be a rule of general practice, and in the word of Chief Justice Marshall of the United States Supreme Court, «That which is an established rule of practice is a rule of law».

We have recited this dictum of the Chief Justice of the United States only to disprove the thesis of the United States on this iusse. The claim, however that the conduct of the United States has been consistently one of strict adherence to the rule of three mile limit is open to serious question. In stressing such a claim, the United States, we fear, cannot support their case with the facts of history. It may be mentioned, without discrediting the United States, that as eminent a western jurist as Fulton declared in his book, «*The Sovereignty of the Sea*», that the American Government «more than any other power has varied her principles and claims as to the extent of the territorial waters, according to her policy at the time». Thus the advocacy of the United States in support of the doctrine of the freedom of the seas is inconsistent with the varied claims and principles made by the United States herself. To be a real crusader, one must practice rather than preach. It is in the silent deeds, not in the ringing words that we can find a common language for this conference.

To elaborate further our argument, we can safely say that the three mile rule has been contested and disputed for a long period of time. Even marine states, without whose participation no convention can be made, have for long absolved themselves from the three mile limit. Suffice it to mention that Professor Brown stated that it is «an obvious conclusion... to those... who have carefully investigated the usages and precedents of most maritime nations» that the three mile limit is not generally accepted. Again, as early as 1894, at the meeting of the International Law Institute in Paris, de Martin declared that, «The books talk about the three mile limit as if it were an incontestable principle. It is nothing of the sort». This contest is more than six decades old, and what is of significance is that it found expression in a multitude of international acts. In the treaties concluded between the United States on one hand, and Norway, Denmark, Sweden, Italy, Belgium, Spain, France, Greece, Poland, and Chile, on the other hand, a reservation has been entered with reference to the limit of the territorial waters that the par-

ties «respectively retain their rights and claims... with respect to the extent of their territorial jurisdiction».

Thus, by a treaty provision by the United States, the three mile limit stands in chaos and confusion. To apply the legal phraseology relevant to this situation, we can say that the rule of estoppel acts against the United States. Having accepted a reservation in more than one treaty with regard to the breadth of the territorial sea, the United States cannot stand before this conference to defend the sanctify of the three mile limit. In fact, the whole contention of the United States on this point is not substantiated by state practice, nor is it supported by existing international law. We say existing, for once upon a time, there used to be such a rule of law. And in testimony, if testimony is required at all, let us read what the eminent jurist, Dr. Jessup of the United States, said: «The practice of nations viewed over a period of two hundred years ranges from one extreme to the other. It is possible to take several positions relative to the extent of the territorial sea... and to support them all by fairly numerous illustrations drawn from international events... and by the authority of text writers». As to text writers, suffice it to choose a vehement western supporter of the three mile limit, Professor Colombos, who felt himself bound to declare in a scholarly manner that, «There is not in existence a universally recognized rule of international law as to the extent of territorial waters».

This, in a nutshell, is the history of the three mile limit. A conclusion, an irresistible conclusion, could be safely made: The three mile limit as a maximum is not universally recognized. As a minimum, this limit raises no doubt or controversy. In fact, since the days of Jefferson, one of the founding fathers of the United States, this concept of three miles as a minimum was established. In an official note of the year 1793, Jefferson declared that, «The smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball usually stated at one sea league». We hope this quotation by itself will prove eloquent enough to prevail over the United States. Anyhow, if Mr. Jefferson cannot do the task, no one else can venture to do it. But it is our hope that the United States will soften rather than sharpen the edges of its own position.

Thus we have reached a stage where the three mile limit has become obsolete, has been abandoned by state practice, and has lost the ground which gave rise to its determination.

This is a situation which we must face boldly. This is where progressive development of international law is called for. It is of no use to propose half solutions, or display hesitation. We must extend the limit of the territorial sea. We stand in support of this extension. The rules of law are a reflection

of the needs of human society. It is noteworthy that this extension is not a novel trend. Perhaps it is as old as the three mile limit; and it is of no avail on the part of the United States to take a negative attitude in total disregard of the facts of the case. For the United States is on record on this point in particular. In an official note, the Secretary of State, Lansing, admitted in 1915 as follows: «There are certain reasons, brought forward from time to time in the discussion of this question and advanced by writers on international law, why the maritime nations might deem the way clear to extend this... limit of three miles, in view of the great improvement in gunnery and of the extended distance to which... the rights of nations could be defended». This statement on the part of the United States not only serves to show that endeavours for extension are not novel; it goes further; it states the reasons for extension: improvement in gunnery. Well, if in 1915 the reason advanced was simply described as an improvement in gunnery, what adjective is left for this age of ours when atomic and nuclear weapons have become the conventional arms of the day. Surely the weight must be in favour of extension. It was the range of the cannon shot which constituted the main, if not the sole criterion for determining the limit of the territorial sea. It is idle to stick to the same distance when the range has changed - when everything has changed since the distance was first determined by the Italian jurist, Galiani.

Even such a staunch advocate of three mile rule as Dr. Jessup of the United States could not resist the outcry for extension. In his valuable work on the Law of the Sea, we read as follows: «No fault can be found with the logic of those who contend that... with improvements in the science of ballistics... the marginal sea (should be) widened». Fulton, another distinguished jurist, has supported the idea of extension. In his words, «It is erroneous to declare... that territorial jurisdiction cannot be carried further». Calvo, Phillimore, and a great number of text writers have declared that the three mile limit «is too small and ought logically to be increased».

Hall, moreover, in his «International Law», stands for an exceedingly brave and progressive approach, and sounds as though he is addressing himself to this committee. Referring to the three mile limit, Hall declares: «As it has been determined, if determined at all, upon an assumption which has ceased to hold good (i.e. the range of the cannon), it would be pedantry to adhere to the rule in its present form, and perhaps it may be said without impropriety that a state has theoretically the right to extend its territorial waters at will with the increased range of guns».

One can continue to present a lengthy line of quotations in support of extension. This much is sufficient. What is significant, however, is that these

opinions of jurists have found support, even under the most cautious and reserved judiciaries of the world. In the Bangor Case, during World War I, the British High Court of Justice stated that «It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection». We have made special reference to the decision of the highest British court with the solemn hope that at least delegations who are brought up under English law would dislodge themselves from their positions. After all, those who know the dignity of the British High Court of Justice can readily fathom the depth and soundness of such a finding in support of extension of the territorial waters. Even years before the decision of the High Court, the Institute of International Law that met in Paris in 1894 declared that the «usually adopted distance of three miles is absolutely insufficient».

These are the reasons which we believe have led the Commission to state that the extension to twelve miles could not be characterized as a breach of international law. Yet in spite of this learned and well considered conclusion, some major states are still adamant in their opposition to extension. They are still deeply entrenched in the mud of the three mile rule. We do not mean to be offensive, rude, or cruel. This rule of three mile limit is now in a state of decomposition. It is a waste of time and dignity to aim at its resurrection. With the national and international life as it is, we cannot bend before a rule of law that is only good to be kept in maritime museums. A similar difficulty faced a British court in the same manner as we face it now. In July, 1934, the Privy Council, in a case of piracy, was faced with a legal precedent of 1696. Rebellious at this precedent, the court remarked in these protesting words: «But over and above, we are not now in the year 1696, we are now in the year 1934». Similarly, Sir, to those who stick to the rule of the 17th Century we must say: «Harken, gentlemen, we are in the year 1958».

I admit, that we have dealt with this question at some length, but with full justification. It is not the pleasure of a detailed debate that we are after. We have endeavoured to marshal all arguments in favour of extension, for this is the key, the master key, to the whole Law of the Sea. As to the outcome, we fear we are bound to resound Shakespeare's warning: «To be, or not to be, that is the question». Let us have no doubts in our minds. Let us be careful and mindful. To extend, or not to extend, this is the whole question.

As far as Arab states are concerned, we can convey to the committee that the Saudi Arabian government has enacted recently a Royal Decree set-

ting the limit of the territorial sea at twelve nautical miles. This conforms with modern trend and state practice. It is in full accord with the conclusions of the International Law Commission. This limit has become within the sovereignty of the state. Now it is an Arab sea.

Thus our individual attitude has been defined, and what remains for the conference is to provide for an extension to twelve miles for those states who are in favour of such an extension. Those who are happy with three or four can stand for no more. Within this maximum each state is free to set its own delimitation. After all, this is the net result of the recommendations of the International Law Commission.

In conclusion, we see this to be the only course open. We see no other course that could lead to success. In the remarkable words of Gidel, the three mile limit is nothing but «the fallen idol». To be successful, we must have no room for idols, whether they be fallen or standing. This is our hope and prayer.

THIRD SPEECH

Further Refutation

We are now face to face before Article 3 of the Draft Law; and once more the dilemma of the breadth of the territorial sea unfolds itself at this international forum, attended with a train of lengthy and weary history. For let it be remembered that we have many predecessors who have fallen in this field of action. The Hague Conference of 1930 is not our only ancestor. Before, there were several other Hague Conferences. Likewise many a jurist and many an International Institution have endeavoured to tackle the problem.

Indeed, it was as early as the 17th and 18th centuries when Meadows, the English jurist, and Azuni, the Italian author, regretted that no rule of law has yet been universally recognized with regard to the breadth of territorial sea. As we are undertaking to do, those two great jurists of their day have declared that the limit of sovereignty of the State over its sea, ought to be fixed by a solemn treaty between the powers of the world.

So it is the same story again and again. And devolving as it does from our forebearers in law, this legacy falls upon our shoulders with all its gravity and far reaching significance. Be it as it may, this state of affairs should be no ground for despair or alarm, even if we fail to reach agreement; and we would venture to say even if the whole conference ends with failure. Truly we are here to endeavour the impossible to bring its success. But should we fail, it is no disaster; and the representative of Canada will, we hope, forgive us for sharing his fears, without finding disaster in our failure. For international law will continue to be in the making, without our making.

Yet we have more than one reason to set fear aside and hope for success. In his statement before the committee, our distinguished colleague of Canada penetrated down to the core of the question. At the Hague in 1930, he said there were 42 delegations in contrast to 87 delegations, now meeting here in Geneva. This is the crux of the problem. Sovereign States have almost doubled in number, to speak nothing of the States that have not been

admitted for one reason or another. This emergence of ancient peoples into modern nationhood is not without significance. Their coasts, their fisheries, their living resources and indeed their defense build up has become their affair and their affair only. They are now lord and master on their land and on their sea. The Empires in which they were canned conceived the territorial sea in terms of colonialism and continued domination. In examining a similar situation, Professor Meyer in his valuable book on the «*Extent of Jurisdiction in Coastal Waters*» rightly remarked that as the Roman Empire encompassed the whole of the Mediterranean Sea... «it was only natural that the sea belonged to a single state... and that a coastal sea in the political legal sense had no reality until after the dissolution of the Empire».

It seems that history, repeating itself, is bound to record once more the fateful verdict that with the dissolution of empires and the emergence of national states, the breadth of the territorial sea becomes a legal reality, a vibrant reality.

This contention of ours, however, is not based on mere national aspiration or sheer political agitation. It is in the context of law that we plead; and to the temple of law that we have our recourse.

In the main, we have a basic submission to make – a submission which will decide the fate of the various resolutions that are tabled now before the conference. So far, we are seized with twelve resolutions in regard to the extent of the territorial sea. They range from three, to six to nine and twelve. There is also the proposal for a limitless limit except by the limit of reason and necessity. It is to these resolutions that we have submitted our amendment. Yet this by itself should not be taken as an acceptance of the resolutions based on the three mile limit.

To start with, we must define our starting point. The central question with which we are faced is simple to state. Is the three mile limit an existing rule of international law? This is the crucial question; and the answer no doubt is the acid test for any proposal – to accept or to reject. We have in mind the Canadian resolution which sets the territorial sea at a limit of three nautical miles.

In his statement to the committee, the distinguished delegate of Canada complained that in recent years claims have been made far beyond, three, six, or twelve mile limits, and that in 1953 three states extended their territorial claims up to 200 miles. Strange as it may sound, such a situation as has struck our colleague from Canada, is not strange in reality. This is not an abnormal situation and there is nothing strange about it. Now, there is no fixed limit on the territorial sea and there never has been. In the words of the In-

ternational Law Commission international practice is not uniform as regards the delimitation of the territorial sea. Moreover, we venture to claim that international practice not only is not uniform, but that it has never been.

From ancient times through the medieval ages, down to our day, there has never been any recognized uniform yardstick to measure the width of the territorial sea. The complaint of our colleague of Canada, for no uniformity in the limit of the territorial sea, is no complaint at all; for non-uniformity is the positive rule. Under Roman Law and subsequently in the jurisprudence of the Mediterranean States the extent of the territorial sea was not set at a fixed limit. It was at variance and was dictated from time to time by the need for protection against pirates. The limit was limitless exactly as conceived in the resolution of Peru. To borrow the phraseology of the proposal of the Soviet Union, each State determined the breadth of her territorial waters in accordance with historic, geographic, economic and security grounds. That was the natural course to follow: to limit the territorial sea by the limits of necessity.

This submission of ours is further substained by the custom of the Nations: State practice in favour of no uniform practice.

In his valuable international work, Bartolus, a great Italian jurist who died in 1357, declared that the jurisdiction of a coastal State extended to a distance of 100 Milliara from the coast.

Later in 1740, De Casaregis, another Italian author of great distinction, maintained that the sovereignty of a State to exercise civil and criminal jurisdiction, and even to prohibit or permit navigation extended to one hundred Milliara from the coast.

In the middle of the 18th century, Bertodano, a Spanish jurist of great standing, declared in a book on the law of Maritime prize that state sovereignty extended to one hundred miles from the coast.

In the 16th century, Paoli Sarpi, one of the early fathers of international law, advocated no uniform limit... and stressed that a jurisdiction of a coastal State should extend as far as the interests of the State demand.

Even Galiani of 1782, who is reputed for his calculation of the three mile limit, did not stand for three miles. He supported a limit of a hundred miles for purposes of jurisdiction. For such purposes as the regulation of navigation, being a troublesome task, as he describes it, he proposed a three mile limit.

In 1689, Sir Philip Meadows, this time a distinguished British authority, referred to the declaration made by King James in 1618 to fix a limit of fourteen miles.

As for the French jurisprudence, Professor Valin declared in 1760 that a limit of six nautical miles is generally accepted as the limit of coastal jurisdiction.

With regard to the United States, the position is much more interesting and informative. In 1807 the President of the United States was authorized and requested to cause a survey to be taken of «the coasts of the United States... within twenty league – 60 nautical miles». This was not a unilateral act on the part of the United States for it stems from a concerted action by the United States and the United Kingdom. In the Treaty of Peace of 3rd September 1783, in which the independance of the United States was acknowledged, it was agreed that «the following are and shall be, their boundaries viz. ... comprehending all islands within twenty leagues of any part of the shores of the United States».

As for the United States and the United Kingdom, these are not press clippings. These are State records that cannot be denied. Under every reserved construction and with all courteous definition, these official statements simply demolish the case of the United States and the United Kingdom. As was rightly pointed out by Professor Meyer, Great Britain and the United States are generally supposed to have established a three mile limit, but that the actual position is that neither of them have done so. In fact, the United States and the United Kingdom, falling now into grips on the breadth of the territorial sea, have been led by their invalid positions to expose each other and defeat each other. And this is precisely what led to the introduction of the proposals of the United States and the United Kingdom.

Yet we owe it as a duty to disclose the fallacies inherent in the resolutions of the United Kingdom and the United States, as explained in their statements before the committee.

To begin with it is to be observed that in his last statement before the committee, the distinguished delegate of the United Kingdom declared on behalf of his Government that under international law the maximum breadth of the territorial sea is limited to three miles. We can say outright that the three mile limit is neither a rule of international law nor is it a rule of law recognized by the United Kingdom. Perhaps we should say that the United Kingdom recognizes the rule in relation to the breadth of territorial sea only with regard to other States. To the United Kingdom the three mile limit is a rule of law to be invoked against other States, but not to be applied against the shores of the United Kingdom. We trust that this charge is not taken as devoid of corroboration.

In his book on coastal waters, Professor Meyer stated that the three mile width does not express what Great Britain considered herself entitled to reserve, but what she found it expedient to grant to others. To the United Kingdom the three mile rule is binding in favour of the United Kingdom. It is a rule of law, but against other States, with nothing more or less.

In fairness, however, to the distinguished delegate of the United Kingdom, we must not fail to observe the caution with which he expressed himself on the issue of the three mile limit. In his words «for 200 years or so the United Kingdom adhered to and maintained the three mile limit». Two hundred years or so, was a span of time intelligently selected by the distinguished delegate of the United Kingdom. But we fear the calculation of the representative of the United Kingdom does not carry him anywhere. Neither before nor after this period has the United Kingdom adhered to or maintained the three mile limit. We shall, however, impeach the contention of the United Kingdom, only as far as the last two hundred years or so. We shall meet the colleague of the United Kingdom in a field of his own choice. Nonetheless, we shall not make a resurrection of the position of the Great Kingdom over this whole span of time. Rich with contradictions, the British attitude, be it as it may, is a fertile field for illustrations. But we shall select one or two occasions which tend to demolish the case of the United Kingdom, or what remains of the case.

In February 1878, when presenting to the House of Lords the bill over the territorial waters jurisdiction, Lord Cairns, the Chancellor, cited several English, American and other authors on international law and stated in categoric terms that «the authorities were clear on this, that if the three miles were not found sufficient for the purpose of defense... or if the nature of the trade or commerce in the zone required it, there was a power in the country on the seaboard to extend the zone».

Further, in the session of 1909, the English Parliament was discussing a bill touching upon the limit of the territorial sea. The trend of discussion on both sides, the Government and the opposition, betrayed the British position on this question. We shall place before you one or two recitals of the debate: Sir Bignold said «let the Government remember that the three mile limit.. has never been, and I trust never will be, incorporated into any international European law». Major Gray said, «the signatories to the North Sea Convention agreed to a three mile limit but there is no three mile limit in international law». The Earl of Halsbery, disclosing the matter to the most naked extent, declared: «I have never myself, as a judge, admitted that the three mile limit is one that international law recognizes... there is no international law which would prevent a much longer limit being taken if the pub-

lic interest required it». Lord Salisbury said, «great care has been tahen not to name three miles as a territorial limit».

This position of the United Kingdom was not revealed in the English Parliament for home consumption or party politics. One year later, which is still within the stretch of the two hundred years or so, the British Government upheld the same views before the Hague of 1910. At that Conference the United Kingdom marshalled her talented diplomacy to show that the three mile limit was not a rule of law. When confronted with the North Sea Treaty of 1862, which refers to a three mile limit, the British Government took refuge in a very ingenious position. The British Government pointed out that the fact that this limit is fixed by a treaty is precisely a proof that it is not a rule binding upon other States.

No doubt this is a most convincing and intelligent argument. If anything is devastating to the heresy of the three mile limit, the British defense is a master argument.

We hope, however, that this master argument will convince the master of the argument. In his statement before the committee, the distinguished delegate of the United Kingdom said that he has given very careful consideration to our argument, but «I must frankly say», he declared, «we did not find them at all convincing».

It is for this same reason that we appeal to the disinguished delegate of the United Kingdom to give careful consideration to the arguments of the United Kingdom herself within the span of the last two hundred years or so.

Yet, if the British arguments fail to convince the British delegation, then we are afraid all other efforts become a set of nullity and vanity.

One other aspect remains to be examined. As an additional ground is support of the three mile limit, the delegate of the United Kingdom and the United States put up a plea based on economic considerations. The British delagate argued that a twelve mile limit would give coastal States exclusive fishing rights and thus affect the British fishing fleets. He stressed that they have to maintain a population of fifty million, that they do not produce all the food they consume and that they have to balance their economy.

We are glad that our colleagues of the United Kingdom and the United States were good enough to introduce the economic aspects into our deliberations. The economic side, our colleagues should know, is one major ground for a twelve mile limit. Apart from other forceful arguments, the coastal states, in fixing a twelve mile limit, are led by the demands of their

national economy. They too, like the British, have to maintain millions of their population; they too, do not produce all the food they consume. They too have to balance their economy. After all, the coastal states have a right of priority, a right of pre-emption to exclusive fishing on their coasts. The fact that the British have a fishing fleet is no reason for the coastal states to be perpetuated in a state of economic dependence. The coastal states are eager to build up fleets of their own and to become «sea going» countries with «fishing as their tradition and custom», as the delegate of the United Kingdom described the British to be. Unlike the British, who have a high standard of life, the coastal states are emerging from a life of misery, poverty and destitution. When the life of fifty million is cited as an argument, this conference should not fail to remember the millions upon millions of the citizens of the coastal states in Asia, Africa, Latin America and other areas of the world. It is high time that these countries catch their own fish, eat their own catch, and fish in their own waters.

This question of fishing as operating against the authority of other coastal states is not a novel argument. This is a British legacy passing down from one generation to another. Here is a British recital, much more interesting than the statement made to us by the British delegate. In 1909, and with regard to fishing, the Lord Chancellor stated on behalf of the British Government before the British Parliament as follows: «I shall forbear from saying anything at all about the three mile limit, for the reason that we should walk very warily in this matter. Many of our best fishing districts are within ten miles of the coast of our neighbors. The question is not merely one of what is to happen to our fisheries within ten miles of our coast, but of how many of our own fishermen may be prevented from going to their present fishing grounds within ten miles of a foreign coast».

Thus, to Great Britain the three mile rule is no problem to their coast. They can handle their coasts. Each and every situation is easy to tackle when the occasion arises. But to them, and to the United States for that matter, the problem, the real problem, is now to siege the peoples of the coastal States behind a bar of three miles.

This brings us to the main contention of the United Kingdom and the United States in rejecting an extension of the twelve mile limit. Their central theme flows from the doctrine of the open seas. And here again, their standby itself invites a great deal to be said, as frankly as it should be said.

We shall not follow the tracks of the United States and the United Kingdom in their record of violations of the principle of the open seas. Lengthy as it is, still we shall confine ourselves to a few instances.

In his valuable book on International Law, Professor Wilson states: «About thirty years ago, the United States fought is favour of mare clausum in Bering Sea, and about fifteen yeras afterwards, the United States endeavoured to establish a limited British sovereignty respecting the North Atlantic Coast Fisheries».

On the 16th of September 1864, the United States Secretary of State, Mr. Seward, asked the British Ambassador in Washington «whether it would not be advisable to extend the limit of the territorial sea from three to five miles in view of the increase of the range of cannons».

In 1874, in the course of negotiations between the United States and Spain, Germany, Austria, Italy, Holland and Belgium for the regulation of fisheries in the Sound, it was declared that if the coastal sea was to be limited by International Convention, four miles must be the minimum breadth.

In a reply dated 15th February 1896, addressed to the British Government, the United States stated, «this Government would not be indisposed to reach an accord by which the territorial jurisdiction of a State bounded by the high seas, should henceforth extend six nautical miles».

In the treaty of 2nd of February 1848, between the United States and Mexico, Article 5 stipulated that the boundary line between two countries shall commence nine miles from the land in the Gulf of Mexico. Against the British Government protest, the United States, in her reply of August 1848, stated that, «third parties have no just cause of complaint». Not only did the United States reply that this was not the business of the United Kingdom, but the United States went a step further. Five years later, in December 1853, the United States entered into agreement with Mexico reiterating the same provision for nine miles.

Thus, paradoxically in 1848 the United States stood for nine miles, while the United Kingdom stood for three. In 1958 the United States stands for three miles and the United Kingdom stands for six. Truly, history repeats itself, but repetition in this instance was made in a converse manner.

Turning to the judiciary branch, the Supreme Court of the United States in the case of Church v. Hubbart in 1804 referred to the American customs limit of our leagues as a proof that a State may extend its protecting measures as far as the circumstances reasonably make it necessary. Further, the court observed that the fact that the limits must be drawn more narrowly in waters like the English Channel cannot prevent their being drawn much further out on the American coasts.

