CHAPTER I

The International Law Commission

In this and the next chapter, only those aspects of the work of the International Law Commission (ILC) and the Geneva Conferences that deal with boundary and associated problems will be considered. The work of the ILC must be regarded as preparatory in nature only since its final recommendation was for convening an international conference of plenipotentiaries to examine the law of the sea, and to embody the results of its work in one or more international conventions.[1]

The frame of reference for the Geneva Conferences was the final report of the ILC, and many of the articles adopted at Geneva follow literally the phraseology of the draft articles of the Commission. In order, therefore, to avoid extensive repetitions the Commission's report will be dealt with not as a separate entity, article by article, but through the conventions adopted at Geneva, emphasizing where departures exist or where no action at all was taken—for example, on the breadth of the territorial sea.

There is little doubt but what the work of the International Law Commission and the 1958 Geneva Conference represents the greatest advance in the development and codification of the international law of the sea since the 1930 Hague Conference for the Codification of International Law was convened.

II. ORIGIN AND ORGANIZATION

Article 13 of the Charter of the United Nations requires the General Assembly to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." The machinery established by the General Assembly for carrying out

1. Report of the International Law Commission, 8th Sess. 3 (1956) and recorded in Official Records, U.N. General Assembly, 11th Sess., Supp. No. 9 (1956) (U.N. Doc. A/3159) (cited hereinafter as Report of the ILC (1956)).

this task took the form of the International Law Commission, which was established under General Assembly Resolution 174 (II) on November 21, 1947. Under the statute, the Commission is charged with the codification and development of international law.[2]

The Commission is composed of 21 eminent international lawyers and jurists—no two of which are nationals of the same State—elected by the General Assembly from a list of candidates submitted by the governments of members of the United Nations.[3] The term of office of each member is 5 years.

12. PREPARATORY WORK OF THE COMMISSION

The Commission, at its first session in 1949, selected as topics for consideration both the regime of the high seas (including the contiguous zone and the continental shelf) and the regime of the territorial sea, the former being given priority.

Consideration of the regime of the high seas was begun in 1950 and was completed in 1956 after the Commission had published two drafts on the high seas based on six reports by a Special Rapporteur and comments by governments.

Work on the regime of the territorial sea was begun by the Commission in 1952 on the basis of a report by the special rapporteur which dealt in particular with questions of baselines and bays. In 1954, provisional articles were promulgated to governments which reflected the observations of a group of experts on certain technical aspects of the problem.[4] At its eighth session, in 1956, the Commission examined the replies from governments and drew up its final report on the regime of the territorial sea and the regime of the high seas, incorporating a number of changes suggested by the replies.[5] This formed the background and framework for the Conferences on the Law of the Sea in 1958 and 1960 (*see* 22 and 23), and paved the way for an orderly consideration of the many problems that were to be dealt with.

2. In Art. 15 of the statute, the expression "codification of international law" is defined as "the more precise formulation and systematization of rules of international law in fields where there already have been extensive State practice, precedent and doctrine"; whilst the expression "progressive development of international law" is defined as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."

3. Prior to 1956, the Commission was composed of only 15 members, but this was changed by General Assembly Resolution 1103 (XI), Dec. 18, 1956. Johnson, *The Preparation of the 1958 Geneva Conference on the Law of the Sea,* INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 124 (Jan. 1959).

4. Report of the ILC (1956), *supra* note 1, at 3.

5. *Id.* at 4–12.

13. FINAL REPORT

The final report of the Commission is in two parts, the first dealing with the territorial sea and the second with the high seas. Part I is subdivided into a general section, a section on the limits of the territorial sea, and a section on the right of innocent passage. Part II is subdivided into sections on the general regime of the high seas, contiguous zone, and continental shelf.

There are 73 articles in all, each accompanied by a commentary which in some cases is quite extensive.[6] The commentaries are sometimes merely of a clarifying nature and confined to a statement of the route by which the Commission arrived at its conclusions; in other cases they contain matters more substantive in nature.

In preparing this set of rules, the Commission found difficulty in distinguishing those that were merely a restatement of existing international law, thus belonging to the category of "codification," from those that were proposals for the creation of new law and, therefore, belonging to the category of "progressive development" of the law (*see* 11). Several of the rules the Commission found did not wholly belong to either category. Under the circumstances, in order to give effect to the project as a whole, it proposed an international conference of government representatives to examine the law of the sea (*see* note 1 *supra* and accompanying text).

131. Summation of Rules Adopted

From the standpoint of shore and sea boundaries, the pertinent rules adopted by the ILC are those dealing with the territorial sea and the continental shelf. A summation only of these rules will be given in this section and will be considered against the background of established American practice. A fuller treatment is included in Chapter 2.

1311. *The Territorial Sea*

The pertinent portions of this part of the Commission's report deal with baselines, bays, islands, drying rocks and shoals, and breadth and outer limits of the territorial sea. The Commission supports the rule of the tidemark (the

6. Art. 20 of its statute requires the Commission, when engaged in the codification of international law, to attach commentaries to its drafts. Such commentaries must contain (a) adequate presentation of precedents and other relevant data, including treaties, judicial decisions, and doctrine; and (b) conclusions relevant to: (i) the extent of agreement on each point in the practice of States and in doctrine; (ii) divergencies and disagreements which exist, as well as arguments invoked in favor of one or another solution. Johnson, *supra* note 3, at 127.

low-water line) as the baseline for delimiting the territorial sea in the case of a normal coastline. Where circumstances necessitate a special regime, as where the coast is deeply indented or is fringed with islands, the Commission upholds the use of straight baselines in accordance with the criteria laid down in the *Anglo-Norwegian Fisheries* case (*see* Part 1, 513). Straight baselines may not, however, be drawn to and from drying rocks and shoals (those that bare at low water but are covered at high water). No limitation is placed on the length of baseline, nor on the distance from the coast.