That much serves the purpose. We shall not proceed any further in unfolding the whole record of the United States and the United Kingdom with regard to this catchword of the freedom of the high seas. Those who stand ready to be convinced, can be convinced. But those who are bent upon interpretations of their own, should be left to their own. It was Fauchille, the great scholar, who said: «With respect to the freedom of the seas there exists in fact an English interpretation, an American and a French interpretation».

This verdict of Fauchille is amply supported by the demeanor of certain Great Powers, particularly during the course of war. The high seas provide the greatest battlefields with many military advantages over the land. The wider the high seas, the wider becomes the area for military operations. Those who are masters in the ghastly art of war know what it means to carry out military actions without hindrance up to a three mile limit. A twelve mile limit is a limitation of the battleground. Partial as it may be, it is a brake in the engine of war.

Thus the conclusion is crystal clear. Those who clamour most for the freedom of the high seas, do not have the freedom of the high seas at heart. They resist to be dispossessed of this double edged weapon. In time of peace, freedom of the high seas means a freedom for the monopoly of fisheries and a monopoly of communications. In time of war it is a freedom of war to the widest limits.

Finally, it is to combat such malignant freedoms that all freedom loving peoples should resist the three mile limit; and to eradicate such evils that all peace loving peoples must support the widest possible limit. This goes to explain that while we oppose all resolutions of less than twelve miles limit, we have introduced our amendment as a saving clause in all resolutions on Article 3.

As to our main proposal, it is not the best but the next best. We hope it will be carried in case the other resolutions for a twelve mile limit fail. We have not submitted this proposal as a face saving device to the Conference. Nor is it an effort of salvage from the wreckage which the conference may suffer. It is a sincere attempt to keep the way open for an international agreement on the width of the territorial sea. But pending such agreement, we have set out the principles that raise no serious controversy. They are well established principles of international law whether we recognize them or deny them. To adopt them the conference ends not in failure, but in a self-chosen recess. It will be a breathing space for all to ponder, to negotiate and to argue. This is the main jist of our resolution.

As for out part, we have already determined the limits of our coastal sovereignty within a twelve mile limit. Our sea, our fisheries, our bays, our islands, our historic waters are our own. Our position is in accord with the established principles of international law; and the consent of others is neither called for nor required.

To this we have nothing to add, and from this we have nothing to yield.

FOURTH SPEECH

Conclusion

The motion that stands in our name hardly calls for elucidation. It is self-explanatory and raises no controversy in international law, either in the field of doctrine or practice. It is a modest attempt intended to give the law a modest name. Far from having ulterior motives, our proposal is innocent and simple. It genuinely means what it really says. And all that we say is that these rules should be known as «The Law of the Sea in Time of Peace».

This title, however, should not terrify anyone. It should cause no worry or unrest anywhere. In fact, it should pacify everyone and alarm none. To give the law its title is not only normal and natural, but also imperative. In municipal law, all enactments are known by their titles. In the international domain, conventions or other acts are entitled with their titles. In all endeavours of codification, the title is made an integral part of the draft law. The International Law Association that met in Vienna in 1926 named its code «The Laws of Maritime Jurisdiction in Time of Peace». In all works on international law, the main division in the Law of Nations sets out the rules of law in time of peace, and those applicable in time of war. In the last thirteen years, since the inception of the Charter of the United Nations, publishing houses have saturated our libraries with books on international law in times of peace and war alike. Even jurists who are delicately conscientious regarding the abolition of war as an international institution are still engaged in elaboring rules for war and for peace.

In the course of the general debate, one single delegation has sounded an objection against the idea of restricting the application of the law to the time of peace only. In this statement before the conference, that delegation advocated that the United Nations Charter does not permit the existence of a state of war between member States of the United Nations, nor does it admit the exercise of belligerent rights.

We do not propose at this stage of our debate to comment on such a

statement. Nor is it our intention to examine how far the United Nations Charter has influenced the traditional concepts of war. Our observations shall be confined only by the confines of the motion under discussion.

To begin with, it was the International Law Commission itself that pointed out the distinction between the maritime law in time of peace, and maritime law in time of war. In its concluding words of the introductory report, the Commission emphasized that the draft law «regulates the Law of the Sea in time of peace only». Also, in commenting on the right of passage, the Commission stated that «The whole of these regulations are applicable only in time of peace».

It, therefore, becomes amply clear that our motion to give the law its proper name is only a side reflection of the views of the International Law Commission. In fact, it represents a miniature picture of the drawing of the Commission. It would have been proper on our part to propose a rule to the effect that the law is applicable in time of peace only. That would have been a reproduction of the words of the Commission. But we have preferred a shorter cut; a course soft as it may be, yet pregnant with sufficient indication.

Thus, the proposal, though standing in our name, is in essence a proposal by the Commission, at least in embryonic expression. And the Commission, we hope we can admit, has a fair knowledge of international law. That much, we trust, we can accord to the Commission.

There is, however, one technical difficulty that may confront our proposal, and which may give rise to apprehension amongst certain delegations. Formal as it may be, we believe the difficulty is more of an apparent than of a real nature. Briefly stated, the difficulty is that this is a United Nations Conference, summoned and held under the auspices of the United Nations. The Charter of the United Nations declared the dual obligation: first to settle international disputes by peaceful means, and second to refrain from the threat or use of force. In a word, the Charter, unlike the Covenant of the League of Nations, not only provides for checks and restraints against war, but has entirely abolished the conception of war as an institution of international law. And hence no attempt can legitimately be made to distinguish between the laws of war and the laws of peace. No matter how well founded this conclusion may be, in the light of the hot debate at present taking place among jurists, we remain bound to distinguish between international objectives and international realities. While solemnly kept as our main purpose, the abolition of war is an idea, or if you will, a determination still to be hoped for, particularly so in the light of the bitter experience gained since the birth of the United Nations.

It is a fact that the Charter as a code, and the United Nations as an organization, have outlawed war. But the brutal fact is that neither of them has been able to prevent its occurence. Regrettably the illustrations are not few. The war in the Middle East in the autumn of 1956 was not only a vibrant illustration, but one which had almost set the world at the brink of war.

Moreover, this concept of the renunciation of war should not deter this conference from adopting our proposal. The Charter of the United Nations, in none of its provisions, expressly or by implication, precludes designating the draft law with its real name. To say that these rules shall be known as «The Law of the Sea in Time of Peace» is not a breach of the Charter. Neither is it *per se* a justification of war, of the existence of a state of war, or the exercise of the right of belligerency.

Again, that a war can take place, in spite of the Charter, in spite of the United Nations, and against the best will on earth, does not require a moment's reflection. What is the meaning of this wild race in nuclear weapons? What is the significance of this dreadful progress in the art of destruction on earth and around this earth? If they mean anything, it is war made ready and prepared.

After all, should war take place, God forbid, it is more human to have a war with rules of conduct than to have a war without rules whatsoever. It is the least evil in this colossal evil. Thus, our proposal does not disturb the new international norms that have been incorporated in the Charter of the United Nations, nor does it defeat the Charter's renunciation of war as a means to settle international disputes. In this regard we need only recall the remarkable words of such a distinguished authority as Oppenheim. In the chapter dealing with war, we read the following: «... the law of war must continue to be a legitimate object of the science of International Law. While a legal system can prohibit recourse to unlawful force, it cannot always prevent it; neither can it renounce physical compulsion for the purpose of enforcing the law. In either case, especially when the opponents consist of collective units equipped with enormous resources of power, it is desirable to provide rules intended to regulate and, if possible, to mitigate the use of force. Thus in civil war, whose occurrence cannot be avoided by the fact that Municipal Law stigmatizes it as a criminal act of reason on the part of the rebels, it has been found necessary to regularize and humanize hostilities, either by express recognition of belligerency, or by racit observance of the rules of warfare as established by International Law, or as shown in the Geneva Conventions of 1949, by the express extension of the humanitarian rules of warfare to civil wars».

We might even add that with the abolition of war as a declared objective, we should be more on the lookout. An aggressor state should not be allowed to free herself from the rules of conduct when she wages war; neither must she be saved from penalties provided in the law of war.

Yet this Conference, in examining our proposal, should realize that this world of ours with things as they are is far from being the Republic of Plato. The quest of mankind to abolish war is as old as the misery of war itself. Human endeavours to outlaw war in religious or political teachings are too well known to call for any recital. In modern history, international writings and conventions are no less clamorous in condemning war. The Covenant of the League of Nations, binding on the States of the day, provided serious restraints against war. The Paris Pact of 1928, effective up to the present moment, was a renunciation of war made by sixty nations. The American Anti-war Treaty of 1933 reaffirmed the determination of the American Republics to abolish war. The Charter of the United Nations, referring to the maintenance of international peace no less than thirty-two times, has renounced war, except in self-defense and collective measures of security. Yet in spite of all these highly cherished instruments of peace, many of our colleagues in this conference have witnessed the sorrows of two world wars; the younger colleagues lived their lives in the throes of a nuclear war in the making.

Hence, in connection with our proposal and in relation to our United Nations Charter, we should feel no difficulty, either in substance or in form, in accepting the nomenclature which we propose to give to the Law of the Sea.

It is important, however, to note that the juridical aspect of our resolution is well covered in a well known decision of the International Court of Justice. In the case of the Corfù Channel, the Court declared that «it was generally recognized 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». The Court further ruled that, «there is no right for a coastal state to prohibit such passage *in time of peace*». Further still, the Court decided that passage through «international highways cannot be prohibited by a coastal state *in time of peace*». Moreover, the Court in pronouncing her final conclusion took cognizance of the fact that «Greece had declared that she considered herself technically in a state of war with Albania».

From these quotations a set of significant facts emerge beyond any shadow of doubt. In the first place, the Court referred three times to a rule of law as qualified in time of peace. In the second place, the plea of a state of war was raised and considered by the Court, even though it was of technical nature. It was not rejected by the Court as null and void on the

ground of the Charter's renunciation of war. We need not say that this case was decided subsequent to the United Nations Charter; nor do we need to prove that the court in delivering their judgment had taken judicial notice of the new international norms contained in the Charter.

In conclusion, we must make it clear that this proposal of ours is not designed to meet ultra-national demands of a state or a group of states. It is not intended to serve regional policies or transient situations. It embodies a general indication in the right direction. We would say that no responsible state here in the conference can avoid our resolution by saying: «It is not my business». Can a coastal state, at a time of armed conflict, or in a state of war, allow, let us say, the right of innocent passage in her territorial waters in favour of an agressor state?

This is only one instance to show why no responsible state can be disinterested in the subject matter of our motion, and why the whole Conference should receive it with careful and earnest consideration.

Finally, it goes without saying that our proposal stands before the conference open for any constructive amendment. We do not take an adamant position on the matter as long as the intents of the proposal are taken care of. We are ready to consider any amendment without damage to the main idea embodied in the resolution. At the same time, we shall be too glad to make any explanation which will throw further light on the matter, should the need call for any explanation.

Statements at
The Second International Conference
of The Law of The Sea

FIRST SPEECH

Recapitulation

We are assembled again in the United Nations Conference on the Law of the Sea. It is our ardent hope that at this stage of our journey on the law of the sea, our passage would be innocent, our navigation secure and our landing safe. We trust that our work will be a success, and to this end we pledge our support from the heart of our heart.

At the outset, we should like to put on record a word of caution. In spite of all appearances, the point we are raising is not formal. Neither is it marginal. It is cardinal, down to the core and central to the last atom. It is one of substance. At a conference of law, held under United Nations auspices, the point we have in mind should not escape our attention, nor should its relevance or bearing be discarded with a light heart.

This Conference of ours has been designated as the Second United Nations Conference on the Law of the Sea. For our part, we have avoided this designation in our introductory words. This we have perpetrated, as the legal dictum runs, not by omission but rather by commission.

It is conceded that for purposes of special designation, easy reference and for the systematic enumeration of our records, it is admissible to speak of this Conference as the Second United Nations Conference on the Law of the Sea. But in fairness to the law of the sea itself, and to the vital national and international interests we have come to tackle, ours is not the Second Conference. In essence, it is a continuation of the Conference that was held in Geneva in February 1958. We are back again to the Conference. It is one and the same, reconvened, resumed and continued.

We trust this point is not taken as pointless – with much ado about nothing. On the contrary it is no ado at all and with everything. In our sea-fearing endeavour, it stands as a light house pointing out our present station and final destination. And for a gathering of gifted jurists and talented diplomats, as ours is, this point merits careful consideration and profound reflection.

The significance of the point, however, is neither academic nor does it stem from a quarrel over phraseology or terminology. It is very much over and above. It is the oneness of our work, and indeed our only assignment. When we press the point of one and the same Conference, we do not mean to be drastic or dogmatic. We simply mean to say that we are back again to work - the same work, the unfinished work. We stress unfinished, because, honestly and sincerely, the work we have done so far is unfinished and shall remain unfinished for ever and ever, unless and until we make every effort to bring the present session to a success, a real success.

In the spring of 1958 we were able to prepare four conventions dealing with the (1) Territorial Sea and the Contiguous Zone, (2) the High Seas, (3) Fishing and Conservation of Resources on the High Seas, (4) the Continental Shelf. Also, we adopted an optional protocol for the compulsory jurisdiction of the International Court of Justice in certain disputes arising out of those conventions.

This result has been received with appreciation by the General Assembly of the United Nations, and in its resolution 1307 (XIII), the Assembly has referred to that achievement as «an historic contribution to the codification and progressive development of international law». No doubt, this is a well-deserved tribute. Yet, without minimizing the work so far done, it must be admitted that what remains undone is the major part of the whole undertaking. The breadth of the territorial sea and the fishery limits stand today unsettled. These are no little items. It is true, we have prepared a number of conventions heavily loaded with a number of articles. But work, international work in particular, is not to be measured by its volume and weight. Our work on the law of the sea is not one of cargo and freight. It must be measured by its final impact and its general effect. With this criterion in mind, we can safely say that the law of the sea can only be regulated once the breadth of the territorial sea is settled – and finally settled.

We cannot, therefore, sit back happy with the idea that we have adopted four conventions and a protocol in respect of the law of the sea. Without an acceptable formula for the delimitation of the territorial sea, these conventions will remain outside the sacred temple of international law.

For the law of the sea, the high sea and the territorial sea, are the two wings of the eagle. They hold together, and together they strike the balance.

But without a fixed delimitation of the territorial sea, you will have no high sea and no freedom of navigation. Neither can we possess any of the dearest concepts of international law that were won by the civilized community since the days of Grotius – the beloved father of international law. One

might go even further. Without being discourteous or pessimistic, one would be fully justified to say that no agreement on the breadth of the territorial sea means the nullification of all the work we had accomplished in 1958. In simple words, this would mean the non-existence of the law of the sea. Furthermore, the conventions we have prepared, even though signed and ratified, will be nothing but a scrap of paper, and our past endeavours will be reduced to a heap of waste in a barren desert.

Thus, the present session of the Conference stands face to face before the bar of history. Ours is a decisive Conference that is bound to decide not only the destiny of the territorial sea but the law of the sea in its entirety. There lies in our deliberations a great responsibility that must be shouldered in the best interests of international relations. It seems to us, the end will be complete success or complete failure with no other alternative. The question admits no half solutions or shaky adjustments. The outcome is clear cut and decisive. It is a law of the sea, or no law of the sea at all. If we succeed in this session, it would be an overall success for the whole work past and present. Should we not, God forbid, the work we have done – the conventions we have adopted, would find their way to the archives of the Codification Conference of 1930 – a Conference that was inaugurated with laurels, and passed away with mourning wreaths.

It is not our wish at the threshold of our meeting, to bring the Conference a message of despair or even discomfort. What we wish to bring home to our minds is the interdependence and inseparability of the law of the sea. It is true that the law can fall into parts and divisions, and that it can be reduced into more than one convention. But the fact, the central fact, remains that without an acceptable instrument on the width for the territorial sea, all conventions on the law of the sea, become drowned in the bottom of the sea, as a wreckage with little hope for salvage.

This is not a figurative assessment of the present situation. The General Assembly in its resolution 899 (IX) has expressed the view that the various matters of the law of the sea are «parts of a whole» and are «closely linked together juridically as well as physically». Moreover, in its report to the General Assembly (paragraph 29) the Commission declared that «judging from its owen experience... and the comments of the governments have confirmed the view - (it considers) that the various sections of the law of the sea hold together..».

With such a balanced opinion pronounced by the grand jurists of the United Nations, we should know where we stand at the present stage of our work. We should not be lured nor lulled by the many conventions we have adopted in the past sessions. The General Assembly in commending our

work as a historic contribution to «the codification and the progressive development of international law» was, we fear, simply placing on record a routine courtesy. No doubt, there was a certain amount of success scored, but the laurels were very much bigger than the achievement itself.

We say that without an apology, for it is only through candor that we can hope to reedem our failures and make up for our shortcomings. As a matter of fact, the ground we have covered was already a well established field of international law long before we were invited by the United Nations to assemble as a conference. The Hague Conference of 1930 stands in testimony. As was rightly pointed out by Professor Colombos in his valuable work on the international law of the sea, «although the Conference of the Hague was unable to reach an agreement on the subjet of territorial waters, it succeeded in preparing a draft convention on the legal status of the territorial sea for future consideration». In dealing with the same point, Professor Lauterpacht, in his well known book on international law, stated as a fact that «with regard to territorial waters, the Conference (of the Hague) was unable to adopt a convention as no agreement could be reached on the question of the extent of the territorial waters... (although) some measure of agreement was reached on such questions as the legal status of territorial waters... the right of innocent passage and the base line, etc..».

These facts that we have brought to light are not intended as an historic recapitulation to the problem, but are intended as a warning that we are now in almost the same position that prevailed thirty years ago. Except for name, the Geneva Conference of 1960 is the Hague Conference of 1930, standing in its shoes without even a change of model or fashion.

This is no sarcasm. It is the reality in all its truism. If we care to seek the evidence, we need only compare word for word the text we adopted in Geneva with the text suggested at the Hague.

There is, however, one aspect to be regretted, and for this matter our remark embraces both the breadth of the territorial sea, as well as the remaining topics of the law of the sea. We refer to our disposition vis-à-vis the work of the Commission.

After strenuous patient labour, and upon expert knowledge furnished by the Secretary-General of the United Nations, the International Law Commission has done the ground work for our Conference and presented to us a draft code covering the whole field of the international law of the sea, neatly prepared and ably formulated. It was a master-piece of work that commends itself readily for adoption, and, with slight variations here and there, would even invite our ratification. In a word, in our Conference of 1958 we should

have adopted in total the main principles pronounced by the Commission.

But instead of pursuing such a worthy course, we have brushed aside the conclusions of the Commission on the breadth of the territoral sea. With the same courage and ease we have inflicted a number of mutilations in the rest of its code - mutilations, which were to become embodied in our Conventions.

Gloomy as it may be, the present situation is neither incurable nor hopeless. We still have the remedy well in hand, and the die is not cast. Our chance of success lies in our approach to the question of the limit of the territorial waters. And it is only within these that we can anchor our success in the present Conference, and compensate for the damage caused by the past Conference.

Such an appraisal does not fall within the realm of imagination or even exaggeration. The breadth of the territorial sea is the master key to the law of the sea in its entirety, in time of peace as in time of war. We refer to war, for it is no use denying that the war potential and the war effort is one major factor in plaguing the mind of more than one state in approaching this problem. Rights and duties of states, all in all, begin and end on both fringes of the territorial sea. A bird's eye view on the field of the law of the sea will no doubt reveal this absolute truth. The juridical status of territorial sea, the right of innocent passage, the freedom of the high seas, the contiguous zone, the continental shelf, the right of visit, the right of hot pursuit, the right to fish, the right to lay submarine cables and pipelines and a host of other legal norms, rights and duties – all would become meaningless unless and until the territorial sea is well defined in a generally accepted formula. Agreement on this matter is in fact putting teeth into the Conventions we have adopted, without which, not only do we suffer stomachache, but international headache, for all time to come.

It is mainly due to the far-reaching significance of the breadth of the territorial sea that the General Assembly, in its resolution 1307 (XIII) has rightly observed that «agreement (on the breadth of the territorial sea and fishery limits) would contribute substantially to the lessening of international tensions and to the preservation of world order and peace».

Thus the position taken by the General Assembly on this matter is crystal clear. In the words of the General Assembly, the problem we are to attack can lessen or worsen international tension. It can preserve world order and security and can likewise preserve world disorder and insecurity. And it is our conduct or misconduct which will lead us one way or the other. The question then arises, how are we to tackle the problem, with what approach, and where to begin?

Convened as we are under the United Nations auspices, and indeed acting, as we are, under a resolution of the United Nations, it is proper and natural to seek guidance from the United Nations. Happily the source of guidance is abundant. We have before us the work accomplished by the quasi legislative organ of the United Nations – namely the International Law Commission. With this head-fountain at our command, we can proceed to explore the avenues of a reasonable agreement. We say reasonable, because arbitrary positions based on caprice are unmanageable. And if we are to stand by caprice, if we have come with fixed attitudes, if we intend to cook another convention by pressure, and in a pressurized pot, we had better from the very start disperce immediately and let the question drift anywhere. Let it go where it may go.

But it is to avoid such a result, and we would say a catastrophic result, that we must, all of us, in interests of this voyage of ours, submit to the rules of navigations and yield to our able pilot. This is the code for every voyage, if we mean a voyage safe and secure. In this instance our pilot is the International Law Commission; and let us see how best we are to be guided.

On the breadth of the territorial sea, it is true, the Commission did not take a decision. But the Commission had pronounced certain principles and conclusions which no doubt spell out the necessary elements that constitute the basis for us to take the decision. Instead of setting out the limit of the territorial sea, the Commission has found it proper and wise to leave the matter to be decided by the Conference. Yet the matter did not hang in the air. The Commission has given our Conference ample guiding principles, if we are not to stand impregnable to guidance.

So, what are those guiding principles? In the first place the Commission declared that, «International practice is not uniform as regards the delimitation of the territorial sea». This is a finding which we cannot challenge. It is common knowledge, now, that state practice ranges between three, nine, six and twelve miles, with some delimination as far as 200 miles. But this non-uniformity is not a novelty. It has been going on for a number of decades. Professor Lauterpacht, a distinguished authority on Anglo-American international jurisprudence, came to the conclusion that «with regard to the breadth of the maritime belt, various opinions have in former times been held and quite exorbitant claims have been advanced by different States, such as a range of sixty or a hundred miles..». To mention a few illustrations only, in support of non-uniformity, we can refer to Denmark's claims for fishing rights within sixty-nine miles of the coasts of Greenland, to the Russian «Ukase» of September 1821, asserting jurisdiction within a hundred Italian miles from its coasts, and finally to the claim of the United States to

assert jurisdictional right of control over the seal fishery in respect of the Behring Sea.

As a matter of fact the United States has made a great contribution to create this state of non-uniformity of the breadth of the territorial sea.

By the terms of the Treaty of Guadalupe of May 30, 1848, Mexico ceded to the United States a territory lying northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. In his Digest of International Law, Hackworth, the Legal Adviser of the Department of State, contends that «By virtue of this treaty, the United States assumed jurisdiction over the region thus ceded, both territorial and maritime... which embraced all of the ports, harbours, bays, and inlets along the coast of California and for considerable though perhaps indefinite distance into the ocean..».

This non-uniformity, however, is not to be found only in the precedents of state practice. It has become a fact noted judicially, to borrow the term obtained under the English legal system. The British High Court of Justice sitting as a Prize Court in 1916 in the Bangor case, stated: «... The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion».

This dictum is of far reaching significance, for when in the United Kingdom, where the rule of three mile limit is held with a great deal of reverence, the British High Court of Justice, and what a Supreme Tribunal this court is, takes judicial notice that the matter, as far back as 1916, has been subject to much discussion, we can realize that the non-uniformity, in respect of the breadth of the territorial waters, was the rule of the age.

It was due to this chaos in this field of international law, that the Hague Conference of 1930 was held to discharge the very same undertaking we are wrestling with at the present moment. That Conference has regrettably failed but has left for our Conference certain salient facts that should influence our present deliberations.

Firstly, the Conference has disclosed a wide diversity of opinion on the limits of the territorial sea. The member states have fallen into eight categories, namely, for three, four, six, ten, twelve miles, and for twenty, thirty, and sixty kilometers.

Secondly, the second committee of the Conference which was dealing with the subject refrained from asking a decision on the question whether existing international law recognizes any fixed breadth of the belt of the territorial sea.

Thirdly, faced with diffrences of opinion on this subject, the committee

preferred, in conformity with the instructions it received from the Conference, not to express an opinion on what ought to be regarded as the existing law, but to concentrate its efforts on reaching an agreement which would fix the breadth of the territorial sea for the future.

This state of affairs has persisted to the present day. It lives with us up to this moment; and if any evidence is required, we need only consult the minutes of our meetings in 1958. And it is precisely of this non-uniformity that we are assembled again in this Conference.

But happily enough, we are not left in a state of legal vacuum. The International Law Commission has filled the vacuum, not by material prefabricated for the occasion, but by material already in the hands of the international community. In doing so, the Commission has enunciated two principles: (1) that «international law does not permit an extension of the territorial sea beyond twelve miles»; and (2) that «The extension by a State of its territorial sea to a breadth of between three and twelve miles was not characterized... as a breach of international law..».

With this in mind, we may ask then, what is the importance of the conclusions of the International Law Commission on this matter? This is a pertinent question, the answer to which can be so decisive as to determine the work of our Conference.

The Irresistable finding of fact which underlies the conclusions of the Commission is that the three-mile limit is no more an established rule of international law, and that a twelve-mile limit is not an encroachment on the high seas and hence not a violation of the principles of international law.

We do not propose to trace the history of the three-mile rule, its genesis, application and its evolution. Neither do we deem it convenient to enter into a detailed legal analysis of this problem. In the earlier sessions of our Conference in 1958, we have made a modest endeavour to place before the Conference a comprehensive research on the subject, based on state practice, case law, jurisprudence and treaty precedents – mostly drawn from Anglo-American sources.

What we propose to say at this stage is that the three-mile limit may be taken as a minimum but not as a maximum. This proposal is not based on legal literature but on sound legal precedent. In the leading American case, Manchester versus Massachusetts, and for this matter we invite the keen attention of the delegation of the United States, the court said: «We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast».

It is with such a judicial verdict and a host of others that the three-mile rule as a maximum has become condemned as the «fallen idol» of Professor Jidel, and the «abandoned shore batteries rule» of Professor Anzilotti. This latter distinguished jurist has gone even further. He stressed the absence of any rule of International law on the matter. In Rivista II as far back as 1917 he proclaimed that no rule of international law has been developed to take the place of the abandoned «shore batteries» rule.

These views are not mere pronouncements of scholars of international law. They are nothing but a reflection of state practice established ever since the middle of the nineteenth century. One illustration is sufficient to corroborate this assertion. Out of Ironic coincidence, the illustration we have in mind, refers to both the United States and Mexico, the former an exponent and the latter an opponent to the three mile rule.

The territorial waters of Mexico and the United States have been fixed by the Treaty of Peace, Amity and Boundaries concluded between the two countries on February 2, 1848, at nine nautical miles. That was not all. Both states have taken action on the strength of the treaty.

In his note of August 19, 1848, Mr. James Buchanan, Scretary of State of the United States, declared that the territorial waters extend three nautical leagues, while Mexico published in the *Diario Official* of August 31, 1935, a decree fixing the breadth of the territorial waters at nine nautical miles.

This state practice based on a treaty between the United States and Mexico does not only reveal the legal situation in 1848. It must certainly point out what the situation should be in 1960. If nine nautical miles were recognized by the United States as the breadth of the territorial sea at the age of gun powder, what should the limit be at the present time? What should the limit be when the Sputnik and Pioneer V are now penetrating into the interplanetary system, as the first honored guests of the stars.

But we need not wonder about this limit. The International Law Commission made two findings - one of fact, and one of law. The first, is that a twelve-mile delimitation of the territorial sea is supported by State practice; and the second, that such a limit is not a breach of international law. This is the legal position for those whose minds are ready to surrender to the dictates of law. If we seek the law, then, this is the last word in law. Nothing remains but to be guided by the law.

We said «guided» although in fact we should have said abided. For we hasten to submit that, for us as a Conference of the United Nations, there is every reason to accept in this particular case the formulation of the International Law Commission. This is a fifteen-man Commission composed of

distinguished jurists, representing all the principal legal systems of the world - the Anglo-American, the continental, the socialist East European, the Islamic, and the Latin American, as well as the legal trends in the Far East and the Scandinavian countries.

With such a composition, we submit, and rightly so, that short of a flagrant violation of the law or a serious miscarriage of justice, inherent in the work of the Commission, we cannot by a stroke of the pen just ignore the fundamentals that were recognized by the Commission.

These fundamentals, and as basic they are, were not arrived at haphazardly with a lazy mind and easy labour.

The Commission was cognizant of all the studies undertaken by the League of Nations in this field. They had at their disposal all the expert knowledge that the United Nations could provide. Finally, the Commission took no little pain, patience or labour, in studying the problem. It was after its fourth, fifth, sixth, seventh and eighth session – running for five consecutive years, deliberating, arguing, researching and hair-splitting, that the Commission has been able to present to the Conference its formulation on the breadth of the territorial sea. But how far have we been influenced by the labours of the Commission?

On April 27, 1958, at our concluding meeting, we adopted a resolution, which reads:

«The Conference resolves to pay a tribute of gratitude, respect and admiration to the International Law Commission for its excellent work in the matter of the codification and development of international law, in the form of various drafts and commentaries of great juridical value».

Well, if we are to stand by our word that the Commission deserves a tribute of gratitude, respect and admiration for its excellent work, which we describe by our resolution as of great juridical value, how can we discard the fundamental principles enunciated by the Commission? How can we hesitate to accept a twelve-mile limit which has been declared by the Commission as no breach of international law?

If we speak of juridical value, we must admit its value, so much so when we are convened as a conference of law. In this Conference we have no official value and a black market; our values must be one and the same.

It stands to reason, therefore, and in order to render juridical value, genuine value, not a lip service, that we must adopt a formula along the lines pointed out by the Commission - namely a delimitation of the territorial sea within a maximum of twelve miles.

Such a formula is a compromise by itself. It allows a degree of flexibility up to a rigid maximum. States content with three, four or nine miles can remain to the contentment of their heart. States with a twelve-mile limit stand on their own right, and will extend no more.

Apart from flexibility, there is also the advantage of practicability, short of which no formula can have the merit of workability. It is common knowledge that the «twelve milers» represent a cross section of States all over the world – in Asia, Africa, Latin America and in Eastern Europe. This is no political or ideological grouping. Those States represent various political systems and different social and economic orders. Their common stand for a twelve-mile rule is an historic human evolution that was brought about by different factors which we do not need to detail at the present moment. Behind their twelve-mile limitation there have become established interests which cannot, and ought not, be subjected to any jeopardy. You cannot expect these States to compromise their vital national interests. Neither would they be willing to betray their defensive or economic necessities. Each State, as rightly declared by Hyde, in his book on international law, «must itself be the judge of what violates its own rights and interests».

As to other States, whether they are three, six or nine milers, the formula of a twelve-mile maximum, does not inflict upon them any injury. The formula is neither discriminatory nor derogatory. It does not deny them any advantage accorded to others. They can, too, extend their limit to twelve miles, whether for pleasure or interest.

Lastly, a formula of twelve miles is all inclusive and comprehensive. It satisfies all, and grieves none. Within this formula, all delimitations are embraced, and indeed with sympathy. But any other formula is exclusive. It excludes a great number of States. This Conference, we suppose, need not be told that the lesser is included in the greater, and not vice versa. This is a geometric axiom, too simple to call for a reminder.

Yet we cannot conclude without alluding to the one single factor which, to our modest calculation, constitutes the main reason for the division of the Conference. We mean the military aspect to the problem.

We know that this aspect, as far as our deliberations are concerned, has been sealed with silence. Never was it put at the foreground. It has always been in the background. None spoke of it, but more than one is labouring under it. And it is worthwhile that for this matter the ice should be broken.

All the various delimitations have a military aspect, defensive or offensive, call them what you can call them – these are adjectives that even his-

tory has not always been able to determine. But because it is devoid of discrimination, the formula of twelve miles, with all its military advantages or disadvantages, is open to all and closed to none. It does not destroy the present balance, or any balance, neither whould it prejudice the positions and attitudes of States, one way or the other. Those who feel aggrieved by a twelve miles limit because they are three milers or the like, can extend their limits up to the maximum to meet their military needs, if they so desire. The balance would, thus, continue well-balanced, with no chance for any state to gain preponderance.

But those worried most about this military aspect are the last to be told of its significance. With the world what it is, and what it is going to be, we seriously contend that the military aspect of the territorial sea is too remote to call for any consideration. Man's conquest of the outer-space has made too negligible the innerspace, let alone the ocean space. In this age of intercontinental ballistic missiles, the sea is becoming a primitive, poor and modest field of military operations. This is how we see it with our primitive, poor and modest knowledge of military tactics and strategy.

Be that as it may, even on the military aspect a formula of twelve miles as maximum, leaves no State at the mercy of another. Viewed from military potentialities, the «haves» and the «have nots» represented in the Conference can put the twelve-mile maximum to the best of their interests, with equality to all and disability to none.

Finally let me assure you that the twelve-mile formula offers the only chance for the success of the Conference. This is no adamant position dictated by sheer obstinacy. In essence, it is realism accorded proper realization.

In the past we have resisted this realistic approach, and its is precisely because of this obstinacy against the realities of international life that the 1930 and 1958 Conferences have failed.

Today, the present Conference stands on the brink – with even chances for failure or success. What we need is statesmanship not brinkmanship. And with us lies the choice for a miserable failure or a glorious success. We have chosen to portray the present situation clean cut and crystal clear, because this is exactly where the Conference stands.

For our part, our choice goes for success; and to this end, we pledge, as we have stated at the beginning, our support from the heart of our heart.

SECOND SPEECH

Argument for The Twelve Mile Limit

In our opening address we have outlined in general terms the fundamental principles that should guide our Conference in discharging the highly complex task assigned to us by the United Nations. Since then, a great number of substantial statements were made by different delegations on both questions of the breadth of the territorial sea and the fishing limits. In the meantime, four draft resolutions were introduced by the Soviet Union, Mexico, the United States and Canada. We should, therefore, beg your leave to intervene again in this debate not to speak in abstract, but rather to set out, in a more concrete and definitive manner, the criteria which this Conference should take into consideration in appraising the merits and demerits – the pros and cons of these resolutions.

We do so, because in deciding upon one resolution or the other, the Conference, although inherently vested with unfettered discretion, must act judiciously. Discretion is no synonym of an arbitrary action. Our actions should be reasoned, conditioned and, one would say anchored upon solid foundation. We cannot seek refuge in the plea that we are sovereign States and that it is our sovereign right at random, to express our preference to this resolution or that. This position, while essentially valid – yet behind this choice there must be a sovereign judgment. And for a judgment to be sovereign, it must be based upon well-considered and well-balanced grounds. Of course, in the problems we are facing there are aspects which are debatable and arguable. But utlimately the dictates of reason, logic and common sense must be our supreme judge. It is true that various conflicting national interests do weigh heavily on our minds and it is equally true that the general interests of the international community have their equal impact too, but the Conference, in adopting a resolution, any resolution, cannot, so to speak, fly in the face of the realities of the current life. We cannot and should not ignore the present modern trends in their rush to take their worthy place in the international arena. We should not, indeed we cannot, stop the march of history. We are face

to face before new ideas, new interests and what is more, before new States. The Conference, while keeping in mind the interests of the international community, should not betray national interests, particularly those that belong to the emerging nations. We say the Conference should not betray national interests, for after all, national interests, coordinated, compromised and balanced, are in their amalgam the very interests of the civilized community.

Let us see, therefore, how far the resolutions that stand now before the house, meet the requirements. How far they stand the test of reason, logic and common sense. How far they satisfy the progressive development of international law; and finally how far they can strike a balance between national and international interests.

For as these resolutions may be, yet basically they represent two tendencies, separate and distinct. They stand for two independent schools of thought, underlying two conflicting hypotheses, and aiming at two diametrically opposed solutions. And it is no secret to discover, neither is it a shame to cover, that the Conference falls, at present, into two main divisions – the six milers and the twelve milers – both fighting the battle of the breadth of the territorial sea to the last breadth, and both fishing for the best fishing limits.

Deeply entrenched as we are, each behind his limits, we can almost know beforehand the outcome of this battle. If we continue to cling to our positions, if we remain stuck to our trenches, and lastly, should we hold steadfastly unswervingly to our preferences, it shall be a triumph to none and a defeat to all. Nay, one should say it would be a triumph but to disorder and chaos. Should such and inglorious victory be registered, God forbid, all of us in this august body will have to share in this tragic achievement, each contributing according to his conduct and demeanor.

Thus, to avoid such a result, each and every one has a duty to discharge, and a responsibility to shoulder. Foremost and uppermost, we must be ready with all our will and mind, to relax, to retire, to resign to open-mindedness and receptiveness. To achieve such an objective, we must stand prepared to yield and even to surrender. We cannot go on divided, facing each other, besieged in adamance and captured by intransigence.

Instead of pursuing this voyage endlessly and aimlessly in this stormy weather, we have to seek refuge somewhere – to avoid getting nowhere. We must seek a safety harbour, wherein our minds do not harbour any conflict, fear or suspicion. And to find our way we must give way. But in what direction and on what basis? Who is to yield to the other? Should the six milers or the twelve milers give way? Representing a twelve miler State, we stand

ready to yield. Equally, the six milers must stand ready to yield.

But this process of yielding could not be effected through tossing or lottery. Nor could it be a dictated capitulation or an arbitrary concession. Let us not yield one to the other, but let us yield to normal standards – standards of reason, logic and common sense.

It is with such an approach in mind, with this preparedness to yield to these common standards, that we crave your indulgence to examine not only the six-mile resolutions but the twelve-mile resolutions as well.

We propose to deal first with the United States draft resolution. This selection is motivated by the sole fact that the United States resolution, for all intents and purposes, represents the main arch for a six-mile limitation with our distinguished colleague, Ambassador Dean, as its able architect. The Canadian resolution, although having a different offshoot, stems from the same trunk; hence an anlysis of the United States resolution must of necessity cover a great deal of the position taken by Canada.

In his statement before the Conference on March 17, the Chairman of the United States delegation made a number of assertions of fact and law in support of the United States resolution based upon a six-mile limitation. We shall deal with these assertions one by one.

Taking up the assertions of fact first, we propose to refer to the consequences which, in the calculation of the United States, are to arise in the wake of a twleve-mile extension.

In brief, the leader of the United States delegation has stressed difficulties of visibility, anchorage, navigation and of air flying.

We submit these contentions on behalf of the United States, to put it mildly and respectfully, hold no water. These difficulties, we admit, are there. But they are not characteristic to a twelve-mile limitation, nor are they inherent in such a system. They are there in the six-mile limitation as well. The objections of the United States are applicable to the six-mile with equal validity. The question is only one of degree. But the difficulties or hardships, call them as you please, are there. They have been planted, so to speak, by nature. These difficulties of which the distinguished delegate of the United States made a great capital, are to be suffered anyhow and anywhere. For at any point off the coast, the meteorological changes and the configurations of the coasts, not under man's control, create the same difficulties. The evidence, should evidence be claimed, is to be found in the great network of installations and aids that are established even within the three-mile limitation.

But this is not the crux of the matter. Our answer to the problems that

were raised by the distinguished delegate of the United States is the very same answer - the human answer – the eternal answer which we have confronted the problems of human progress – ever since man started his journey on this planet. The history of human progress is nothing but an ancient and lengthy record of man's victory over these difficulties.

It is common knowledge that in every phase, human progress has brought in its wake many problems, which have at times appeared on the surface to be insuperable. Every stride in the advancement of our race was accompanied by difficulties. And never in our history has man been relieved from new burdens attendant to his inventions. For innovation, of whatever demission and character, must necessarily create maladjustments and injuries. Let us turn from abstraction to illustration.

The industrial revolution, with all its blessings, was not without evils on our social and economic order. Yet we have never advocated that we must arrest our progress in the field of industry. Take mechanized agriculture, with its colossal profits and tremendous output. It has brought in its train serious problems in our urban and rural life. But we have never thought for a moment to fall back on our old plows and oxen.

Another illustration – the modern means of transportation that carried all the delegations to this Conference with ease and comfort, was not achieved without injury to camel carriers and donkey drivers. And still, who would dare in this Conference to say that we shall retain carriage by camels and donkeys?

Thus it is no argument to suggest that because of certain difficulties we should not expand our use of the territorial sea, nor should we extend our exploitation of its resources. On the contrary, having advanced in the field of scientific knowledge, in technology and in the know-how, we should not be precluded from harnessing our coasts up to twelve miles in the best of our interests – to feed our people, to raise their standard of living, and to alleviate conditions of misery, disease and poverty all over the world.

There was a time in primitive history when man, faced with difficulties, was unable to make use of one span of his coasts. These difficulties were not a detterent. He rose above the challenge. He triumphed over those difficulties; and his domain has started over the coast. Had man's endeavours been thwarted by these difficulties, the three milers would not have enjoyed one single iota of their cherished three miles. So let us speak no more of difficulties in this age, when man is scoring his victories day by day.

Nevertheless, these difficulties, financial or technical, to which the distinguished delegate of the United States has alluded, need not be born by all

the States. This is no tax to be levied by hook or crook. The twelve-mile limitation is neither mandatory nor immediate. It is a right – not a duty. It is a discretion not an obligation. A State can decide for its own in accordance with necessarity and capacity. A State can choose to fix the breadth at any point up to twelve miles, and has the right to change from time to time its delimitation within this maximum. A twelve-mile limitation is not obligation, but the right to such a limit must be written into the law of the nations, so that any State can exercise this right, now or at any time to come.

We turn now to the assertions of law advanced by the distinguished delegate of the United States – assertions that were upheld by some delegations.

As a matter of fact, the United States proposal has been described as a departure from the three-mile traditional rule and that, should it fail to get the necessary majority, all the three milers would pull back to their old positions.

We wonder, unless it is a psychological warfare, why should this point be injected at the present session into our deliberations. This is an attempt to put the clock back, far back behind the march of history. The Conference can rightly feel stunned, if we allow ourselves to be dragged back into a retrograde, when we are assumed to undertake the progressive development of international law. In the First Conference, the three-mile limit has been shown to exist no more. We would have preferred never to revert to the point. But unfortunately there was a wild chorus at the present session to attempt the resurrection of a concept that, for long, had been lying in its eternal rest.

We say eternal rest, for in its short span of life, this rule had a feeble and anaemic life, torn with dissent, conflict and controversy. At no time had the rule become universally recognized or even tacitly accepted. Just as an illegitimate child it was elevated to its status by adoption, but frequently it was betrayed by those who chose its adoption. At no stage of international affairs, ever since international law became a science, has there been a genuinely acceptable formula for the delimitation of the territorial sea. A three-mile limitation was one, but not the only one delimitation, neither the maximum limit. At the First Conference, we traced the different systems of the delimitations adopted by different States; but because the point is raised again at the present session, it becomes necessary to elaborate the matter a bit further. We shall confine ourselves to a few illustrations:

Under an ordinance dated June 13, 1691, the King of Denmark had set out his maritime domain to include the area «within his jurisdiction and in sight of his coast» - a delimitation which was calculated to be four or five leagues from the islands off the coast.

In her negotiations with Denmark in September 1691, France proposed through a communication addressed by the French Ministre de la Marine, a two league for the Norwegian coast up to Trondhjem, and a longer extent for Jutland.

In Great Britain, the series of the Hovering Acts started with a custom control zone of two leagues from the shore (1736, 9 Geo. II, c.35). This distance was gradually increased first to four leagues (24 Geo. II, c.47) and later to eight leagues.

In 1864, in the well known case of the Alabama, the French Minister of Foreign Affairs in an interview with the Minister of the United States stated that the «distance to which neutral right... extended... from the coast was unsettled, and that the reason of the old rules which assumed that three miles was the outermost reach of a cannon shot, no longer existed..».

In a number of commercial treaties concluded between France and Spain during the second half of the eighteenth century, a limit of two leagues was adopted. This limit has persisted in Spanish practice to a much later date.

In a Danish-Dutch dispute in 1740 concerning fishing in the coasts of Iceland, the Danish Government asserted claims under their own law based on a four league limit – a view which Denmark continued to maintain for fishery purposes off the Ferreoes and Iceland up to 1836. It is a point of historic interest that Denmark had claimed four leagues, with full knowledge of the three-mile delimitation, as an interpretation of the cannon shot range. In this regard a Dutch diplomatist said at the time: «I do not believe that there is any cannon in the world that can carry even one league, let alone four leagues». If this respectable Dutch diplomatist could, through a miracle of resurrection, come to life again to tell the Conference of the extent of a cannon range in our modern age, surely a great many amongst us will not attempt the resurrection of the three-mile delimitation.

As to the opinions of well known publicists and distinguished jurists, it must be remarked that international jurisprudence on this point is as voluminous and clear as the state practice that we have just outlined.

In 1740, Casaregis, an Italian author of very high authority, declared his acceptance for the three-mile rule based on the cannon shot principle, but at the same time recognizes a 100 mile limit for purposes of criminal and civil jurisdiction.

In 1746, Abreu published a Spanish treatise advocating a maritime sovereignty extending up to a distance of 100 miles in a straight line in the case of States which, like Spain, have ports on the ocean. In the case of nar-

rower seas the limit of jurisdiction, he said, may be fixed at two leagues.

In 1761, Valin, the king's advocate at Rochelle, France, declared in his commentary on the marine laws of France, that «as far as the distance of two leagues, the sea is the dominion of the sovereign of the neighbouring coast». But Valin further advocated that this dominion of the sea could be extended for purposes of jurisdiction and fisheries to a greater distance by particular treaties. While referring to the three-mile cannon shot rule, Valin discussed in detail the various prevalent delimitations based on 100 miles, 60 miles, two days' journey, and the limit of the view.

In 1783, Emerigon in his «*Traité des Assurances*» and Merlin, in his article «Mer» of 1777, two distinguished French writers on maritime law, have advocated a limitation of two leagues.

In 1789, De Martens, in his «*Précis du Droit des Gens*», referred to the three-mile cannon shot rule as the accepted minimum distance, but the treaties, he said, have in certain cases extended the limit as far as three leagues.

In 1894, at is meeting in Paris, the Institut de Droit International resolved that territorial waters should be extended to six marime miles, and that in time of war a neutral state might fix a neutral zone beyond the six miles as far as the range of cannon shot, for all purposes of neutrality.

Such an extension, it must be observed in passing, has not been advocated only for a neutrality zone, but also by reason of the advancement of weapons. Field, in his international code, declared that «inasmuch as a cannon shot can now be sent more than two leagues, it seems desirable to extend the territorial limits accordingly». Perels in his well known work on international law says: «The extension (of the territorial sea) depends on the range of cannon shot at the particular period. It is, however, at such period for all coasts».

We can go on almost endlessly to put before the Conference a heap of legal material in this field. But this much is sufficient to reveal that ever since this concept of the territorial sea has emerged, there has never been a generally accepted rule of international law delimiting its breadth. There was a range of diversity of state practice, of treaty precedent, and of jurists' wrintings – and these are the main sources of the law of the nations. No doubt, the three-mile system was there. It was often referred to as a minimum. But there were other limitations of 60 miles, of 100 miles, of four leagues, of three leagues and of two leagues. Of significance to note is that these various limitations were frequently ignored by the very same exponents of those delimitations. It was a state of no law - the non-existence of a rule of international law. So chaotic was the situation that Azuni, a great Italian

author, struck with this divergence, proposed a conference for the maritime powers to conclude a treaty on the subject.