On the matter of bays, the Commission recommends the "semicircular rule" (*see* Part 1, 421), advocated by the United States at the 1930 Hague Conference, as an appropriate criterion for determining the status of indentations (whether inland waters or open sea), but extends the "10-mile rule" (*see* Part 1, 43) by providing a 15-mile limitation as the closing line for an indentation that exceeds this distance at the entrance. The Commission suggested no specific relationship between this distance and the breadth of the territorial sea. It took account, however, of the fact that the 10-mile rule dated back to a time when a 3-mile territorial sea was generally accepted, and inasmuch as there is a tendency to increase the breadth of the territorial sea, the extension seemed justified to the Commission.

The proposal with regard to islands along a coast represents substantially American practice in this field, that is, every island has its own territorial sea.[7] No specific provision is made for the treatment of groups of islands or archipelagoes along a coast because of the complicated nature of the problem and the lack of technical information on the subject.

The provision as to drying rocks and shoals reflects American practice. They carry no territorial belt of their own if situated outside the territorial sea; if wholly or partly within, they are treated the same as islands, the net effect of which is to introduce bulges in the outer limit.

1312. *The Continental Shelf*

In formulating its draft articles on the continental shelf, the Commission was faced with a *de facto* and highly explosive situation arising from the unilateral and divergent claims of maritime nations over the natural resources of this submerged portion of the continents of the world (*see* Part 2, 2221).

7. In a commentary on this proposal, the Commission specifically spells out that elevations of the seabed that are above water at low tide only (including installations built on such an elevation and permanently above water) are not to be included in the category of islands. Report of the ILC (1956), *supra* note 1, at 17.

The Commission spells out that a coastal nation exercises sovereign rights over the continental shelf for the purposes of exploring and exploiting its natural resources. It defines the term continental shelf, as used in the draft articles, as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters (approximately 100 fathoms).[8]

1313. *The Breadth of the Territorial Sea*

The most controversial aspect of the territorial sea is its breadth. It was the stumbling block at the 1930 Hague Conference, and no single resolution proposing an appropriate breadth was even put to a vote. Since that time, the area of agreement has been further diminished by new claims to large areas of the high seas. The Commission recognized the wide diversity of opinion that existed among governments regarding this, and the same diversity was noted within the Commission. While several proposals were considered, no single one received majority approval.[9] It, therefore, contented itself with merely noting some of the difficulties that stood in the way of adopting a uniform distance, and drafted, in its final report, the following Article 3:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such breadth when that of their own territorial sea is less.
4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.[10]

It is important to note that the Commission gave no support to the claims of nations to extend the territorial sea to a breadth which jeopardizes the prin-

8. The final report of the Commission differs in one important respect from the draft articles promulgated in 1953. While maintaining the limit of 200 meters as the normal limit corresponding to present needs, the Commission is of the opinion that where exploitation of the subsoil is practical there is no justification in applying a discriminatory legal regime to such regions. It therefore subjoined to the main proviso the language "or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." This exploitability or competence test has the advantage of flexibility and had the support of the United States in the earlier drafts. *Id.* at 41–42.

9. Among the proposals suggested were that each nation be free to fix its own territorial sea in accordance with the real needs of that State, and where the breadth adopted could be shown justified by such needs the limit would be in accordance with international law; that the Commission adopt a rule that any limit between 3 and 12 miles was legal; that the breadth be 3 miles but that a greater distance be recognized if based on customary law; and that a State be allowed to fix a breadth greater than 3 miles, but not to enforce it against any State which had not adopted an equal or greater breadth. *Id.* at 13.

10. *Id.* at 12. Such a conference was held in 1958 and in 1960, but no agreement was reached (*see* 2217 and 232).

ciple of the freedom of the high seas, and while it stated that the upper limit under international law is 12 miles, it was unable to fix a limit between 3 and 12 miles. It was the view of the United States, as transmitted by *notes verbale* of February 3, 1955, and March 12, 1956, that there is no valid legal basis for claims to territorial waters in excess of 3 miles, that international law does not require nations to recognize a breadth of territorial waters beyond that distance, and that 3 miles is the proposal most consistent with the principle of freedom of the seas and has the greatest sanction in history and practice.

For delimiting the outer boundary of the territorial sea, the Commission adopted the "envelope line" every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea (*see* Part 2, 1621(*c*)).

132. United Nations Action

The report of the International Law Commission was exhaustively debated by the Sixth (Legal) Committee of the General Assembly, after which the Assembly adopted Resolution 1105 (XI) on February 21, 1957, instructing the Secretary-General to convoke an International Conference and to invite appropriate experts to advise and assist the Secretariat in preparing the Conference.[11] The General Assembly referred to the Conference the report of the ILC as the basis for its consideration of the problems involved in the development and codification of the law of the sea. It also referred to the Conference the relevant verbatim records of the General Assembly.[12]

11. General Assembly, 11th Sess., Official Records, Supp. No. 17 (A/3572). The resolution states that the General Assembly "*Decides,* in accordance with the recommendation contained in paragraph 28 of the report of the International Law Commission covering the work of its eighth session, 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, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."

12. In addition, the Conference had available documents of a legal, technical, and scientific nature. Among these were a memorandum concerning historic bays; a comparison between the law of the air and the ILC draft articles; two surveys of the geographical and hydrographical features of straits which constitute routes for international traffic, and of bays and estuaries, the coasts of which belong to different States; a study of certain legal aspects of the delimitation of the territorial waters of archipelagoes; and two technical studies concerning the continental shelf. Johnson, *supra* note 3, at 140–141, where citations to these studies and documents are given.