We have restated the views of this distinguished Italian jurist with the full knowledge that our previous references to Anzilotti, another eminent Italian jurist, has provoked the sensitivities of the distinguished representative of Italy. In our opening statement we referred to the views of Anzilotti, a treasure of enlightenment not only for Italy but for the world as a whole. Those views are to be found in Oppenheim on *International Law*, Volume I, eighth edition, page 490, Footnote 2, wherein it is stated that «Anzilotti considers that no rule of international law has been developed to take the place of the abandoned shore batteries rule». And this is what we have recited in our first statement word for word.

Hence, the charge of lack of *fidelité*, dashed by the distinguished delegate of Italy, lacks *fidelité*. This explanation we owe to our distinguished colleague of Italy, although his reference to our statement was a marked departure from the rules of behavior and courtesy so universally recognized in international conferences.

Be that as it may, this proposal to hold a conference by Azuni, the great Italian jurist, was made in the year 1795, and we come in 1960, almost 165 years later, to claim here in the Conference that the three-mile limitation is a rule of law now in existence.

In support of such a claim, the Chairman of the United Kingdom delegation, in his statement before the Conference, has stressed the point from another angle. In his opinion, the holding of this Conference would be meaningless if international law already recognized a twelve-mile limitation. He went further to say «we should not be here if that were the case». We do not enter into a legal argument with the Chairman of the United Kingdom delegation and take advantage of his being a layman in the field of law. His deputy, Sir Gerald Fitzmaurice, the great jurist of the United Kingdom, is the right man with whom one can argue on this matter. Yet the leader of the United Kingdom delegation has employed an enticing argument when he stated that we should not be here if a twelve-mile limitation was a rule of law». No doubt, this is a clever argument, but we fear not exceedingly clever. For in the same tenor we can say «had the three-mile limit been a recognized law we should not be here». This is how the British contention is being defeated by the British argument!

In connection with the three-mile limit there is also another aspect underlying the United States resolution which cannot be left unexamined. In his statement to the Conference, our distinguished colleague of the United

States has declared that «the United States adheres, has always adhered to this limit (the three-mile limit) and for this reason shall continue to do so if there is no agreement reached here».

No doubt this is a very serious declaration coming from a leading power as the United States, and pronounced by an able and outstanding personality as the Chairman of the delegation of the United States. Should it be well substantiated, such a statement would, no doubt, carry a great weight in support of the resolution of the United States. Surely it must influence our thinking and our voting, if we are to think and vote guided by facts and facts only. One would go even further to say that, should the assertions of our colleague of the United States prove to be facts and nothing but facts, we would humbly submit that the resolution of the United States deserves to be carried not by a majority but an unanimity. We, as a twelve miler would, then, be prepared to divorce our position and advocate the adoption of the United States resolution or its twin, the Canadian resolution.

So, let us pause for a moment to examine the facts, not as we see them, but as viewed by the United States itself. We shall begin from the very beginning – with the emergence of the United States as a sovereign State, setting the facts in their chronological order.

In the Treaty of Peace of September 3, 1783, concluded betwen the United Kingdom and the United States, which acknowledged the independance of the United States, the boundaries of the United States were described as «comprehending all islands within twenty leagues of any part of the shores of the United States».

In connection with an act of hostility committed by a French privateer near Charleston, S.C., at the close of the eighteenth century, the President of the United States asserted that «we ought to assume as a principle, that the neutrality of our territory should extend to the Gulf stream, within which as a national boundary we ought not to suffer any hostility».

In the case of Church versus Hubbart of 1804, the Supreme Court of the United States declared that a State may extend its protecting measures in the territorial sea as far as the circumstances reasonably make it necessary.

In a dispatch, dated May 17, 1806, to the United States plenipotentiaries in London, the Secretary of State, referring to the neutrality zone, declared as follows: «In defending this distance, it would not be perhaps unreasonable considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well defined path of the Gulf stream, to expect an immunity for the space between that limit and the American shore. But at least it may be insisted that the extent of the

neutral immunity should correspond with the claims (of our leagues) maintained by Great Britain around her territory..».

In 1807, the President of the United States was authorized to cause a survey to be taken of «the coasts of the United States within twenty leagues – 60 nautical miles».

Sections 2760, 2867 and 3067 of the Revised United States Statues fix the limit of jurisdiction of customs offices at twelve nautical miles.

In a memorandum dated December 16, 1862, addressed to Spain, the Secretary of State of the United States said as follows: «This limit (the three-mile limit) was early proposed by publicists of all maritime nations – while it is not now insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves..». The Secretary of State went on to remark that «if any state has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power and constitutes an exception..».

One year later, on August 10, 1863, referring again to the same matter in a communication addressed to Spain, the Secretary of State states as follows: «(Spain) insists that this principle (the three mile) has its exceptions and that some States, and among them the United States, habitually claim and exercise a wider jurisdiction; while this fact is cheerfully admitted, it does not seem... conclusive in favour of the claim of Spain». We invite your attention to this phrase wherein the Secretary of State cheerfully admits that the United States habitually claims and exercises a wider limit.

In a note to the British Chargé dated September 16, 1864, the Secretary of the State of the United States, referring to the Spanish argument «that the modern improvement in gunnery renders the ancient limit of a marine league inadequate», stated as follows: «The United States, adhering in war, no less than when they were in the enjoyment of peace, to their traditional liberality towards neutral rights, are not unwilling to come to an understanding upon the novel question which has thus been raised in consequence of the improvement of gunnery».

In 1874, in the course of negotiations between the United States and Spain, Germany, Austria, Italy, Holland and Belgium for the regulations of fisheries in the Sound, it was declared that if the coastal sea was to be limited by international conventions, four miles must be the minimum breadth.

In the treaty between the United States and Mexico dated February 2, 1848, it was declared that in the Gulf of Mexico the boundary line between the two countries shall be nine miles from the coast.

In a statement dated 15th February 1896, the United States declared «this government would not be indisposed to reach an accord by which the territorial jurisdiction of a State bounded by the coast should henceforth extend six nautical miles».

Chancellor Kent asserted that, considering the long line of American coasts, the United States might claim control of the waters included within lines stretching from Cape Ann to Cape Cod, from Nantucket to Montauk Point and to the capes of Delaware, and from the South Cape of Florida to the Mississippi; thus embracing a great body of water which can rightly be termed, not the territorial sea of the United States, but its territorial ocean.

In 1915, Secretary of State, Mr. Lansing, in dealing with the question of the territorial waters, took note that «there are certain reasons brought forward from time to time in the discussion of this question and advanced by writers on international law, why the maritime nations might deem the way clear to extend... this limit of three miles in view of the great improvement in gunnery and of the extended distance to which the rights of nations could be defended?».

These are only a few excerpts from the archives of the United States on this matter. They reveal without any shred of doubt that at best the three-mile limit is only one formula of many – many measurements of the breadth of the territorial sea. Moreover, they go to show that on the strength of United States official documents there is not at present, and there has never been, any fixed breadth of the territorial sea. The events that we have quoted have shown that the territorial sea was drowned in an ocean of diversity, ambiguity and non-conformity.

We do realize, however, that the official pronouncements of the United States are not binding on the Conference. But they do bind the United States and should gear its resolution. And under the rules of consistency and estoppel, neither the United States resolution can be entertained in this Conference.

It seems, however, that with his vast knowledge of the conflicting positions of the United States on this matter, Ambassador Dean has chosen to single out one, and only one, era as a basis for his stand on the three-mile delimitation. In introducing his resolution to the Conference, our distinguished colleague of the United States has invited our attention to the fact that it was Thomas Jefferson, who in 1791 had fixed a three-mile limitation. Thus, it is only fair that we judge this position on the very ground he has chosen. Let us see how far Thomas Jefferson can be of help to the United States resolution.

Tiny as the point may be, we venture to correct, that Tomas Jefferson took no position on the matter in 1791. Our distinguished colleague of Uni-

ted States would be good enough to correct by correction, should he be pleased to do so. It was on November 8, 1793, when Mr. Jefferson had taken for the first time a position on the problem. And because this has been the selected source of the United States, we shall recite the statement of Jefferson on the matter. We must place it before the Conference in tote. Addressing himself to the British and French Ministers, Thomas Jefferson stated as follows:

«The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles; and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever».

The president, after reserving the ultimate extent for future deliberations, sets out «for the present» the distance of «one sea league or three geographical miles from the sea shores».

Thus the statement of Thomas Jefferson has many things to say to this Conference. It is not only an instrument which refers to a three-mile limit. It is a document that reveals the international status of the territorial sea as far back as the eighteenth century. In short, the statement of Thomas Jefferson boils down to the following summation:

(1) That the final delimitation for the distance should be finally decided in friendly conferences.

(2) That different opinions and claims do exist on the subject ranging between twenty miles as the maximum distance and one sea league as the minimum, and that respectable assent among nations has been given in regard to these distances.

(3) That some intermediate distances have been insisted on and that a distance of three sea leagues has some authority in its favour.

(4) That provisionally, pending final agreement in friendly conferences, the United States has chosen a limit of three miles.

It therefore becomes abundantly obvious that the statement of Thomas Jefferson does in fact demolish the case of the United States as presented in the Conference. We are grateful to our distinguished colleague of the United States for having invited our attention to that admirable statement because it simply supports the position taken by the twelve milers.

Thomas Jefferson seems, as though to live, to argue, to advocate with us in this Conference pleading for all resolutions based on twelve miles. The position he explained in 1791 – is the same position that prevails in the Conference now in 1960. Thomas Jefferson spoke of a friendly conference. We are now in a Conference – friendly we wish it to be. He spoke of the law being unsettled and that is why we met in the past at the Hague and why we meet at present in Geneva – and perhaps why we might meet in the future. Thomas Jefferson enumerated the extent of territorial sea to be then three miles, nine miles and twenty miles – and resolutions for a twelve-mile maximum is a modest incarnation of his calculation. We should not take as an irony that Thomas Jefferson is co-sponsor of the resolution tabled by the Soviet Union. All what remains for us, including the United States, is to abide by the pronouncements of Thomas Jefferson, and all the principles for which he stood as one of the distinguished patriarchs of the United States.

One major aspect, however, should not escape our attention. It is one of an organic and constitutional character, and we beg your indulgence to give it careful consideration.

We are not on our own. This is a United Nations Conference, constituted by a United Nations resolution (1105 XI). We were not left to our discretion, wise and judicious as it may be, but we were provided with the necessary directives. In paragraph 2 of the operative part of its resolution, the General Assembly decided that «... an international conference of plenipotentiaries should be convoked to examine the law of the sea, taking account not only of the legal but also of the technical, economic and political aspects of the problem..».

Thus a resolution, any resolution introduced before this Conference, must take into account not only the legal but *inter alia* the economic and political aspects of the problem. The legal aspects have been shown on the side of the twelve milers' resolutions. What about the economic and political aspects? A resolution by this Conference on the matter would be *ultra vires*

the United Nations resolution, if it does not take full account of the economic and political considerations. Let us see how far do the present resolutions satisfy and meet these criteria.

Of all the delegations seated here in this Conference, Mr. Hare, the leader of the United Kingdom delegation, was head and shoulders above the rest of us in treating these matters with frankness and clarity. Leaving the legal matters to his deputy, Sir Gerald, the distinguished head of the United Kingdom delegation has elaborated in detail the political, the economic and the security aspects of the matter. Let us examine his contention before we dash a judgment.

Starting with the political we must say out-right that whatever delimitation we might advocate, we humbly submit, that such a delimitation is not and never was the making of nations. At its advent and for centuries later, such delimination was nothing more than the will of one or two emperors, with one or two little monarchs. At that time there was no family of nations. The sovereigns of the day who are described in textbooks as the principal maritime powers, have delineated their coasts and our coasts. With a rough calculation, our coasts mean at present the coasts of no less than seventy States, now fully independent and fully sovereign.

As an illustration take Africa and Asia, the most ancient continents of the world, which contain the greatest concentration of peoples, and whose shores are washed by all oceans and seas – who has delineated their coasts? Not a single African or a single Asian. When a delimitation was established for these coasts, Africa and Asia were nothing more than terms of geography. At that time there was no African or Asian statehood, and indeed no African or Asian personality. Fortunately for humanity, the situation has changed. In the Conference of the Hague, there were 42 States represented. At this Conference, counting only the States we recognize, the number has risen to 87, although there are a handful of other States not participating in the Conference, all making up the totality of the States of the world. But to become part of the law of nations, a rule of law must be made by the nations. Agreement of the maritime powers is not law, although this agreement has always been one of disagreement.

All this goes to explain why we, the new nations in Asia, Africa, Latin America and in Europe, are striving to set the limits of our territorial sea at twelve miles. Now that we have achieved our freedom, we simply reject the delimitations that were made, on our behalf, in our absence and when our land and sea had been subject to foreign domination. We have emancipated our land, and the time has come to emancipate our sea.

With regard to the question of security, the distinguished representative of the United Kingdom, in an attempt to support the United States resolution, made assertions of a serious character. He claimed that security based on the extension of the territorial sea is a misconception, that in the modern conditions of warfare a wide belt of waters is not a suit of armour and lastly that a wider limit is costly and difficult to control.

These assertions are neither valid nor relevant. At least they are not called for. Each State is the best to judge how its own interests can be served and how best our security can be secured. This is a Conference of States, fully sovereign and fully independent. We are under the mandate of none, and no State represented in the Conference is under a system of trusteeship. Those who were in the past administering or mandatory powers, should be reminded that these systems have been liquidated, and liquidated forever. That past is past, and this language of tutelage should not be spoken in this Conference, and never to be spoken anymore.

Yet even as innocent advice, on the part of the United Kingdom, such words are hardly consistent with deeds. It is no military secret that the United Kingdom has always considered her defence to be not within her territory, whether land or sea, but in Europe, in Africa and in Asia. Is it too much for the small states to seek their security not far and wide, but within their coastal sea?

In the last Cyprus talks held in London, the Conference broke down on one question, the area of British military base, how wide should it be? And our distinguished delegate of the United Kingdom claims from this rostrum that a wider territorial sea is not a suit of armour.

We only plead that before we make such pronouncements, let us not be forgetful of our deeds, let us be consistent and thoughtful, and what is more, let us preach what we practice.

It must be noted, however, that national security is not the only merit in a wider territorial sea – and to this point we invite the attention of the Conference. A wider territorial sea is a wider zone of international security and safety. The territorial sea is a belt of peace in time of war. The reason is obvious. Belligerent States cannot conduct any military operations within the territorial seas of other states – neither the battleships on the surface, the submarine beneath, nor the jet fighters above. In time of war, the high seas are the battlefield of military operations. Thus a twelve-mile limitation expands the area of peace and contracts the area of war, while a six-mile limitation expands the area of war and contracts the area of peace. Is this not sufficient to support a twelve-mile resolution and defeat a six-mile resolution,

if we really stand for peace, against war and against the untold misery of war?

We turn last to deal the economic aspects, namely merchant shipping and fishing.

With regard to shipping, the distinguished representative of the United Kingdom spoke at length on the heavy loss, sacrifice and damage that would accrue from a twelve-mile limitation. Even a six-miles limit, he said, would involve a great sacrifice to the United Kingdom.

This is not a novel argument. In the Hague Conference, just 30 years ago, Sir Maurice Gwyer, the British delegate, pointed out that the three-mile delimitation is being supported by maritime nations possessing eighty per cent of the world's effective tonnage. We do not desire to deal at length with this point, for a number of colleagues have successfully elaborated the matter. But we cannot resist the feeling that such terms of loss, damage and sacrifice, as employed by the United Kingdom, convey the assumption that the United Kingdom and other States with similar feelings, are the possessors and owners of the high seas. You can only complain of a sacrifice when you forego a thing you own and possess. With this British pleading, in this tone of sacrifice, it was like reading Sir John Boroughs, in his book on international law, entitled: «*The Sovereignty of British Seas, Proved By Records, History and the Municipal Laws of this Kingdom*». But now the British seas are gone, and their records and history are gone. The high seas, now, are for all and it is for all to define the high seas.

Yet, to those who complain of sacrifice, we seriously address the question, have the high seas ever been defined - delineated? We speak frequently and loudly of the high seas, of the freedom of navigation and of other similar slogans – but is there a generally acceptable delimitation of the high seas? We simply know them to be high – that is away from the coastal sea. But where the high sea begins and where the territorial sea ends – nobody knows. There is no settled law. There is no fixed delimitation. Had there been a settled law, and a fixed delimitation, to borrow the words of the distinguished leader of the United Kingdom delegation, we should not be here.

On the question of fishing, the distinguished Chairman of the United Kingdom as a Minister of Agriculture, Fisheries and Food, had many important things to say to us with regard to food and fisheries. In support of the United States resolution, he stated *inter alia* that distant-water British fishermen supply the British with the most of the fish they eat, that they bring home more than half the total catch of fish, that large numbers of British fishermen and their families are dependent on fishing industry, and

that the loss of that fish would be a cruel blow to the British economy. This is the British case. It is one of fishing for fishing.

These facts could be admitted. But are they valid arguments against the coastal States? In the course of the dismemberment of the British Empire, Great Britain, no doubt, had suffered immensely. But these losses were no argument against the independence of its components. The members of the British Empire became independent, and Great Britain has remarkably adapted herself to the new situation.

In the same manner, Great Britain as a fishing State will have to adjust herself to this situation, namely the emergence of the coastal States asserting exclusive fishing rights within their coastal waters. Of course, with good will, there is every room for a free cooperation between the fishing and the coastal States. The coastal States possess the fish within their territorial sea, and the fishing states have the experience and the equipment. And this is a new avenue of international cooperation based upon free agreement. Other national resources, in different parts of the world, are being exploited in this way. And surely one could think of many other ways – within the United Nations or without.

But one thing must be certain – there should be no more fishing fleets within the waters of the coastal States, without the explicit agreement of the coastal States. The distinguished Chairman of the United Kingdom has said that distant water fishing has nothing to do with imperialism and colonialism. We never have wished in this Conference to refer to this matter in this vein. We cannot agree with the distinguished representative of the United Kingdom. We must declare in the most categorical terms that this sort of distant-water fishing is mostly a relic of imperialism and colonialism, and as such should continue no more. We do not want to deal at length with the point. Suffice it to say that if we were to trace back this distant-water fishing to its history, we would find its origin mostly to be rooted with the Empire system – with foreign domination. The picture is crystal clear. Because our countries were dominated, our coasts became dominated, and our fiheries became dominated too. Should any evidence be required, one fact outstanding here in the Conference can be recalled. The Chairman of the United Kingdom delegation is a Minister of Fisheries. Most of us do not have ministers of fisheries, simply because we are deprived of our fisheries. To have ministers for fisheries, we must regain our fisheries, and this is what we are striving to do.

Yet let no one be under any misconception. It is not in a spirit of ill-feeling, or selfishness that we refer to our fisheries. The coastal peoples, particularly those of under-developed countries do not breathe vengeance. They want to eat. They are suffering in want. It is only human that they must eat

their fish – the fish of their coastal waters. But how do the coastal people eat their fish? Not in their hands, their fish is caught, it is transported overseas, it is canned, and finally it is retransported to their market. All these operations are done by others. What a long and costly process – devoid of equity. You catch our fish from coasts, you transport it in your fleets, you can it in your factories, you carry it again in your shipping fleet, to be exported to our countries – and the only thing we have to do is to pay the bill – and how heavy is the bill!

But why should not the coastal peoples catch their own fish, eat it, preserve it and make of it an industry – a national income?

The distinguished delegate of the United Kingdom has condemned the Canadian resolution for its injustice in depriving the fishing States of their so-called rights. Before we speak of injustice, let us do justice.

Is it an act of justice to meet the demands of fishermen and their families, whose lives, no doubt, are very dear to us, and ignore the outcry of millions of peoples – of whole peoples all around the world – in their quest for economic development, in their struggle for social betterment and, finally in their hunger for food – food which only lies within a few miles of their coasts.

In the final analysis, it is this human factor, among others, which ultimately influences our course of action. A resolution for a twelve-mile territorial sea, far more than any other resolution, is not only consistent with state practice, with state security, with political and psychological considerations, but with the needs and interests of humanity, that should prevail, high and supreme, transcending all other considerations.

In conclusion, let us declare with all the emphasis at our command, that our position for a twelve-mile limitation, is not motivated by any desire to inflict injury or hardship upon anyone. In all earnestness our position is based, first and last, upon vital interests of paramount importance – interests that fall within the ambit of international demands as recognized under the law of nations. From this rostrum, a number of delegations have explained the interests of their peoples – relating their origin to geography or history. For our part, we of the Arab States, can legitimately trace back our interests to both – geography and history. Ancient as they are, our coasts are enormous and diversified. In no metaphor, they embrace the heart of world communications. Continuous and uninterrupted, our shores start from the Atlantic on the west and extend through Gibraltar, into the Southern and Eastern Mediterranean, marking the coasts of Morocco, Algeria, Tunisa, Libya, the United Arab Republic, Lebanon as well as the entirety of

the coasts of Palestine – jammed with the ports of the holy land, Acre, Haifa, Jaffa and Gaza. From the Suez port, Arab coasts resume their stream into the Red Sea, leaving the Gulf of Aqaba with its closed waters under the exclusive jurisdiction of Saudi Arabia, United Arab Republic and Jordan. From the Red Sea, Arab coasts continue further to extend into the Arab Sea, through Bab Al Mandab, and touching the Indian Ocean, they run right through the Gulf of Oman up to the Persian Gulf.

Thus our stake in the Conference is immeasurably colossal. Discarding military considerations, Arab interests in their aggregate are not less vital than those of any of the great powers represented in the Conference.

Nevertheles, our national interests are not our sole source of inspiration. We are not unmindful of the interests of the civilized community. But it is our sincere conviction that our position is supported by law and does meet the needs of the international community. This by itself is sufficient to explain why we stand where we stand.

THIRD SPEECH

Fishing Zone should Equal Territorial Waters

It is not our desire to speak on the eighteen-power resolution sponsored by Mexico, Venezuela and 16 Afro-Asian States. In their well-balanced statements, the distinguished representatives of Mexico, Ghana and Indonesia have most ably introduced our resolution in a manner that merits statisfaction and admiration.

We shall therefore confine our remarks to the draft resolution co-sponsored by Canada and the United States.

We have listened with a great deal of interest to the elucidations made by our highly esteemed colleagues of the United States and Canada in introducing their resolution. We have found the resolution to represent a merger of certain matters contained in their previous resolutions and the elimination of some other matters. Much as we are gratified by the successful efforts of the United States and Canada to close their ranks, we should not loose sight of the fact that this process of merger and elimination does not touch the root of their original positions. It is not a new approach, rather it is a rapprochement within the limits of the same approach. It is a gentle trimming, so to speak, of the tree, but one and the same.

It must be admitted, however, that the statements of Ambassadors Dean and Drew of the United States and Canada, have provided additional testimony of their charm, ability and dignity. At the present Conference, as in 1958, their interventions and behaviour have commanded our respect and admiration. No doubt, they will stand in the annals of our Conference as two outstanding figures of hight record. Surely Ambassadors Dean and Drew have shown to be perfect in every respect. There is, however, one thing wrong about them. They betray one fault which we regret. They are six milers. And for this fault, we fear, there is no remedy. Together with the distinguished leader of the United Kingdom, they shall continue adamant with their six miles. Allow us, therefore, to examine this

fault as reflected in the resolution of the United States and Canada.

Taking up the statement of Ambassador Dean first, we should like to remark that in substantiating his resolution, our highly esteemed colleague of the United States did not resort to any of the arguments that were tossed around in the Conference. For instance, he did not refer to the legal, political, economic or even security considerations which are inextrically linked with the problem. This course on the part of the distinguished representative of the United States is one that discloses wisdom, penetration and tact, for which he must be congratulated. As a shrewd lawyer, Ambassador Dean has discovered, after Thomas Jefferson's quotations, that it is not intelligent advocacy to resort to defective arguments. Moreover, in the course of the debate, he must have found that the weight of legal, economic and political considerations is overwhelming on the side of a twelve-mile rather than a six mile delimitation. Hence, it was sound strategy and tactics on the part of Ambassador Dean to change the terrain of the battle, to throw away the conventional weapons and then to advance on a new ground with new weapons.

This new approach of the distinguished delegate of the United States is to be found in his calculation of the relative sea area with a six-mile and that of a twelve-mile delimitation.

In a nutshell, Ambassador Dean contends that it is a popular conception, or a misconception as he preferred, that a six-mile territorial sea is double that of one of three miles. He pointed out certain illustrations which go to show that the doubling of the breadth could in fact triple the area of the territorial sea. Ambassador Dean estimated that a six-mile territorial sea may amount to a reduction of the high seas by a zone not just three additional miles in breadth, but one averaging four, five or six miles.

Thus the United States complaint, if we may be allowed to use this word, rests on the great reduction of the area of the high sea that results from the extension of the territorial sea.

Without going into the details, it can be generally conceded that the calculations of Ambassador Dean are fairly correct. Also, it can be admitted as he asserted, that in certain cases the area of the territorial water may increase in geometrical proportions though the breadth of the territorial sea is increased by arithmetic proportion.

No doubt, this argument as a whole is a novelty, never brought before. The point did not come to our minds as small nations. Probably the reason is that we have not developed any domination, or feeling of domination, over the high seas. As our distinguished colleague of the United Kingdom has done in his two statements to the Conference, one is led to calculate

losses and reductions in respect of a property when one owns that property, even subconsciously. But when the property is held in common, estimations of gain and losses do not arise. The gain and loss will be for all, and by all.

Be that as it may, one should not be surprised that such a plea of the reduction of the high seas should come out from the delegation of the Unites States. Looking at the list of the United States delegation embracing such a wide representation of human knowledge, we can readily understand the nicety and complexity of the United States contention. But with all the interest they provoke in our minds, the calculations of Ambassador Dean have no bearing on the question. We should say they have a bearing but only to support a twelve-mile position.

We do not propose to deal with the ancient dispute over which determines which – are the high seas determined by the territorial sea or vice-versa? Nor would we raise the question, which should shrink in favour of the other. As chosen by our colleague of the United States, the matter boils down to the relative areas of the high seas and the territorial seas. We need therefore know the respective areas of water and land in this globe of ours.

On this subject we can speak with little authority. However, we can safely say that in our planet wherein we live, the water area is immensely greater than the land area. In «*Les Phénomènes Géologiques*», Vol. I., Professor Hang stated that the water area represents 73 per cent while the land area stands only at 27 per cent. What a great disproportion that should be brought to permissible proportion?

Thus, from the beginning man was surrounded with vast oceans, only to live on small islands, later called continents. Hence, his environment was nothing more than a fraction of the globe intercepted with deserts and mountains and girdled by oceans of salinity. The disproportion was thus great, entailing great hardship and want, and man's genius had to overcome these sufferings. Man's progress, no doubt, since immemorial time was a struggle to bring coastal water under his domain, and to harness the high sea to navigation, formerly by sails and steam, and now by atomic power. That was the story of man's struggle not for existence but for better existence. To put it in legal phraseology, it had been a struggle to assimilate the sea into the status of land. It is a history of the extension of the land domain into the sea. It is a genius endeavour to destroy disproportion, to even the uneven, or, at least, to bring it to a possible equilibrium.

Therefore, there should be no complaint to make. This is the march of man on the sea, and this march should neither be stopped nor retarded. Our forefathers started their territorial sea within one single fathom, to

avoid being drowned. That marked man's first conquest of the sea. Later, with the march continuing, his coastal sea was extended further and further. Thus the reduction of the high seas upon which the representative of the United States based his case, has been an historic process that responded to the necessities of life. This reduction has become part of our progress and advancement. It has been going on before the three-mile limitation and after. The level of reduction was rising with three, six, nine and with twelve miles delimitation and the graph cannot be bent down. This is the verdict of human evolution, or to put it in the context of our atomic age, the verdict of our revolutionary evolution. And after all, this reduction of which the distinguished representative of the United States is nothing more than a little wave in our great oceans and seas.

Let us now turn to the statement of our distinguished colleague of Canada.

Ambassador Drew has dealt at length with the reasons that brought about this combined draft resolution. We shall not examine the motives for the merger. We take these to be honorable, although the merger would have been ideal had it been applied to the twelve miles. That would have been a real success.

But, because we are not sure how this United States-Canadian compromise was affected, we are unable to conceive how we can be included in the deal. We know there was a tug of war between Canada and the United States on this question. All of a sudden, the game was declared ended between Ambassadors, Dean and Drew – and we did not know who drew who. If we know, or if we can know, probably our chances to go into the deal would be more promising. This, perhaps, explains to the leader of the United Kingdom delegation why we have not been in the compromise, and why we cannot support the resolution.

We cannot support the resolution, because by its very terms, we are left with no choice but to fight it right to the end, and right to the last letter.

We say to the last letter, not out of oratory but rather in fairness to accuracy. The «S» as the last letter in last word «paragraphs» of the resolution is a non-clerical mistake which must necessarily confuse the substance. True, this is a tiny little point, but it may be an exciting appetizer to discover the major defects. So, what are the major defects?

To begin with, let us say a word on the fishing zone, in paragraph 2 of the resolution as explained by the distinguished representative of Canada. We should say outright that although we admit a state's right of exclusive

fishing within a twelve-mile delimitation, we cannot admit the existence of a fishing zone as such. Fishing is a right not a zone. It is not a legal norm, institution or concept. It is a right exercised under the law of the sea, the law of nature, or call it what you like. But, under no international jurisprudence, state practice or judicial precedent, there exists such a thing as a twelve-mile fishing zone. We do not want to challenge our distinguished colleague of Canada. We most respectfully beg of him to point out one single illustration of a defined coastal fishing zone ever known in the history of fishing, not since international law became a science but even since the early days of the first fisherman of our grandfathers.

The absolute truth is that fishing as a right has always been one in a bundle of rights enjoyed in the territorial sea. We are not speaking of fishing in the ocean. What we should like to stress is that coastal fishing, all along the fishing generations, was exercised within the territorial sea. When the breadth of the territorial sea was three miles, exclusive fishing was within three miles. When the coastal sea was extended to six, nine, or twelve miles, exclusive fishing was extendel accordingly. And exclusive fishing within twelve miles must therefore be taken as evidence of a twelve-mile delimitation of the territorial sea.

We do not propose to elaborate this point at great length. All we want to say is that exclusive fishing in the coastal sea can only be conceived in the concept of the territorial sea, and within its limits. In fact, the very concept of the territorial sea is rationalized *inter alia* by fishing – and definitely not as the first factor. Professor Columbus, in his book on international law of the sea, enumerated the reasons to justify the extension of State sovereignty over the sea to be (1) security (2) commercial, fiscal and political interests and (3) the exclusive enjoyment of the products of the sea.

Perels, in his work on the admiralty, in dealing with the same point states the reasons to be (1) security (2) the development of the political, commercial and fiscal interests (3) to sustain the existence of the population.

Oppenheim, in his well known work on international law, recognizes to the State within its maritime belt the right to exclusive fisheries.

In the case of Louisiana versus Mississippi of 1906, Chief Justice Fuller of the United States defined the territorial sea to be as «that part of the sea, which, in contradiction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls or amber or other products of the sea.

This is sufficient to show beyond any shred of doubt that exclusive

coastal fishing has always been linked with the breadth of the territorial sea. Exclusive coastal fishing beyond the territorial sea is inconceivable, simply because this right of exclusiveness must have a basis. It cannot be set up in vacuum. Law, like nature, abhors vacuum. This fishing zone, as newly tailored, is not workable, if workable is undefendable. Yet even the most skillful tailor cannot make a jacket with three arms unless the client has a third arm. Of course, he can make it, but it is not dressable.

It may, however, be argued, that although the concept is new, we in the Conference can legislate whatever we deem convenient. On this count, the distinguished delegate of the United Kingdom, for instance, may be happy to quote the British maxim which says that a parliament can do everything except make man a woman or vice-versa.

But gentlemen, it is the quality not the capacity which finally determines the merit of our legislation.

It should be noted, however, that the significant point in the matter is the unavoidable impact of article 2 of the resolution on article 1. In a word, it is the direct effect of the width of the fishing zone on the width of the territorial sea. Having accepted a breadth of twelve miles for a fishing zone, the United States and Canada by reason of logic, reason and common sense, are bound, we repeat are bound, to accept a twelve-mile delimitation of the territorial sea. Let us state our reasons.

Our distinguished colleagues of Canada and the U.S.A. have explained to us the wisdom of October 31, 1960, the date from which the ten years stipulated in paragraph 3 are to commence. As Ambassador Dean put it, this date is not of any mysterious significance. We have greatly admired this phraseology and it is precisely because of this admiration that we wondered about the wisdom of the figure twelve miles for the width of the fishing zone. Can the distinguished delegate of the United States tell us that the figure twelve is not a mystery. Why has the fishing zone been made twelve and not ten, or fourteen, or a hundred, if you please?

We have carried out an extensive research in all Anglo-American sources on international law to find any precedent for twelve miles as a fishing limit. It was in vain. Naturally, we did not go into the communist literature; first, because we do not know it, and secondly because some delegations, including our friend of the United Kingdom, would not accept it. Anyhow, we have found none – not a single instance where the twelve miles were considered as a maximum limit for exclusive coastal fishing. And here again, we do not challenge the distinguished representative of the United States. We simply beg of him to point out one single precedent to show

the basis of a twelve-mile fishing delimitation. Even when we meet in the Third Conference, the question will stand unanswered, simply because it has no answer.

Nonetheless, the matter is not an insoluble riddle and we should like to submit the explanation. The figure twelve miles for exclusive fishing rights is the same figure twelve for the delimitation of the territorial sea – the former arising from the latter. It is because a twelve-mile delimitation is supported by state practice, that twelve miles fishing rights become legitimate and exercisable. Thus by accepting a twelve-mile limitation for fishing, the United States and Canada are assumed even against their declared will to have accepted the twelve-mile limitation for the territorial sea. For the former stems from the latter. Exclusive fishing is one *raison d'être* for the territorial sea. If you accept the «raison» you have to accept the «être» and to the same extent. Otherwise the «être» would be without «reason».

But to remedy this incompatibility between paragraph 1 and paragraph 2 in the draft resolution, our distinguished colleague of Canada has contended that in most of the earlier cases where the measurement of the territorial sea was extended to twelve miles, it was done for the sole purpose of asserting control over fishing. With this contention we cannot disagree more. We respectfully submit to our colleague of Canada that this assertion is not valid, if our assertions are to be supported by facts and facts only. So let us examine the facts.

Under numerous Acts of the Scottish Parliament, exclusive fishing rights were proclaimed far beyond twelve miles. There is a regrettable case on record where the Scots had killed a number of Hollanders who fished within twenty-eight miles from the shore. Our colleagues from Holland need not look around for, we believe, we have no pure Scots in the Conference.

The Scotch Professor Welwood, well known antagonist of Grotius, has quoted an agreement between the Scotch and the Dutch whereby the latter were not to fish within eighty miles of the coast of Scotland.

In a dispute between the Dutch and the English in the Seventeenth Century, with Sweden as a mediator, England demanded twelve thousand pounds per annum as a cost of fishing, far beyond the territorial sea. The Swedish mediator suggested that the Dutch pay a smaller yearly payment for «the privilege of drying their nets on shore», but this was refused by the British delegate. We trust, our distinguished colleague of the United Kingdom will not count this privilege as one of British sacrifices.

Under the treaty of 1970 between Great Britain and Spain it was stipulated that «British subjects shall not carry on their fishery within the space

of 30 nautical miles from any part of the coasts already occupied by Spain».

On the 9th March 1811, a British Order in Council was issued providing for the confiscation of vessels hovering within or near the limits of the banks of pearl oysters at Ceylon which extended from six to twenty-one miles from the coast. In this case, we hope the distinguished representative of the United Kingdom will not claim any loss, for Ceylon is no longer British.

Under the Treaty of 1696 between France and Great Britain it was agreed that the subjects of the contracting parties should enjoy fishing rights to certain areas far removed from their coasts.

By the Peace Treaty of Utrecht of 1713, France was excluded from fishing in a belt of ninety miles broad, lying at the Isle Sable, which is situated ninety miles off the coast of Nova Scotia.

By the Peace Treaty of Paris of 1763, after the Seven Years War, France was further excluded from fishing within forty-five miles from the coast of Cape Breton Island. Under the same Treaty, Spain was debarred from the fisheries on the Grand Banks.

Under the declaration of 1821, Russia has reserved to its subjects the whaling and fishery within vast areas from Behring strait to the 51st parallel. All foreign vessels were prohibited from landing within 100 Italian miles from their coasts.

In an enquiry held by a select committee of the House of Commons in 1833, it was asserted that English fishermen were prevented from fishing oysters fifteen miles from the shores of France, while the French were fishing at a distance of less than one mile from the English coast.

Under the Convention Act of 1868, the Irish commissioners were empowered to regulate oyster fisheries within a distance of twenty miles seaward, a water area of 1300 square miles outside the three mile limit.

We will not go any further. There is still a lengthy record on the matter. We only confined ourselves to precedents that deal with different eras and areas, before the gun shot rule and after, and in different parts of the world.

All this is a conclusive proof that, against the contention of our colleague of Canada, the extension of the territorial sea up to twelve miles was not solely motivated by a desire to control fisheries. On the contrary, the dispute between States had invariably arisen in respect of fishing far beyond the three, six, or twelve mile delimitation. Hence, the inevitable conclusion is established that a fishing zone of twelve miles is inseparable from a twelve miles territorial sea, and having admitted the former you must *ipso facto* admit the latter. This is the only explanation for figure twelve, as the limit of

the fishing zone, unless figure twelve is a mystery that we should not attempt to explain.

There is, however, one last observation to which we invite the attention of the Conference as a whole, and in particular our colleagues from Canada and the United States.

In the concluding portions of the statement of Ambassador Drew, two significant facts must have considerably aroused profound thinking in the Conference. They may very well be, not only a torchlight illuminating our way, but perhaps they could be a life saving boat which will carry us all ashore in perfect comfort and unity.

The distinguished representative of Canada asserted first, that there is almost unanimous agreement that there should be a fishing zone extending to a total breadth of twelve miles, and secondly that there is still a wide difference of opinion in regard to the measurement of the territorial sea.

We cannot agree more. We do not wish to deal with distant-water fishing. The two facts brought so eloquently by our colleague from Canada are the absolute truth of which the Conference should take complete cognizance. We believe, there is no one in this Conference who can seriously challenge the distinguished representative of Canada on these two matters – our unity and disunity – unity on the fishing zone and disunity on the territorial sea. But how are we to proceed united on one, and disunited on the other, when they are both tied together, and do not admit separation.

The position on the fishing zone, we must recall, is most telling and informative. In 1958 such unanimity did not exist, and in fact, a proposal for a fishing zone had failed. Time, contacts, friendly discussions and cold reflection – all have joined to bring about this oneness of thinking with regard to the fishing zone. This community of interests and identity of thinking did not find expression on the delimitation of the territorial sea. Hence, the unity on the fishing zone, becomes lost in the disunity on the delimitation. The whole resolution stands to one destiny – you take it or leave it. For our part, there is no room for doubt or hesitation. We will leave it, all in all, rather than take it; and we will do every effort to defeat it, all in all.

This position is final. It is final now in the committee, later in the plenary, and later still after conventions are adopted or ratified, should there be any convention adopted or ratified.

This Conference is mainly convened to make a rule of law. The resolution of the United States and Canada could be adopted by a majority, simple or two-thirds. In the same manner, it could be a convention with all the

necessary modalities and signatures. But it will not be law, neither is this the way for law making. Without being generally accepted, no act by this Conference can become law. It will be a law, only binding the signatories no matter how many they may be. If they choose to fix for themselves a width of six miles, they are free to do so. They accept a restriction from which it is not easy to be untied. The other States choose and shall continue to choose a twelve-mile limitation. They may convene a conference of their own. They may choose, generally or regionally, to have their own conventions for 12 miles delimitation.

This is the final destination in which the world community will have to find itself, should the six-mile resolution succeed. And the six-mile resolution and its sponsors and supporters should stand before the bar of history for their share in this dreadful ending.

The gossip is being circulated around, that the twelve-mile delimitation is a failure. Hence, the advice is offered that the six-mile resolution is the only alternative. Along with this advice, it is pressed that the Conference should not fail, and that we must seek a resolution, any resolution.

Of course, many could by whipped into action under such an advice and various other devices. Likewise, votes could be pressed in various ways. But we can assure you this will be no good, neither to the Conference, to the rule of law and order, nor to the interests of the family of nations. A bad resolution is no solution. When we are so divided, as the distinguished representative of Canada has rightly said, no resolution is the best resolution, and no solution is the best solution.

There is no adamant position on our part, just as much as the position of the six milers is not one of compromise or conciliation. Compromise and the host of similar terms invoked by the distinguished representative of the United Kingdom in the statement he made two days ago, are not simple terms to be flung around so easily and lightly. The word compromise is not cosmetics used to beautify ugly situations.

Our distinguished colleague of the United Kingdom has spoken loudly in favour of compromise. His appeal for compromise has almost carried the words of a crusader, but at the same time he did not hesitate to complain as he put it, of some of the less agreeable things in our statement, thus setting aside the spirit of compromise and for a matter of words. Our distinguished colleague of the United Kingdom was not able to swallow some less agreeable things in our statement, and he wants us to accept the destruction of our vital interests, under the guise of this so-called compromise.

We may say in passing that the less agreeable thing in our statement,

are really less agreeable. We admit, and apologize to the distinguished colleague of the United Kingdom if these things tasted bitter. But bitter facts are always bitter – and the fault is not ours. He who made them bitter must not complain of bitterness. We would not wish to say who made them bitter because the distinguished representative of the United Kingdom is exceedingly gentle, and it is our duty to treat him gently.

Bitterness or no bitterness, it is the conduct not the words, whether sweet or not sweet, that proves a spirit of a compromise. The distinguished representative of the United Kingdom spoke at length and with eloquence for a compromise. But when he comes to deal with the problems of poor and little Iceland, the spirit of compromise is suddenly evaporated. It was no compromise. The position of the United Kingdom vis-à-vis Iceland did not breathe one single iota of compromise. It compromised the very spirit of compromise. The United Kingdom seem to be ready to compromise with Iceland, invoking not the law of the sea, but rather the law in the sea – where the big fishes eat the small ones. We should say with mercy and compromise, for they eat them without being fried.

Yet our distinguished colleague of the United Kingdom did not confine himself to an appeal for compromise. He asked the twelve milers, what compromise have they offered. The distinguished representative of the United States and Canada have joined in the campaign. It seemed to us to be a grand orchestra named compromise. Let us therefore tell you what is our compromise – and what is your compromise.

To evaluate a compromise we must know the starting point. We have to know what is the starting point of the six milers. If you had a zero delimitation of the breadth of the territorial sea, three miles would be a compromise. If you had three miles, six miles would be a compromise. But if three miles were never your limit, then, you stand to lose nothing, sacrifice nothing and eventually compromise nothing. This we address to the United States, France, the United Kingdom and Canada, as great maritime powers and great six milers.

THE UNITED STATES - we have shown from the statement by Thomas Jefferson as far back as 1793, that nations' assent has been given for a breadth ranging between three to twenty miles.

FRANCE - we have shown the Minister of Foreign Affairs in 1864 to be against the three miles, for this delimitation, in his words, has lost the reasons for which it existed.

THE UNITED KINGDOM - here we must pause for a while, lest we say some disagreeable things about the United Kingdom. We shall give the

floor to the highest British authorities to relate things, which we pray will not be disagreeable.

In 1878, 1895 and in 1909, the British Parliament had an extensive discussion over the question of territorial waters jurisdiction. Here is the dialogue, with their Lordships speaking:

Lord Cairns, the Chancellor, cited several English, American and other authors on international law and states «the authorities were clear on this, that if the three miles were not found sufficient for the purpose of defense... or if the nature of the trade or commerce in the zone required it, there was a power in the country on the seaboard to extend the zone».

Sir Bignold said «let the Government remember that the three-mile limit... has never been, and I trust never will be, incorporated into any international European law».

Major Gray said «the signatories to the North Sea Convention agreed to a three-mile limit but there is no three-mile limit in international law».

The Earl of Halsbury declared: «I have never myself, as a judge, admitted that the three-mile limit is one that international law recognizes... there is no international law which would prevent a much longer limit being taken if the public interest required it».

Lord Salisbury said «great care has been taken not to name three miles as a territorial limit».

Lord Halsbury, who had charge of the Territorial Waters Jurisdiction Act said that «in that Act they took great care to avoid any measurements. The distance was left at such limit as was necessary for the defence of the Realm».

The Lord Chancellor, Lord Herschell said: «that he was far from saying that the three miles were to be the limit of territorial waters for all time».

Lord Salisbury then referred to a gun which was fired on Jubilee Day and carried twelve miles, and Lord Herschell referred to one which had a range of thirteen miles.

This is the position of the United Kingdom, and from your mouth, thou shall be... We will not continue, you know the condemnation.

As to CANADA, to speak frankly and honestly, we have found nothing serious in the past records of Canada. Canada is a pious and straightforward country. But the Conference cannot act on the pious acts of Canada, unless and until the rest of the giant six milers become as holy and as pious as Canada.

It is this fluctuation of the attitudes of the United States, France and the United Kingdom that made Professor Fauchille, a great scholar of international law, declare as follows: «With respect to the freedom of the seas, there exists in fact an English interpretation, an American and a French interpretation». But the distinguished representatives of France, the United Kingdom, and the Unites States find it easy to speak of a fixed territorial sea, and of the freedom of the high seas – and with a greater ease they speak from this rostrum of conciliation and compromise.

Thus, what the six-mile resolution offers is no compromise. But what about the twelve-mile resolution?

Compromise is not measured by mathematical addition or subtraction. It is measured by its effects.

Our resolution offers equal opportunities for all and an equal answer to the interests of all. We offer you, what we offer for ourselves. We claim no privilege or profit that is denied to you. Here you are, take what you please and leave what you please.

Your resolution is discriminatory, ours is not. It embraces all states, large and small, white and black, red and yellow.

Your resolution is destructive of our interests, our resolution is constructive of your rights and our rights. And lastly, our resolution is flexible, and your resolution is not workable.

We say not workable because you cannot force the twelve milers to accept your resolution. Behind the twelve milers there have become established interests of vital importance. Take the interests of the Soviet Union, as an illustration. We are too slender to defend the interests of the Soviet Union, when the Soviet Union is represented by a genius jurist as Professor Tonkin. Neither is it our role, here in the Conference, to defend the interests of the Soviet Union. But let us ask, how are you going to force the Soviet Union to accept your six miles, as a rule of law?

And we of the small nations, how are you to force us against our interests to accept a six-mile formula. Many of us have legislated for twelve miles, decades ago. Others, have recent enactments, but their legislation was no innovation. It was a declaration of past practice, and past interests.

The United States and their co-sponsors, say that we have come with fixed positions, but they forget their positions. What compromise have you advanced. In 1958 your formula was six miles. Today you are stubbornly adamant on six miles. In fact many of your supporters are six milers by their legislation, since decades. Where is, then, your compromise?

Let us not quarrel on words of compromise and conciliation. Let us not quarrel on figures of six or twelve. We have come to make the law – a law for the nations – not a law to suit the interests of some nations. This can only be done by a general agreement. As we approach the days of Easter and the holy memories of the great master and his disciples, the most sacred fisherman on earth, let us make every effort to be open-minded and open-hearted.

If we are to act by the economic, political, legal and security considerations, your records contain an avalanche of authority – all of which is against the six-mile resolution.

But if we are to act only by sheer voting, then forgive me gentlemen, we have no word to say, and this is the end of it. Do what you desire to do, and let us wait and see.

FOURTH SPEECH

There is still Hope

At this late stage of our deliberations in the Conference, we shall speak without a preface or introduction.

On Wednesday last, our distinguished colleague of Canada has urged the Conference on a number of grounds to adopt the joint United States-Canada resolution which stands now before the house.

In the main, the distinguished representative of Canada has reiterated the argument that the resolution for a six-mile limit is a new compromise arrived at recently by Canada and the United States.

In addressing ourselves to this argument, inducing as it may *prima facie* seem, we feel bound at this historic moment to recall some historic events.

Contrary to what was stressed by our distinguished colleague of Canada, a six-mile formula is neither new, nor a recent compromise.

This Conference is not without ancestors. International efforts to fix the breadth of the territorial sea are not of a modern thinking. To define the limit of the territorial sea was the dream of States, jurists, law institutes, ever since the concept of the territorial sea came into being. Many international Conferences, governmental and non-governmental, were convened at different places with the sole object of reaching a general agreement on this highly important question. And the Geneva Conference of 1958 is the last on the list, with the present Conference in continuity. It remains for tomorrow to tell us whether the list will stand open for a forthcoming Conference to deal with this age old legacy, or whether we can close our books on a glorious triumph based on common consent and general agreement. Our sincere hopes and ardent prayers go outright for the latter – for success and nothing short of success.

But victory has to be won, and it cannot be won unless we realize our

past failures and the reasons for our past defeats. And the whole record of this problem, we must admit, was a continuous series of defeats and failures – the most recent being the Hague Conference of 1930, and the Geneva Conference of 1958. Guided by this bitter experience, we have to ask ourselves whether the six-mile formula as advocated by our distinguished colleague of Canada is a new compromise of a new character. Let us examine the matter.

The first serious initiative to attack the problem on an international level was taken by the Netherlands. In a letter dated 5th November 1895 addressed to the Foreign Secretary of the United States, the Dutch Ambassador stated the following:

«As you are doubtless not unaware, the Institute of International Law discussed in March 1894 the desirability of an understanding among the maritime nations to the end of settling by common accord the question of the limits of the territorial seas.

«Comformably to the views which were developed on that occasion in the aforesaid meeting of the jurisconsults of different nationalities, the Netherland Government asks itself whether the time may not have come for the principal Powers interested to conclude a treaty to the end in question.

«I accordingly take the liberty of addressing myself to your habitual courtesy in order to learn, if possible, what the President's Government would think of the idea which I have suggested. I permit myself to add that the Minister of Foreign Affairs of the United Kingdom is now disposed to believe that such a treaty should stipulate that the territorial waters should henceforth extend to a distance of six miles (sixty to the degree), starting from the low-water mark, while the treaty might perhaps prescribe, at the same time, that this six miles shall be also that of the neutral zone».

In the history of the breadth of the territorial sea, this letter of the Netherlands marks the first invitation to convene a conference to tackle the problem.

We have not recited these portions of the letter simply to refresh our memories of the past record of the problem. No, this is not our intention. We are fully aware that we are convened to tackle the problem as plenipotentiaries representing sovereign states, and not as professors of international law, representing various legal trends. The proposal that had been advanced in 1895 by the Government of the Netherlands has its relevance on the resolution with which we are seized, and much more so at this last stage of our deliberations. That explains our recourse to the archives of the Netherlands. So, what are the points of relevance in this historic document that fits so smoothly into our records?

The first point of significance is that the Institute of International Law, as far back as 1894, has called for a common accord on the question of the territorial sea. Such a recommendation by the Institute, whose membership included the most talented jurists of the time, destroys the argumentation of the distinguished representative of Canada, down to the last core. Also, it serves as an eloquent reminder to the Conference. It plainly warns those who speak from this rostrum so lavishly on a three-mile limit with a tradition of a few hundred years, that the question of the territorial sea was disputed, and that common agreement was lacking, just as it is lacking today. If we are to accept, as we should the views of these gifted jurists, those of us who rise to speak with the statue of jurists should no more claim the existence of an established limitation of the territorial sea, and should utter no more the three-mile limit as a rule of law.

The second point to which we invite the attention of the Conference is the proposal of the Government of the Netherlands for a six-mile limit as the breadth of the territorial sea – just the very same delimitation laid down in the present resolution.

This proposal on behalf of the Government of the Netherlands is conclusive evidence that a six-mile formula is not one that was born here in the cradle of this Conference, nor even in 1958. Neither did it emerge way back at the Hague Conference in 1930. The idea of a six-mile delimitation is very much older. We do not propose to trace back the early origins of this measurement, nor do we wish to refer to the oldest six miler State. There are many in rivalry. Spain, for instance, with a legislation of six miles since the 18th century is one of the oldest. But the point we are stressing is that a six-mile rule was formally proposed to the United States, more than sixty years ago. And still, here comes our colleague from Canada to claim that the present resolution is a recent compromise, the outcome of friendly discussion that took place at the 1958 Conference, and after.

Yet this is not the end of the story, and this question has really become a story. The reply of the United States to the proposal of the government of the Netherlands is most interesting and informative. Indeed, it has its bearing on the present resolution.

In a letter dated 15th February 1895 the Secretary of State of the United States replied as follows: «This Government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law as well as of conventional regulation, by which the territorial jurisdiction of a State bounded by the High Seas should henceforth extend six nautical miles from low-water mark, and at the same time provid-

ing that this six-mile limit shall also be that of the neutral maritime zone».

This reply affirms what has been denied, and denies what has been affirmed. In a word, this reply confirms the fact that a six-mile delimitation was acceptable to the United States more than sixty years ago. In the meantime it refutes the contention of Ambassador Drew that the Canadian-United States resolution was a recent compromise, emerging from the merger of two previous resolutions. No, the present resolution is not a recent flowering of a tulip planted just in this fall. It is an old shrub recently trimmed for the occasion.

As a matter of historic fact, the roots of this shrub, which comes now before us as the resolution of the Committee, can be traced back to almost one hundred years. On the 16th of September 1864, Mr. Seward, the Secretary of State, asked the British Ambassador in Washington whether it would not be advisable by an agreement between the Powers to extend the limit of the territorial sea from three to five miles, in view of the increase of the range of cannons. This shows beyond any scintilla of doubt, that the United States had been in favour of the extension of the territorial sea beyond three miles, and what is more significant, for reasons of the increased range of cannons.

We stress this fact not to recast the past, but rather to examine the present and forecast the future. How do we stand at present, and what sort of future lies before us?

For the present, we are seized with a resolution based on a six-mile delimitation, designed to be a rule of law for future international relations – a future that may extend for generations, This is the main assumption upon which is based the resolution that is now before the Conference.

But the six-mile formula represents the limit which had been set by a great number of States, through practice or legislation, since the days of Bynkershoek, the father of the breadth of the territorial sea. Also, the six-mile delimitation has been proposed by the United States to keep abreast with the increase of the range of the cannons.

It must follow, therefore, that the six-mile delimitation cannot remain stagnant while the range of the cannon is increasing. This is the net result of the argumentation of the United States. In fact, when the three-mile rule was first suggested by Bynkershoek, the maximum range of cannon at the time was not more than 700 metres. Even as late as 1814, the maximum range had not reached 2000 metres. It was about 1500 metres. In the instructions concerning neutrality during the Crimean War, given to the Danish fleet in 1854, the gunshot range as a measure for the extent of the territorial belt at Kronborg, was stated to be a little less than 1 nautical

mile. This goes to explain that the breadth of the territorial sea was behind the heals of the range of cannon. It was not static. Rather it was in constant motion – an extension of the range of cannons to be followed by an extension of the territorial sea.

Thus this resolution is the child of many proposals that were put forward long before our Conference. Since then, time has advanced but the six-mile delimitations of the United States and Canada remained arrested, simply to promote the interests of one group of States – one group of the family of nations, and not the interests of the family as a whole.

We do not mean to say that it is a shame for a state to defend its interests. No state should be shy or reluctant to promote its national necessities. On the contrary, each and every one in the Conference is duty-bound to defend his national interests. He is a traitor who fails his duty. But why not say so? Why not come out in the open and speak openly? It is certainly no pride to advance individual interests under the guise of common principles. Neither is it befitting to preach such interests under the umbrella of the international community. It is not worthy to wage a holy war under a flag of heresy.

This is no exaggerated metaphor. The resolution we are considering at the present moment is a concentration of the interests of a group of States, and one group only. This delimitation stands to represent certain interests – exclusive and restrictive – as four, and no more.

Furthermore, this resolution is mainly designed to destroy the interests of others. In the main the primary target is to bring the twelve-mile delimitation to a defeat, and then to bring the six-mile resolution to a triumph.

In this regard, we must note that the six-mile formula has been conceived and born as part and parcel of the cold war, that persists between the major powers – with the rest of the world left with no choice to make any choice.

In the *New York Times* of 17th April, explaining the situation in the Conference, this point has been made abundantly clear. «Sometime next week», the *New York Times* said, «eighty-eight countries will take a vote that involves the vital interests of the United States Navy, the submarine strategy of the Soviet Union etc.». The writer of the despatch went on to say «the difference between six and twelve is not a matter of haggling. For the United States... it is the difference between naval security and naval danger... As the United States sees it, to narrow the free seas would reduce the efficiency of American air and naval powers. United States officials also have much in mind the movements of the Soviet fleet of about 475 submarines».

This, we submit, is the real background that lurks behind the United States-Canada resolution. It is the cold war, or to be more precise, it is the hot war in its embryo which hangs heavily over the Conference. It may be suggested, however, that the *New York Times* is no authority on this matter. Without arguing, let us accept this contention as valid, and let us look for an authoritative testimony.

We can find no better testimony than Ambassador Dean, the Chairman of the United States delegation. In his writings, Ambassador Dean was more eloquent than in his statements to the Conference. It is there that we can find abundant elucidation of the present resolution.

In his article in the *Foreign Affairs* of October 1958, summing up the work of the 1958 Conference, Ambassador Dean, prefaced first with a reference to the 475 Russian submarines and the dangers of mines, torpedoes, winged subsonic missiles. He then proceeded to state as follows: «One of the major proposals made at this conference was to extend territorial sea limits from three to twelve miles, a step which would have had profound implications – among them, a dramatic increase in the threat posed by submarines. That this proposal was defeated, was one of the most important achievements of the United States at the Geneva Conference».

We can see anything more telling than this observation of Ambassador Dean. To put it in his words, the defeat of the twelve-mile resolution was one of the most important achievements of the United States at the Geneva Conference in 1958. We take it to be a correct statement too, that the defeat of our eighteen-power resolution in April 1960 was also another great achievement scored by the United States. Thus, without pressing for an admission, the United States is not in a position to deny that, through its relentless efforts, the eighteen-power resolution, which represents the interests of a number of Afro-Asian – Latin- American States has been defeated. As a further corollary, it should also be conceded that the present resolution was adopted by the committee of the whole as a great achievement of the United States.

With the United States achievements as such, we have no cause to complain. The defeat of our resolution in the committee is an achievement of the United States, there is no doubt about that. Equally, the adoption of the present resolution by a simple majority is an achievement of the United States, there is no doubt about that too. This is the admission of the leader of the United States delegation. Should the present resolution succeed to get a two-thirds majority, as it may, it will also be an achievement of the United States.

Neither can we question the right of the United States delegation to

cause the victory or defeat of any resolution. This is their sovereign and unfettered right, which we must respect and recognize. Similarly, the concern of the United States delegation for the security of their country against any threat, is worthy and honourable. But what about the rest? What about the interests of other States? What about the security of the other States?

A State, and for this matter any group of States, may have their legitimate fears. It is understandable that they should guard themselves against submarines, nuclear weapons and what not. This is not objectionable. What is objectionable is to harness the whole Conference with a saddle of the fears of individual States, without the slightest regard to the interests and apprehensions of other States.

Having come to this conclusion, it stands flagrantly evident that the present resolution is a one-sided thinking. On the strength of the sayings of Ambassador Dean, this resolution is an achievement of the United States and is intended to safeguard the security of the United States. We cannot deny to the United States their right to look after their defense. But this could not be a rule of law for all the nations. To be admitted into the law of nations, our legislation must be the achievement of the whole Conference – not the achievement of the United States alone. It must translate the interests of the generality of the States, and not the interests of a group of States, no matter how numerous they may be, and influential they may be.

This resolution could be adopted by a two-thirds majority as our colleague of Canada has predicted, although we do not share his wishful and colourful optimism, it cannot and will not be law. Within ten or twenty years, this resolution can be written into a convention, neatly signed and ceremonially ratified. But this is no law. It would be a simple contract binding the contracting parties only.

But what is the true nature of such a majority? Certain votes, we know, will be switched from the north to the south pole. They will be case for the resolution, although they had been against the resolution. Another vote, we have been told in the morning, will turn into an abstention, although the state shall continue to be a twelve miler. We expect other votes to be cracked under the weight of a gigantic pressure that was fired to every corner of the globe.

This is the nature of the two-thirds majority upon which the distinguished representative of Canada bases his colourful and wishful optimism. Although this afternoon certain delegations have received instructions to vote against the U.S.S.R., we leave to those delegations to declare their positions.

But independent of these reasons for this resolution a few days ago, our distinguished colleague of Canada has dealt at length with this question. He advocated that a resolution by two-thirds majority must induce the acceptance of the minority. It is difficult to make a sweeping statement on this point. Each problem has to be decided on its merits. Under the present circumstances, and for this problem, we entirely disagree with our colleague of Canada.

In his well known work on international law, Oppenheim provides enough guidance to our colleague of Canada, and the Conference as a whole. Oppenheim makes a distinction between universal, general and particular international law. At best this resolution, should it succeed and should it become a convention in the unknown future, could not be anything more than a particular international law which binds only the signatories. This point must be amply clear to our colleague from Canada. Were it not for our desire to see a real universal international law emerging from this Conference, we would not resent this abortive resolution. After all, this resolution has the advantage of robbing the three milers of the remaining ashes of this buried rule – ashes that are blown from time to time into the atmosphere of international conference. To be relieved from this evil is no little comfort.

Let us, however, make one point quite clear to our distinguished colleague of Canada. The contention we have advanced that this resolution does not possess the qualities and attributes of a universal international law is not a political pronouncement. It is purely juridical verdict of international law, which the distinguished representative of Canada cannot challenge. Of course he can challenge if he chooses to set aside the principles of international law. So, what is the law on the matter?

To be a rule of law, this resolution must be an expression of common consent. By definition, under all schools of thought, international law is a body of rules without an external power to enforce except through common consent. In the absence of a super state to legislate and enforce, it is the common consent of the states which makes real law of international law. As Professor Lauterpacht has rightly stated, common consent maeans «the consent of an overwhelming majority, that those who dissent are of no importance... It is a matter of appreciation and observation and not of mathematical decision; just as is the answer to the question, how many grains make a heap?». This answers the argumentation of our distinguished colleague of Canada. A two-thirds majority, as sugested by our colleague of Canada, does not make law which is not law. The matter as Professor Lauterpacht put it, is not a mathematical decision. We would say it is the general acceptability which ultimately decides the matter.

We do not deny that our distinguished colleague of Canada is at full liberty to express whatever views he deems fit. Our colleague of Canada may claim that the majority of this Conference can make international law. This is his right that stems from the freedom of speech, which we all cherish. But if he were to seek the impositions of international law or to abide by the advice of his legal advisers, we do not think he possesses a freedom. Professor Lauterpacht has answered our colleague from Canada and nothing could be more devasting to this resolution than this answer. Professor Lauterpacht seems to speak from this rostrum, at this Conference, and against this resolution.

We should, therefore, like to tell our distinguished colleague of Canada that it is not the number of grains in the resolution which determine its weight. It is the general quantum, its grand total – that weighs in the scales of international law. It is not with the number of votes that this resolution can be judged. Rather, it is by the general consent that it commands.

Furthermore, let us ask with Professor Lauterpacht, the distinguished representative of Canada, about the 33 States that voted against this resolution in the committee – is their dissent of no importance? Is it so negligible that the Conference can proceed to act on this resolution? Of course, the 43 votes cast in support of this resolution could be added to a few votes sliced from the opposition or the abstention group. The resolution could even muster a two-thirds majority. But this does not change the situation. For those who are conversed with the processes of vote abduction, this is no wonder. Ultimately it will not work. Neither will it pay for the global efforts that have been exerted in this great operation of vote mobilization. At best, this victory would be nothing more than propaganda performance, that will not amuse all the people, all the time.

When we say a propaganda performance we mean it, for this resolution is bound to be excluded from the field of international law, and our distinguished colleague of Canada is advised to read carefully the statute of the International Court of Justice. After becoming a convention, this resolution might be invoked before the Court, and the statute has plainly laid down that the Court shall apply international conventions, whether general or particular, that are expressly recognized by the contesting States.

Therefore, let our distinguished colleague of Canada rest assured that after becoming a convention, this resolution will only be applicable against Canada and all those who follow the footsteps of Canada. Likewise, he can rest assured that it will not apply to the twelve milers nor to those abstaining.

So, where does this resolution lead to? And what profit is it to adopt such a resolution? If the 43 States or more choose to bind themselves by whatever engagements they choose to accept, they are free to do so. There you are. You can have it if you wish – and the contract is the law of the parties – but it will be your private contract and private law.

There remains one point raised by our distinguished colleague of Canada that should not go into our records unanswered – namely his analysis of the conclusions of the International Law Commission.

We do not need to elaborate this matter, for we have dealt with the question at length on previous occasions. We only deem it necessary, in addressing ourselves to our distinguished colleague of Canada, to state that the International Law Commission did not give its blessings to a six miles delimitation, and no more. Likewise, the Commission did not declare that a three-mile limitation is an established rule of law universally recognized. Moreover, the Commission has not characterized a twelve-mile delimitation of the territorial sea as a breach of international law. All these conclusions, and we challenge the distinguished representative of Canada to challenge them, are sufficient to demolish the whole stratum upon which is based the Canadian-United States resolution.

Should our colleague of Canada be not sufficiently convinced by the International Law Commission, we would recommend to him an article in the *Sunday Sun* of 24th November 1935 by H.H. Charteris, Professor of International Law at the University of Sidney, and we hope this will not be embarrassing to our dear friend, the Chairman of the Australian delegation. In dealing with the question of the territorial waters, Professor Charteris puts the question whether the Great Barrier Reef, sixty miles off the Queensland coast, is in Australian waters or on the high seas. He says: «No term is more familiar in our law but none is less clearly defined than territorial waters». He exclaims: «What, oh what, are Australian waters?».

Thus, if the distinguished jurist of Australia cannot be sure whether waters beyond 60 miles are high seas or territorial seas, how can we reject a twelve-mile delimitation. And again, if our Professor from Australia exclaims what, oh what are the Australian waters?, shall we not exclaim what, oh what is this six-mile delimitation proposed by the United States and Canada?

Yet against this resolution there stands another talented jurist of great frame and name. He is Professor De Magellas of Portugal. He seems to disarm our distinguished colleague of Canada from all his arguments – a comprehensive, general and complete disarmament. Professor De Magellas was

an expert appointed under the League of Nations as a result of a resolution adopted by the Assembly in 1924, at the instance or the Swedish delegation, for the progressive codification of International Law.

In January 1926, in a memorandum dealing with the question of the territorial sea, Professor De Magellas, declared his opposition to the establishment of two different zones one outside the other – and this is what the United States-Canadian resolution stands for. He then proceeded to quote a number of resolutions adopted by the Fishery Congresses, and proposed that a single zone be established for the territorial sea, and this zone «shall extend for twelve marine miles from the low-water mark along the whole of the coast».

We have selected Professor De Magellas with full purpose and intention. Professor De Magellas, comes from Portugal, a six milers State. He is neither an Afro-Asian nor an East European. He was simply a sincere servant of the League of Nations who has dedicated himself to serve the cause of the progressive codification of international law. If our distinguished colleague of Canada has chosen, as he did, to judge his resolution by legal considerations, well this is law as expounded by the fathers of law. If on the other hand, our distinguished colleague of Canada and the rest of his supporters do not choose to bend to the pronouncements of law, how can they hope to have their resolution become part of the law?

In conclusion, let us address our final conclusion. On the question of the territorial sea, as the various positions have revealed, there is amongst us a deeply seated division that has not been bridged so far. If you force the issue further, not only the division will be deepened but a new element of international tension will be created. The Conference would have defeated the very purpose for which it was convened. In its resolution 1307 (XIII) the United Nations General Assembly has declared that «agreement thereon (on the two items before us) would contribute substantially to the lessening of international tensions and to the preservation of world order and peace». The resolution spoke of agreement, and it is obvious, there is no agreement. And short of agreement, our work, with the best will on earth, is bound to increase international tension.

In his statement before the committee of the whole, our distinguished colleague from Canada made the following declaration. He said «there is still a wide difference of opinion in regard to the measurement of the territorial sea». This is a statement by one of the authors of the joint resolution. This statement remains to be true and will continue to be so, until we find a common ground for agreement.

The question then arises, is it any service to the cause of peace, law and order to adopt such a resolution under such an atmosphere of wide difference as described by the distinguished delegate of Canada? We appeal to you to listen to the counsel of wisdom, and to think before you leap. However, the appeal we are making is not motivated by the slightest sense of apprehension. The twelve milers are sovereign States. They have nothing to fear, and their territorial sea is under their exclusive domain. But it is our duty to leave nothing unsaid that should be said to reach a general agreement. And this is the only motive for our appeal.

After all, why be in a hurry. With all its importance the question is not exceedingly urgent. It is an old legacy that witnessed one failure after the other. Why score another failure. Why not wait for a better time and a better atmosphere. Leave it to the future, for time is the greatest healer, when the remedy is not available.

There is no reason to hurry; the question of the width of the territorial sea was unsettled since it was conceived. In 1868, almost 100 years ago, a great French author made a prediction which still stands true, and we trust this prediction will keep the French delegate on his intelligent abstention. It was Mr. Hautefeuille who said:

«It would certainly be very desirable that the width of the territorial seas of each country be fixed in a definite manner. However, I do not believe that it is possible to reach this result». This is still true. At this moment we can say with Mr. Hautefeuille, we do not believe that it is possible to reach this result.

We should, therefore, ask this honorable Conference with all humility, but with no fear, to abstain from taking any decision on this question. With such an abstention we exercise discretion, display prudence and what is more we leave the door open for our future efforts to be crowned with unity and success.

Let us therefore keep the door open, wide open, for in the morrow dwells hope, and what a great thing hope can be.

APPENDIX

A number of countries co-sponsored a resolution which would have extended the territorial waters to twelve miles. The resolution was, however, defeated by a narrow margin, with 36 in favor and 39 against its adoption. The text of the resolution is reproduced extensio as Annex A. Also, the draft resolution sponsored by Canada and the United States is reproduced as Annex B.

ANNEX A:

ETHIOPIA, GHANA, GUINEA, INDONESIA, IRAQ, IRAN, JORDAN, LEBANON, LIBYA MEXICO, MOROCCO, PHILIPPINES, SAUDI ARABIA, SUDAN, TUNISIA, UNITED ARAB REPUBLIC, VENEZUELA AND YEMEN: REVISED PROPOSAL.

Article 1: Every State is entitled to fix the breadth of its territorial sea up to a limit of twelve nautical miles measured from the applicable baseline.

Article 2: When the breadth of its territorial sea is less than twelve nautical miles measured as above, a state is entitled to establish a fishing zone contiguous to its territorial sea in which it has the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea. This fishing zone shall be measured from the applicable baseline from which the breadth of the territorial sea is measured and may extend to a limit of twelve nautical miles.

Article 3: A State, if it has fixed the breadth of its territorial sea or contiguous fishing zone at less than twelve nautical miles, is entitled vis-à-vis any other State with a wider delimitation thereof, to exercise the same sovereignty or the rights stated in article 2 above up to a limit equal to the limits fixed by that other State.

Article 4: Every State shall enact the necessary laws and regulations to prevent its nationals from fishing within the territorial seas and fishing zones of other States unless authorized to do so by the competent authorities of the coastal States concerned.

Article 5: Nothing in the provisions of this convention shall be construed so as to preclude the conclusion, subject to the established rules of international law, of bilateral or multilateral agreements of a regional character to regulate all matters of fishing amongst States with common interests.

Article 6: The foregoing provisions shall not affect in any manner the juridical status of historic waters.

ANNEX B:

CANADA AND THE UNITED STATES: PROPOSAL

1. A State is entitled to fix the breadth of its territorial sea up to a maximum of six nautical miles measured from the applicable baseline. For the purpose of the present Convention the term mile means a sea mile (1,852 metres) reckoned at sixty to one degree of latitude.

2. A State is entitled to establish a fishing zone in the high sea contiguous to its territorial sea extending to a maximum limit of twelve nautical miles from the baseline from which the breadth of its territorial sea is measured, in which it shall have the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea.

3. Any State whose vessels have made a pratice of fishing in the outer six miles of the fishing zone established by the coastal State, in accordance with paragraph 2 above, for the period of five years immediately preceding January 1, 1958, may continue to do so for a period of ten years from October 31, 1960.

4. The provisions of Articles 9 and 11 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, adopted at Geneva on 27 April, 1958, shall apply *mutatis mutandis* to the settlement of any dispute arising out of the application of the foregoing paragraphs.

5. The provision of the present Convention shall not affect conventions or other international agreements already in force, as between States parties to them, or preclude the conclusion of bilateral or multilateral agreements for the purpose of regulating matters of fishing.

The Question of Initiating a Study of the Juridical Regime of Historic Waters, Including Historic Bays

THE ORIGIN AND NATURE OF HISTORIC WATERS

Historic waters, the subject matter of this item, are not, and could not be, without history. To be historic, it is essential that such waters must have had a history; otherwise they would be devoid of the main attribute that vests this category of waters with a juridical status of its own. Like many juristic concepts, institutions or norms, historic waters have preceded International Law as a science. The role of International Law in this regard was not one of creation. Rather, it was one of recognition and regulation. It is common knowledge that historic waters are but one stage of man's conquest of his surrounding – man's exploitation of the benefits of nature and his subjugation of land and water to secure his survival. Hence, much of the historic waters must have been as old as his needs and his capacities to satisfy such needs.

Yet, it goes without saying that the concept of historic waters is not as old as that of the ownership of land, for the domain of man, let alone an organized community or a state, must have started on the mainland. His control over the sea was exercised neither at the same time, nor in the same manner as has been done in respect to the mainland. Naturally, long ages must have passed between the two stages. Nevertheless, with the rise of organized communities and later with the emergence of states, primitive as they were, there came to be the need to extend the dominion of man from land to sea. In fact, the question was one aspect of human evolution and of instinctive quest to satisfy the needs of the individual and the community. And as man in modern times is endeavoring to extend his dominion to the cosmic space, such was his endeavor in ancient times, although on a more concrete scale, to extend his control to maritime areas that could grafity the necessities of his life. Naturally, maritime areas that happened to be more proximate, more serviceable and more receptive to his demands were the first objects of possession and domination. This process, it could be reasonably inferred, must have first commenced in respect of certain areas of water that were possessed of special circumstances – waters that had a special relation, a particular intimacy or a specific need to the land or its people. Naturally, such areas of water must have been more attractive than others. They must have been more appealing or, precisely, more need-satisfying. The choice, then, must have been first directed to those tracts of water which

were capable of domination and, which in the phrase of Vattel, lend themselves more easily to occupation. Such we believe was the origin of man's domain extended from the land to the sea, and such had been the genesis of historic waters. And it is in this context that a special relationship had been established between a state and its inland waters.

Yet for a body of water to be historic, the origins need not be ancient. «Historic waters» is a term that means what it says. It must have a history of long standing – a kind of *prossessio longi temporis* – not necessarily traceable to the early ages of history. It must be of an *ab-antiquo* nature without being rooted in antiquity. No doubt, some of the historic waters are as old as fishing, long before fishing became an industry. Other historic waters go as far back as medieval ages. Historic waters that belong at present to the U.S.S.R., the United Kingdom, the United States, France, Canada, or to Australia are, no doubt, hundreds of years old.

The Delaware Bay, for instance, was pronounced in 1793 by the United States Court as an historic bay with an historic title as old as the establishment of the British provinces on the banks of the Delaware River.

The status of Chesapeake Bay which is two hundred miles long has been considered in 1835 by the Second Court of Commissioners of Alabama Claims, and was decided a territorial bay with an historic title, dating back, in the words of the Court, to the «earliest history of the country». The origin of the historic title was proved to have stated in the year 1609. Referring to this bay, in its lengthy judgment, the Court held that «it is part of the common history of the country that the states of Virginia and Maryland have, from their earliest territorial existence, claimed jurisdiction over these waters».

In our region, the Gulf of Aqaba, as an Arab *mare clausum* is at least thirteen centuries old. Perhaps, this Gulf, with Saudi Arabia, the United Arab Republic and Jordan as the only bordering states, is one of the oldest, if not *the* oldest body of historic waters that still falls within the exclusive jurisdiction of a single people.

In the case of the Gulf of Fonseca, owned jointly by El Salvador, Nicaragua and Honduras, the Central American Court of Justice in its decision of March 1917, held that the origin of the status of the Gulf as an historic water dates back to 1522 when it was discovered and incorporated in the domain of Spain.

Granville Bay, seventeen miles across its entrance, is – and always has been – French territorial water, ever since its oysters became the prize of French fishermen!

These illustrations and many others, go to show that the present historic waters could be traced to the medieval, as well as to the modern history. They are the culmination of man's need coupled with his capacity to dominate.

But in speaking about man's domination, a distinction must be drawn between the high seas and other bodies of water either within, or adjacent to, the territory of a state. The high seas are incapable of occupation. Unlike historic waters, an act of *imperium* cannot be exercised over the high seas. They are not susceptible of appropriation, and hence, ownership to the exclusion of other states is not conceivable. This is, however, the modern concept of International Law in respect of maritime sovereignty. It is true that up to the end of the eighteenth century, as was rightly remarked by Professor Columbus, there was no part of the seas surrounding Europe free from the claims of proprietary rights of individual powers. We need only recall the terms «Britanic Ocean». «King of the sea», the «sovereignty of the seas» and many other nomenclatures, as relics of the concept of sovereignty over the high seas. Of a similar character, is the old legal slogan about the Mediterranean being a «Roman lake». For centuries, it was generally contended that the sea could be appropriated and that it was not open to navigation for all nations. Large tracts of the sea were partitioned and appropriated between the various states. This situation did not stand, and was not able to stand against the march of mankind, be it an evolution or a revolution! Under the impact of the advancement of human relations and the progress of communication, all such claims over the high seas were abandoned or defeated. Becoming ineffective in the face of the demanding exigencies of trade and navigation, sovereignty over the high seas has fallen into abeyance and invalidity, leaving historic waters under states' jurisdiction.

Thus with modern International Law has ended a long-fought battle between maritime freedom and maritime sovereignty. The openness of the high seas, the freedom of navigation and indeed the international status of the high seas have been the victorious achievements of that war. The high seas which were considered as national waters for hundreds of years, have become, so to speak; internationalized. In fact, it was not an act of internationalization. Rather it was a restoration of its international character. It was not an alteration of status, but a recognition of a lawful status. The high seas were, then, declared as high seas dedicated to the public use, by all and for all.

Yet from the beginning, historic waters were neither included in this conflict, nor affected later in the aftermath. The reason is simple. Historic

waters are a different category. They are not part of the high seas. Separate and distinct, they stand on a different footing and have an entirely different origin, not in any way related to the high seas. Historic waters have a direct relation to the mainland. Their location has determined their legal status and indeed their very destiny. With the land and its people they have a common story and they share the same history. There is a special reciprocal interdependence between historic waters and the adjacent land. Moreover, there are also the special circumstances that create, establish and necessitate a status of exclusiveness between the state and its historic waters. Speaking figuratively, one can say that nature has contracted a solemn marriage between the mainland and its historics waters thereby creating a status of intimacy and privacy which is not open to divorce, desertion or separation. All throughout history, these waters have shared with the mainland and its people the common destiny of victory and defeat. They have lived the very lives of the people. With the high seas such characteristics do not exist. There was no special history between the high seas and a people in particular. The high seas are too far removed from man's control. Unlike historic waters, they do not meet his daily basic needs. In fact, the very nature of the high seas revolts against occupation and domination. The vastness, by itself, imposes a status of free common use for the benefit of all mankind.

On the other hand, historic waters with their relatively small size, were made by nature as an ideal object of possession. To realize this point, it is sufficient to know the classes of historic waters: a bay as the Chesapeake Bay of the United States; a Gulf, as the Gulf of Aqaba of the Arabs; an estuary, as the River Plate Estuary of Argentina; a Strait, as the Investigation Strait of Australia – all these are historic waters that have become closely associated with the national life of the people within whose territories they fall.

What is of importance, however, is that historic waters have never been part of the high seas – nor are they a rival category. As in municipal law, private ownership is one category and the ownership of the commune is another. The high seas are the *res communis* that cannot be subject to individual appropriation, occupation and eventual ownership. On the other hand, historic waters had been a *res nullius* that became an object of appropriation, occupation and eventual ownership. The main point of distinction is that in historic waters the ownership belongs to the state, but in the high seas ownership is indivisible and belong to the whole family of nations. Hence the two categories stand side by side, with none branching out from the other.

Some jurists, however, have expressed certain doubts as to the origin of

the concept of historic waters. Influenced by an adverse disposition, they have claimed that historic waters are an exception to the rule of international law. We respectfully disagree. We see no reason to resort to such a forced reasoning. Why should historic waters be an exception? The concept of historic waters is not an exception to the rule. It is the rule of law by itself, just as the openness of the high seas is a rule of law. In an authoritative appraisal of this point Baldoni has clarified the position beyond any doubt. He has stressed that «it is unnecessary in order to explain the coastal state title... (to historic bays)... to rely on... any special rules created as exceptions... The status of these bays can be explained... by the general rule governing occupation..». Baldoni goes on to conclude that, «the status of historic bays is not... exceptional. Their status is normal because it derives from the law of nations».

On the other hand, dissenting views are on record. Westlake contends that sovereignty now enjoyed over the littoral sea of certain gulfs is the remnant of vast claims which were made to sovereignty over the open sea. In the same manner, Balladore Pallieri, another well-known jurist, claims that the present maritime sovereignty is a pale remnant of the ancient claim to sovereignty over the high seas. But we are afraid such statements are not supported by facts of history. We have not been able to trace any evidence to justify this contention. It is true that claims of sovereignty were made in the past to vast areas of the high seas, but the existing sovereignty over historic waters is not a remnant, not a relic of such claims. Sovereignty over historic waters is of an independent status. It is a «remains» to none, a relic to none, because it stands on its own. To use a medical term, it is not an appendicitis to a member in the body of law, but an independent member by itself. Historic waters have always formed part of the territory of the coastal state. State sovereignty over historic waters is not a feature of aggression committed against the high seas. It is lawful juridical notion based upon a lawful act of occupation. To describe it as a pale remnant of past sovereignty over the high seas, tears historic waters from their real context, and uproots this legal institution from the very soil in which it had grown. In his learned analysis of this aspect of historic waters, Bourquin, a highly distinguished jurist, reiterated a correct statement of law. He emphasized that «the waters in respect of which an historic title is claimed are not waters which the coastal state has appropriated at a more or less recent date, but waters which have always formed part of its territory and which never have been a portion of the high seas». In the well known Fisheries Case of 1951 between Norway and the United Kingdom, which was decided by the International Court of Justice, Norway contended *inter alia*, that historic waters do not constitute a part of the high seas.

Such views, we submit, are based on law and fact, and tend to put the

picture in its rightful frame. In face, when the conflict was at its highest between the two concepts of maritime supremacy and the openness of the high seas, historic waters were not at issue, in the least. In spite of heated controversy over every aspect of the marine supremacy, none of the schools of thought did challenge the concept of historic waters, or question its origin, its juridical regime or its worthy place in international relations. In his most brilliant argumentation on this aspect of the problem, Baldoni arrived at an irresistible conclusion. He said that «at that time when the rule of the freedom of the seas was asserting itself, the bays of Cancale, Chaleurs, Chesapeake, Conception, Delaware, Fonseca and Miramichi were already under the effective permanent sovereignty of the coastal states».

The significance, however, of this distinction between the high seas and historic waters in respect to sovereignty is neither academic nor theoretical. The contrast, we should bear in mind, does raise questions of pratical effects of far-reaching importance. The high seas as belonging to all states collectively and to no state individually, are governed by the established rules of International Law. On the other hand, historic waters, as belonging to a state or a limited group of states, are governed exclusively by the rules of national law – the municipal law. It is true that to decide the status of historic waters, it is necessary that the rules of International Law be invoked. But once decided, historic waters become within the jurisdiction of the state, under the competence of the national tribunal, and subject to the national law. The rules of International Law become not only inapplicable, but entirely unconsultable.

THE DEFINITION AND ITS LEGAL IMPLICATIONS

Having discussed in brief the origin and nature of historic waters, we propose to deal next with the definition of this category of maritime body.

Definition, any definition, however, is not an easy task. Since the days of the Greek philosophers, led by Socrates and Plato, many questions of «why» and «what» stand until today unanswered as ever. To define a subject, no matter how easy it may be, you are bound to encounter many a difficulty. Uppermost in this regard, is to find an inclusive and exclusive definition – a definition which includes all the elements of the subject and, at the same time, which excludes elements of other similar subjects. In historic waters, the difficulty is manifold. On record, we have a complaint from a highly learned authority as Sir Cecil Hurst. Dealing with the territoriality of bays, in the context of historic waters, Hurst expressed his amazement that «It is a curious thing that none of the chief British writers on international law – despite the fullness with which they deal with the subject of ter-

ritorial waters or the marginal belt – seem to give no clear guidance on the question of these internal waters of a bay». This complaint of Hurst is amply justified not only with regard to British writers but may equally apply to all. The whole question of historic waters was by-passed in most textbooks on international law. It was left on the side track with the result that historic waters received only a fragmentary discussion. Suffice it to go through the table of contents of the famous works on international law by Vattel, Philiamore, Kent, Chretien, Hall, Barclay, Westlake, Jessup, Gidel, Bustamenta, Nikolaev, Oppenheim and scores of others, only to find that historic waters were not dealt with in a comprehensive manner. Maybe, as one reason, historic waters being in the national realm caused no serious trouble to the international community and thereby did not provoke the concern of jurists of international jurisprudence.

Again, this lack of comprehensiveness is to be noticed in the drafts of international codes on the Law of the Sea. In all codes prepared, since the nineteeth century by non-governmental institutions, historic waters were listed on the margin. None has made a pause to deal with the subject. Whatever reference made, was only in passing. The draft codes prepared under the auspices of the League of Nations suffer from the same grievance. The same is true of codification under the United Nations. Likewise, the International Law Commission, in its draft codification of the Law of the Sea, has abstained from dealing with the subject. In Paragraph 7 (5) of Its draft, the Commission declared that «the foregoing provisions shall not apply to so-called historic bays..». Thus, by its reference to so-called historic bays, the Commission did not even venture to give historic water their legitimate name.

All this explains the difficulties in treating the subject, its juridical incidence, scope and its definition. This goes to show the great burden the United Nations should shoulder and the necessity to redouble our efforts to regulate the juridical regime of historic waters, including historic bays.

Under these circumstances we can realize why a definition of historic waters has been almost ignored in past endeavors. Since the end of the nineteenth century, some definitions of historic waters have been meagerly attempted. In the draft codes prepared by learned societies, no direct definition of historic waters has been made. In the discussions of the Institute of International Law, in its sessions held in Paris in 1894 and in Stockholm in 1929, historic waters were not defined and reference to them was made in passing in the context of the measurement of the territorial sea. The same is true of the draft codes prepared by the International Law Association in its sessions held in Brussels in 1895 and in 1926. The Ameri-

can Institute of International Law, in its session of 1925, has followed the same path. But in its project of 1933, submitted to the seventh International Conference of American States, the American Institute of International Law has proposed a definition, which perhaps may be the first codified definition. This Institute described historic waters as «those over which the coastal state or states, or their constituents, have traditionally exercised and maintained their sovereign ownership..». The drafts of the Japanese International Law Society and the Harvard Research Commission made no effort to define historic waters. They were referred to in the context of the measurement of the coast line. The Conference on the codification of International Law of 1930 followed the same approach. However, in the Second Committee of this Conference, the United States delegation, while resenting the expression «historic waters» has submitted a formula for historic waters in the following phraseology: «Waters, whether called bays, sounds, straits, or by some other name, which have been under the jurisdiction of the coastal state as part of its interior waters are deemed to continue a part thereof..».

As to juristis, the same failure as to definition seems to prevail. Fauchille in dealing with the matter, has himself put the question in this form: «What exactly is the correct definition of a historic water...?». The question he answered as follows: «It is one of the large gulfs or bays the territorial character of which has been recognized by long-established usage, and undisputed custom..». One can readily see that the answer in one of evidence of historic waters, rather than its definition.

HISTORIC WATERS BELONGING TO MORE THAN ONE STATE

With regard to municipal and international case law, the definition of historic waters has been attempted by leading tribunals, the most outstanding for this matter being the International Court of Justice. In its decision of 1951 in the Fisheries Case between the United Kingdom and Norway, the Court pronounced that «By «historic waters» are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title». It must be noted, however, that although the dispute between Norway and the United Kingdom was not mainly one of historic waters, yet the parties' argumentations on the theory of historic waters and the judgment of the Court as a whole, makes this definition rendered by the Court most persuasive, let alone authoritative. Yet we respectfully submit that an all embracing definition of historic waters is still lacking. We believe that certain elements in the

project of the American Institute of International Law of 1933 should be included in any definiton. Of particular importance in the American project is the idea of «the coastal... states or constituents» exercising sovereignty over historic waters. We have stressed the term «states» in the plural for a very important and demanding situation – one that conceives of historic waters belonging to more than one state. It is not to be denied that there is more than one authority to say that for an area of water to be historic it must belong to a single state. As a corollary to this single state theory it is contended further that a bay surrounded by more than one state is neither historic nor its waters could be recognized as inland waters. Such contentions do not stand unchallenged in International Law, doctrine or practice. Over and above, the single state theory is incompatible with the basic principle of law for collective ownership. No rule of International Law can be quoted to show that the concept of ownership is restricted to a single state. Two or more states can possess and own collectively – as they can do individually. This collective ownership may have devolved from one origin – one title – or may have become the result of any joint lawful act. If historic waters as a juridical institution is admitted, and admittedly this is the case, then what objection is there to applying this institution to more than one state? Neither the nature, nor the origin of the concept of historic waters is inconsistent with aggregate possession. Common sense and logic dictate that what is lawful for one state is lawful for a group of states.

It is admitted that the basis for the title to historic waters has provoked a great deal of controversy. Be that as it may, whether the basis for the title is the size, configuration, vital interest, national defense, actual exploitation, or similar grounds, there can be no valid justification for the single state theory. Such considerations, applicable as they are to a single state, apply with equal force and validity to a group of states. The grounds for national defense, vital interests and other states' rights are no monopoly to a single state, nor are they exercisable exceptionally by a single state. Being a group of states, *per se,* should not disable a limited number of states from enjoying what they are able to enjoy individually. What really decides the issue, as a criterion for historic waters, is the nature of the claim – not the number of claimants. If the claim is well-grounded, amply proven and meets satisfactorily all the legal requirements, then a finding in favour of historic waters can be pronounced without hesitation whether the claimant is one or many. This position wre are advocating is not mere logic, but is one which is strongly supported in International jurisprudence, precedent and State practice.

In his valuable work on «le droit international public positif», Fau-

chille, a great and distinguished scholar has expressed his views on the question in the following manner:

> «According to a generally accepted opinion, the status of gulfs and bays varies, depending on whether they border on the land of one State or of several States, whether their entrance is or is not less than ten miles wide and whether they have or have not a historic character. Gulfs and bays which are less than ten miles wide and are surrounded by a single State, as well as those which, *regardless of their width and the ownership of the surrounding coast*, are historic bays and form part of the national territory of the countries on which they border; the others are nothing other than a portion of the open sea..».

It is quite obvious, according to Fauchille, that a historic bay can be possessed by more than one State, and that such a bay, regardless of its width, is of the same status as a bay with a limited width and surrounded by a single state. In other words, when it comes to dealing with historic waters, it is the nature of the bay that counts, irrespective of the number of adjoining states, and that a historic bay is not disqualified by the mere fact that its waters strike the coast of different states.

Another well noted authority, Twisse, has declared that certain bays and gulfs can be territorial in respect of a number of states. Such bays can belong to the category of historic waters even though surrounded by more than one state. This is a *precis* of Continental Jurisprudence on the matter.

As for the American position, it is just as clear and informative. Hyde, the leading American authority does not only support this view, but strikes a note of staggering amazement. In his authoritative book on International Law, he enunciates his viewpoint as follows:

> «When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privelege should be denied to two or more States to which such land belongs..».

In this expressive statement, one can easily find a scholarly protest addressed by Hyde when he questions with logic, «why a like privilege should be denied to two or more states». Surely no answer, no valid answer, can rise to the level of this question. Neither could this devastating argument be challenged. No one, a layman or a lawman, is able to answer why two or more states should be denied, not only what a single state can lawfully enjoy, but what they themselves can individually enjoy. The question, as framed by Hyde, we are bound to conclude, shall remain unanswered. It has

no answer, unless we choose to step outside the temple of law and the altar of human logic.

Furthermore, this concept of joint ownership of historic waters is adopted in what has become known as the «Melendez Doctrine,» after the name of a President of El Salvador. The doctrine provides that «when an area of the sea occupies the space between two or more countries, the area of waters *inter fauces terrae* is necessarily within in the joint jurisdiction of the coastal states».

In support of this position, we have also another authority to quote – this time not one, but a group of jurists.

In its report on Territorial Waters, submitted in 1929, in connection with territorial waters included within bays, the Harvard University Commission states as follows:

> «Where the waters within the seaward limit are bordered by two or more States, it would seem that the bordering State *should be permitted by international law to divide such waters between them as inland waters*. If the same waters were bordered by the territory of one state only, that state would clearly be entitled... to treat all of the waters as inland waters. *The power of two or more States should not be smaller than the power of one State* in this respect...»

It must be noted that this quotation from the Harvard Commission, while endorsing Hyde on the matter, emphasizes in a positive manner that the power of two or more states should not be smaller than the power of one state. That two or three states cannot do what a single state can do alone, is not a rule of law. It is a mockery of Law and a travesty to reason.

We must add, however, that States' practices and judgments of international tribunals do not fail to support the view of text writers on this question. The Fuca Strait is one example of State practice. Although 85 miles long, having width ranging between twelve and seventeen miles, the Strait of Juan de Fuca, by the Treaty of 1846, concluded between the United States and the United Kingdom, was declared to be under the jurisdiction of the United States and Canada, with its waters treated as inland waters and not subject to the right of innocent passage. When we remember, as a fact that this Strait is the principal maritime channel leading from the Pacific Ocean to ports in British Columbia and in the United States, we can readily see the weight of this state practice in showing how historic waters could belong to more than one state, and how innocent passage therein could be lawfully barred. In this regard, it is relevant to recall that

in the Fisheries Case of 1910, between the United States and the United Kingdom, the Court recorded the fact that the two countries had *«assumed ownership over waters in Fuca Straits* at distances from the shore as great as 17 miles». This is an important finding in support of collective ownership. If this means anything, it certainly means that the tribunal has taken judicial notice of the fact, and declared judicial recognition of the concept.

As to case law, the Gulf of Fonseca, is an outstanding illustration. With a 30 mile length and a breadth ranging between 19 and 50 miles, this Gulf is surrounded by three states: El Salvador, Honduras and Nicaragua. In its well considered decision, the Central American Court of Justice, basing its conclusions on grounds of history, geography and vital interests held unanimously that the Gulf of Fonseca «is an historic bay possessed of the characteristics of a closed sea». The Court noted as a fact, and this is of great significance, that dominion over the bays was exercised first by Spain for three hundred years, second by the Federal Republic of Central America for nineteen years and finally by El Salvador, Honduras and Nicaragua – the three states described by the Court as «the legitimate successors of Spain». Thus the Court has not only admitted the concept of joint ownership of a bay, but also recognized that the splitting, so to speak, of sovereignty does not change the nature of a historic bay. Once a historic bay, it remains always a historic bay regardless of division or succession of sovereignty. We know of many historic bays that are at present held in common between two provinces in one single state, federal or unitary. Should these bays lose their historic character and their judical status if federation is discontinued or unity is divided? Certainly not. We do not want to cite examples lest we offend the feelings of those States. But if we were to answer in the affirmative, it would be an affirmative ridicule. The decision of the Gulf of Fonseca rejects such absurdity.

In connection with the Fonseca Case, we might add that the United States in her note of February 1918, addressed to El Salvador, recognized that «the Gulf of Fonseca is a territorial bay whose waters are within the jurisdiction of the bordering States». This declaration on the part of the United States leaves no scintilla of doubt that the concept of a historic bay can belong to two or more States and not exclusively to one single State.

Of close similarity, however, to the Gulf of Fonseca is the Gulf of Aqaba in our region. At present, the bordering states on Aqaba are Saudi Arabia, United Arab Republic and Jordan. We say «at present» because as in the case of Fonseca, the Gulf of Aqaba had been previously under a common predecessor. It was exclusively under Arab dominion, and the

predecessor is virtually a common ancestor. This factor, not existing in the Fonseca case, adds weight to the historic character of the Gulf of Aqaba.

We have made no mention of Israel as a bordering State on the Gulf of Aqaba, not for any political reason. Neither was it a mere forgetful omission. It is with full purpose, and the reason is one of law and not of politics. We, therefore, owe it as a duty to the reader to furnish him in passing with a bit of legal information. In the first place, the States in the area do not recognize Israel, be it the existence, territory or the boundary, if any. This is their right, in International Law, which none can challenge. Secondly, Israel's foothold on the Aqaba Gulf apart from its illegal origin, is based on Armistice Agreements, which by their character and express provisions vest no sovereignty whatsoever, and leave the territory, including Aqaba, subject to all rights, claims and reservations. This is sufficient to show that Israel has no lawful standing in Aqaba, and passage through the Gulf and Strait of Aqaba to Israel is not lawful.

One other aspect of historic waters must be explained. When historic waters are in issue, the size is not to be taken into account. The width of historic waters in a bay or gulf, is not an element either. Jessup, the well know jurist of the United States, states that «the evidence of International practice and usage does not indicate that a claim to a large bay is illegal...». Should size become one element in the subject, there would be no distinction between historic waters and the high seas; and the status of scores of the existing historic bays and straits would cease to exist. The Hudson Bay and Hudson Strait of Canada comprehend an area of 580,000 square miles. All this great body of water is historic waters. Just imagine its length of 1,000 miles.

THE SIZE IS NOT A CRITERION

In the U.S.S.R., there are the Sea of Azov, the Kara Sea, Laptev Sea, East Siberian Sea, and Chukchi Sea whose nomenclature as seas relieves us from the necessity of calculating their dimensions. But just to give an idea, it is enough to know that the Sea of Azov is 290 miles long and 110 miles wide. In the United Kingdom, Moray Firth is 75 miles wide. the Vestfjord of Norway is about 100 kilometers across its entrance and 170 kilometers long. The Gulf of Gabes of Tunisia is 50 miles wide. In Australia, there are no less than 15 bays and straits whose width ranges between 10 and 48 miles. The San Jorge Gulf of Argentina is 100 miles wide. Thus the width of the bay, particularly at the entrance, is irrelevant in deciding whether a par-

ticular bay is or is not a historic bay. In support of this view, Barclay, a well known authority, states:

> «... There are, however, many bays which are more than ten or even sixteen miles wide and yet must necessarily be regarded by reason of their position, as under the absolute sovereignty of the coastal state. This is true of the firths of Scotland. The Bay of Cancale is seventeen miles wide; in Chaleur Bay, in Canada, the width is sixteen miles . All these bays are regarded as under the exclusive dominion of the coastal state. It is thus necessary to establish the principle that the status of a bay differs from that of the territorial sea proper...».

Professor Bourquin, another distinguished authority, goes even much further in supporting this point. He States:

> «... The number of bays the opening of which exceeds ten miles and which are nevertheless wholly within the internal waters of the coastal state is considerable. Unless we wish to accuse the state to which they belong of infringing the rules of International Law, we must therefore validate their claim...».

We turn now to the legal incidence of historic waters, what is their juridical status and by what law are they to be governed? The answer does not raise any serious difficulty. The difficulty, if any, is the direct result of past confusion in the looseness and inaccuracy of terminology. In draft codes and in textbooks and to some extent in judicial pronouncement, the terms «internal waters» and «territorial waters» were used invariably to mean the same thing. Now, that the International Law Commission has classified the maritime waters into «high seas», the «territorial sea» and «internal waters», there should be no difficulty in deciding what class are historic waters. From now onwards, we trust all reference to historic waters should be made in the context of interrnal waters.

That historic waters are internal waters possessing the juridical status of internal waters is now an established rule of International Law. Suffice it to quote Sir Cecil Hurst in his most illuminating analysis of the «Territoriality of Bays».

Referring to territorial waters and internal waters, he states that: «For practical purposes, however, there is no doubt that the difference between the two is that foreigners have a right of passage for innocent navigation through territorial waters, but enjoy no such right of simple passage through national waters...».

With the same firmness and precision, Gidel expresses the view that

historic waters are internal waters, and as such are not subject to the right of innocent passage. Gidel declares:

> «... When once a bay has been held to be «historic» all of its waters become internal waters with all the consequences which the status of internal waters entails. One consequence is that the coastal state is no longer bound to admit the «innocent passage» of foreign vessels in the waters of that bay...»

Gidel further stresses the point when he says that «it is always necessary to remember, in dealing with historic waters, the essential point that those waters are internal waters... The idea of internal waters and the right of innocent passage... are two incompatible concepts».

Upholding the same proposition, Chretien speaks of bays that penetrate into the land domain as falling «subject to the complete and absolute sovereignty of the coastal states».

Cavarne, in his «*Le droit international publique positif*» asserts that «there can be no right of innocent passage in historic waters».

In supporting the same position, Higgins and Columbus express the view that «the state is entitled... to prescribe and regulate the admission of foreign vessels,» in respect to historic bays and gulfs.

In the Draft Convention prepared by the Committee of Experts under the auspices of the League of Nations, an amendment was adopted which provides that the waters of bays «... are to be assimilated to internal waters».

Also, the International Law Commission, Article 7 of its Draft Code on the Law of the Sea, made ample provision for the assimilation to internal waters.

As to case law, various national courts at different times have decided that historic bays are internal waters. Special mention may be made of the decision of the Supreme Court of Canada in the case of the Bay of Chaleur, of the Second Court of Commissioners of Alabama Claims in the Case of Chesapeake Bay, and of the Privy Council in the Case of Conception Bay.

On the other hand, state practice follows the same line. The Governments of Germany, Canada, Great Britain, Japan and Portugal have informed the Preparatory Committee of the Codification Conference in 1930 that they consider historic waters to be internal waters.

All this volume of legal authority, doctrine and practice, leads to an irresistable conclusion that historic waters are internal waters and that conse-

quently no right of innocent passage is exercised in respect of such waters. Hence, historic bays, whether they be surrounded by one state or more, whether their width at the entrance is 12 miles or more, are internal waters – not open for international navigation. It is upon this assertion that the American Journal of International Law (Supp. April 1929) has described the Gulf of Aqaba as an Arab internal water. The American Journal States:

> «Since the waters (of Aqaba) are «internal waters» the question of applying the six-mile limit of territorial waters, as declared by both Egypt and Saudi Arabia, doed not arise. Nor can there by any question of an *international waterway*. The entrance to the Gulf is not a strait leading into an open sea; nor is it, like the Straits of Corfu, a passage between open seas. It is the entrance to the internal waters of the Arab states by which it has been surrounded for centuries».

The legal value of this view is three-fold. First, it supports the contention that the Gulf of Aqaba comprehends internal waters. Second, that this status existed before Israel came into existence. Third, that the Strait of Tiran which leads to the Gulf is not an international waterway. It must be stressed again in this connection, that once a historic bay, always a historic bay. Subsequent interventing situations, particularly when they are challenged, do not change the status of the historic bay.

This brings us to the most vital questions: what are the main elements that constitute the theory of historic waters, and what requirements should be satisfied to acquire a historic title, and what is the nature of evidence required to support a claim for a historic title?

These questions, distinct as they are, have many grounds in common and an answer to one could not be undertaken without touching the realm of the others.

WHAT CONSTITUTES A TITLE

To start with, it must be admitted that there is not general agreement, in doctrine or parctice, as to the basis of the title to historic waters. If it had served anything, the Fisheries Case of 1951 between the United Kingdom and Norway, did show a wide range of divergence of opinion on this question. The two volumes that were presented to the Court by both parties contain perhaps the greatest pooling of legal material on the question of historic waters although historic waters were not the main issue. Nevertheless, there is ample authority to point out the most plausible basis for a historic title.

From what has been said about historic waters, it is quite evident that national usage is the main root to a historic title. Not only such a proposition is reasonable and logical but it stems from the very concept of historic waters. Ownership cannot be without usage, physical or constructive, and it is inconceivable that a state can become a possessor and eventually an owner without usage. It is therefore logical and legal that nation usage *per se* could constitute a sufficient ground for a historic title. The Preparatory Committee of the First Conference of 1930, for the Codification of International Law recognized «usage» as a sufficient basis for title. The Japanese International Law Society, in its draft code of 1926 emphasized «universal usage». No doubt this is the same definition but lays the emphasis on universality. Usage must be universal, otherwise it cannot be historic. Recent usage does not vest any title, more so an historic title.

The Institute of International Law in its Paris Session of 1894, referred to «continuous usage of long standing». This is, too, a perfection of the basis of historic title. Continuity is the essence of a hsitoric right. A brief interruption to this continuity is of no legal validity. When challenged, an act of interruption, no matter how long it lasts, is equally of no avail. It is only a serious lawful interruption for a relatively long period that breaks the chain. Then, the previous continuity of usage ceases to be standing.

The International Law Association, at its Brussels Sessions in 1926, spoke of «established usage». This is no more than stipulating that usage could not be pure and simple, but must be established.

The American Institute of International Law, in its codification of 1925, made a combination of various expressions by using the phrase «continued and well-established usage».

The Harvard Research Commission, in its draft adopted the expression «established usage».

The League of Nations, in its draft prepared by the Committee of Experts, spoke of «established by continuous and universal usage».

We have made this outline to show that it is national usage, continuous and established, that creates a historic title. It is this usage by itself which is the main criterion for historic waters. In all international and municipal tribunals, national usage has been the pivot upon which turned their decision on historic bays. Suffice it to mention the case of Delaware Bay and the Conception Bay. Although still without a court decision, the Gulf of Aqaba is a vivid illustration of an historic bay based on well-established usage. In this regard, one main feature, as evidenced by non-Arab historians, particularly by foreign travellers, is that the Gulf has constituted for

all Islamic generations a pilgrims' route to the holy cities in the Arabian Peninsula.

National usage, however, no matter what adjectives are attributed to it need not be recognized by other states. Some writers do contend that internatiolnal recognition whether tacit or expressed is a necessary element to support a title for historic waters. But it would be doing extreme violence to the concept of historic title if the matter is to be left to the discretion of other states, to accept or reject. A title, any title, stands on its own. It does not have to wait the consent of others. Others' consent is required when they themselves have a right in the subject matter claimed. It is the use of the user, not the consent of the non-user which determines the right. The Norwegian title, for instance, in respect of the Vestfjord and the Varangarfjord as historic waters was not invalidated because of the challenges by France, as evidenced in the Case of the Vessel «Les Quatre Frères» in 1868, nor by similar challenges that were made by Great Britain in 1869 and 1911.

In fact, the replies of governments to the Preparatory Committee in connection with historic waters, did not refer to international recognition. The «existence of usage» was the term employed. Thus the consent of other states is not a constituting element in the concept of historic waters. The concept is one of Law, not one of states' views. Whether a body of water does or does not comprehend historic water is a question of law. With the present international system, questions of law can only be decided by the International Court of Justice. Thus, the views of the states on the matter are irrelevant. Likewise, the Security Council, the General Assembly or the Secretariat of the United Nations are not competent to adjudicate upon the legal aspects of any problem, be it national or international, whether it refers to land or marine sovereignty.

For political reasons or security considerations, the Security Council or the General Assembly can recommend certain measures with regard to international questions, but not to make any pronouncements on the legality or illegality of any claim to historic waters. Hudson Bay, for instance, could not be influenced one way or the other by reason of statements made in United Nations should a dispute arise in connection with the status of such a large body of water.

In the same manner, the Gulf of Aqaba presents another striking example. Its historic character, is a matter of law, to be decided only by a judicial authority and through judicial processes. Thus statements on the legal aspects of Aqaba made by certain states or by the Secretariat in the course of the deliberations in the General Assembly are irrelevant and inadmissible.

Similarly inadmissible, is any decision taken by the Security Council as far as the legal aspect of the matter is concerned. As was rightly pointed out by the Distinguished Representative of Canada in the course of the General Assembly deliberations on the Suez crisis, the Assembly recommendation in this regard was a political and not a legal act. To this, the Distinguished Representative of India added that the General Assembly cannot decide a legal controversy.

We do wish, however, in dealing with this matter to inject a political controversy into our deliberations. We simply endeavored to show that the question of historic waters is one of law and that the challenge of other states does not invalidate the title to historic waters. Should we bring consent of states as an element in the inherent right of states, we would be leaving all states at the mercy of each and every other state. This point has been vigorously advocated by a jurist of great distinction. In his project on historic waters, Bustamente has formulated his views as follows:

> «...when attempt is made to determine what is to be understood by the word «historic», some Governments maintain that to the traditional possession of the bay, there must be added the consent of other states.
>
> «It is very dangerous, because this that last condition lends itself to notable abuses. No one specifies from how many and from which states this conformity must proceed, or what is the legal value of one or various divergent opinions...».

This is a decisive statement of Law and Equity. It rightly relieves a state from being subjected to the dangers of notable or unnotable abuses. International Law is intended to safeguard the rights of a state, and to protect rather than to expose the state to any abuse of whatever character. Yet what is at stake is not abuse in the abstract. Historic waters are a deciding factor in the life of a state and indeed in its very existence. This is at least one reason why Professor Fauchille and a number of other writers have named historic bays as vital because of the economic, national and defense interests they serve. They are vital because of their special configuration, of their proximate location to the mainland and of their deep penetration. Add to all these considerations their impact on the life of the people to whom they belong. We hope these observations are not taken as legal fiction. They are the Law in its very essence.

In his judgment delivered on the Fisheries Case of 1910, Dr. Drago referred to historic bays and stressed the «requirements of self-defense» as an important ground for an historic title.

The Government of Portugal, in its reply to the Preparatory Committee of the Codification Conference of 1930 stated that «the considerations which justify this claim (to hsitoric waters) are the security and defense of the land territory and ports, and the well-being and even the existence of the State...».

The International Law Conference held in Buenos Aires in 1922, in its draft convention, referred to self-defense as the sole element in historic waters should the other elements be absent.

CONSENT OF OTHER STATES IS NOT AN ELEMENT

The Permanent Court of Arbitration, in the Fisheries Case of 1910, referred to the necessity of defense and to the special value for the industry of the inhabitants and other «circumstances not possible to enumeratre,» as elements that constitute the basis for a title to historic waters.

In the case of the Gulf of Fonseca, which has a striking resemblance to the Gulf of Aqaba, the Court endorsed the fact that the strategic situation of the Gulf and its islands is so advantageous that the riparian states can defend their great interests therein and provide for the defense of their independence and sovereignty.

In the case of Chesapeake Bay, the Court referred to the question as «of very considerable national importance».

All those and other legal precedents simply demonstrate the vital importance of historic waters in relation to the various national interests of the bordering state – a lawfully bordering state. With this in mind, it is inconceivable that such interests of paramount importance should be anchored to the consent of other states.

Yet the consent of states, should it be necessary, can reasonably be inferred from national usage itself. A continuous usage creates a presumption of acceptance on the part of the other states. In dealing with consent of other states, Gidels argues, very cogently, that «as a general rule, prolonged usage will afford the necessary proof». In the Fisheries Case of 1951, the United Kingdom has made out a well-supported submission to the International Court of Justice to the effect that usage can be regarded as evidence of acquiescene of other states. On the other hand, the passage of time in accordance with the submission of the British case is a «vital element... as supplying evidence of the implied acquiescence of other states». Sir Gerald Fitzmaurice adds clarity to this argument when he refers to «the essential role of the historic element» as a means «to supply an inference of acquiescence on the part of other states arising from their inactivity...».

This time element brings us face to face with the question of prescription, which is admittedly at present part of the Law of Nations. Unlike the Municipal Law, prescription in International Law, as Professor Scelle states, is indeterminate. We submit, that each case will have to be decided on its own merits, although it ought to stand the test of reasonableness. Bourquin does not bother himself about the length of time, for as he rightly assumes, «the usage... goes back to the most distant past. It is a universal usage in the strict sense of that word».

But for prescription to run, it msut be uncontested. This is applicable in particular to new states, whether recognized or not recognized, and whether their emergence was legal or illegal. Furthermore, although it is not necessary in law to prove the origin of the prescription – nor its validity – if prescription was proved to have started unlawfully, it will not give rise to any right, no matter how long it lasts. Time does not cure a defective title. The legal maxim *ex injuria non oritur jus* is conclusive: from a wrong no right arises. In the case of the Norwegian occupation of Eastern Greenland, the Permanent Court stated that prescription is open to the challenge that in origin it is «illegal and invalid». These observations happen to explain the legal viewpoints that reflect the Arab position *vis-à-vis* Israel's claim in the Gulf of Aqaba, and it is worthwhile that their views should be made known to the Committee, not from a political, but exclusively from a juridical angle.

LOCATION AND CONFIGURATION ARE EVIDENCE

We turn now to the last aspect, namely the nature of evidence required to support a claim for historic waters. As is generally admitted, there are not hard and fast rules about the quality or the quantity of evidence required in disputes involving matters of International Law. Municipal Law, and the English Common Law as examples, are congested with a set of rules prescribing admissible and inadmissible evidence, with the most minute detail about primary or secondary evidence, about documentary or oral evidence and what not. Such rules do not exist in International Law, particularly so on a question such as historic waters. Hence, normally, all types of evidence are admissible and what remains is the weight of evidence to support the claim. But two highly important facts are of great weight: the location of historic waters and their configuration. These are evidence by themeselves.

In the Delaware Bay Case, the Court accepted the plea that «the Bay belongs to the people with whose lands it is emcompassed». This is evidence of natural configuration.

Chretien considered as integral parts of the territory of coastal states bays which «penetrate into the land domain». This is evidence of location.

In its reply to the Preparatory Committee of the Codification Conference, the Government of Canada stated as follows:

> «In the case of bays where the distance from headland to headland is more than ten miles but the bay itself cannot be entered without traversing territorial waters, the waters of such bays shall be national waters».

These observations of the Government of Canada touch upon both the location and configuration.

In the Fisheries Case of 1910, the Permanent Court of Arbitration referred to «the distance by which the bay is secluded from the highways of nations on the open sea».

In the Fisheries Case of 1951, the International Court of Justice has stressed the location and configuration in the following terms:

> «Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts.
>
> Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them».

In dealing with this matter, Fauchille accepts the Zuider Zee as within Netherlands sovereignty because, as in the Gulf of Aqaba, the sea is enclosed by a continuous fringe of islands separated from each other by narrow passages.

All these recitations of legal authority clearly demonstrate that the facts about location and configuration in respect of historic waters supply what is known in English Common Law as the primary evidence in support of the case. Such facts are sufficient alone to prove the title. In this point, Baldoni, with his usual penetration, penetrates into the heart of the question. He states:

> «We may add that some of these bays, such as Chesapeake and Delaware, are of such configurations and size that they can so surely be regarded as accessory to the coasts surrounding them that no further inquiry of any kind is necessary to establish that they are not subject to the principle of the high seas».

Had Baldoni been familiar with our region, as he is familiar with the West and its bays, no doubt he would have added the Gulf of Aqaba, to Chesapeake and Delaware, as examples of historic bays. With a few miles in width, and extending as far as 100 miles into the heart of Arab territory, the Gulf of Aqaba cannot be anything except a historic bay, and in the words of Baldoni «with no further inquiry being necessary».

Next, we propose to deal with the set of evidence relevant to prove a historic title. Here are involved a number of factors that have a bearing on the exercise of sovereignty over historic waters.

The Central American Court of Justice in the Case of Fonseca referred to conventions as part of the evidence. Likewise in the Fisheries Case of 1951, Norway successfully advocated that measures taken under the Municipal Law, as well as administrative measures and judicial decisions can all supply the required evidence.

To explain the effect of these categories of evidence, particularly conventions and legislation, we shall select one illustration that applies to both. We have made the Gulf of Aqaba our choice because it is the case in point, which illustrates the acts of a state as evidence of historic waters.

In its note of October, 1914, the Ottoman Government announced the establishment of the limit of her marginal sea to apply to the «Black Sea, the Archipelago, the Red Sea, the Sea of Oman and the Persian Gulf». The omission of the Gulf of Aqaba, which was at that time within Ottoman sovereignty, is a clear indication that the Ottoman Empire did not consider the Gulf of Aqaba as part of the high sea calling for the delimitation of the territorial sea.

Again, the International Sanitary Convention of 1912 which spelled out the details for an international regime with regard to the Moslem Pilgrim traffic through the Suez Canal and the Indian Ocean, the Gulf of Aqaba was not referred to, although it is an important pilgrim route. This omission in the convention is an indication to show that the Gulf was recognized as national waters.

We have also Article 10, Paragraph 3 of the Constantinople Convention of 1888, reference to which was frequently made in the United Nations. It is clear from the record of negotiations which led to the conclusion of the convention that the intention was to leave the Gulf of Aqaba and its Straits outside the regime of passage defined fot the Suez Canal. This is again an indication to be inferred from a convention that the waters of the Gulf of Aqaba have no international character.

With regard to domestic legislation as evidence, also the Gulf of Aqaba serves the purpose. The Saudi Arabian Royal Decree of May 1949 has prescribed the Gulf of Aqaba as falling under Arab sovereignty. As to other acts of the state as evidence, we can mention in passing in respect of the Gulf of Aqaba, the past fortification, pilgrim establishments, roads and other arrangements undertaken for the safety of the pilgrimage.

Thus, with this single illustration, we are able to show that all sorts of evidence can be adduced to support a case for historic title.

HOW TO DISPOSE OF THE PROBLEM

In conclusion, this is how we approach the problem of historic waters – its origin – its juridical status, the elements that constitute the concept and the nature of evidence required. We have placed our views in detail on this question, one aspect after the other. This is an item that has come up this year as a legacy of last year. It has been a debit on the books of the International Community ever since the nineteenth century when the efforts for codification were first started.

We are not at this stage making any final proposal, but we have a suggestion to make. Our work can be divided into four stages:

THE FIRST STAGE, here in the United Nations, we can state our views on the subject, thus forming a pool of legal knowledge on the question.

THE SECOND STAGE, we can request the Governments of Member States to supply the Secretariat with all data and information on historic waters within their territories, thus forming a factual pool of information about historic waters.

THE THIRD STAGE is to ask the International Law Commission to prepare in the light of such legal and factual material a draft code to regulate the juridical system of historic waters.

THE FOURTH STAGE would be to convene an international conference of plenipotentiaries to prepare a draft convention on the Regime of Historic Waters.

This is how we see the procedure to be followed in dealing with this matter. Should we follow such course, we submit, the United Nations would make an historic achievement on historic waters.