AUSTRALIA AND THE LAW OF THE SEA*

By Sir Kenneth Bailey†

After remaining markedly stable for almost two centuries, the international law of the sea has, in this generation, become as dynamically unsettled as the science of physics. Since the close of the second world war, it has literally been bursting into new shapes. Australia has much at stake, both in the process and in the outcome.

The established customary international law of the sea can be summed up in a phrase that has long been a slogan, as well as a description: the freedom of the seas. A coastal State has sovereign powers in a defined marine belt (called the "territorial sea") along its coast-line, subject however to a right of innocent passage through the territorial sea for ships of all other States. Beyond the territorial sea lie the high seas, in which no State is sovereign. In the high seas the nationals of every State have freedom to navigate, to fish and to lay submarine cables and pipelines, and over the high seas the nationals of every State have freedom to fly, without the leave or licence of any other State. Together, these rights make up the historic principle of the freedom of the seas.

The essential characteristic of the new law which is coming into shape is that the coastal State is recognized as having a special interest in the waters adjacent to its coasts, even beyond the territorial sea, and is being accorded larger rights. Claims are made to a wider belt of territorial sea, and to confine more strictly the right of passage through it. Claims are made to extend the sovereign powers of the coastal State to the sea-bed and the sub-soil of the continental shelf (an opaque, technical and imprecise expression about which I shall say more presently). Claims are made to enlarge the competence of the coastal State for purposes of conserving the fish stocks in the high seas. The question is, how much and how many of these claims are to be recognised, or (looking at the matter from the other end) how far they are to be denied in the interest of maintaining the historic principle of the freedom of the high seas.

Before turning to show how this works out in detail, let me remind you, however summarily and untechnically, what international law is,

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and how it is changed. There is no Parliament of Man, with the authority to make laws by its own Act. International law is what States consent to be bound by. They give their consent either tacitly, by practice which establishes custom as law, or expressly, by agreement. Positive international law, therefore, is usually classified as either customary or conventional.

What I have said is incomplete, and takes no account of the development of international law of judicial tribunals applying "the general principles of law recognised by civilized nations". But for present purposes it will suffice.

Hitherto, the international law of the sea has been almost wholly customary. But, in our own time, there have been a great many departures, to use a very inexact but familiar and expressive word, many *unilateral* departures, from established norms. These have stimulated an immense concerted effort, through the United Nations, to bring all States together in an attempt to reach a new settlement, on the basis of convention—that is to say, to bring into existence a new code resting not on custom but on treaty.

Many learned disquisitions have been written about the nature and essence of Law. This is not the place, even if I were the person, to expound the conflicting theories and dogmas. For present purposes it is enough to say that the recognition and adjustment of conflicting human interests is an essential feature of any legal order. International law is the set of rules, recognizing, adjusting and regulating international claims and interests, which States will consent to be bound by. The intrinsic reason and justice of the rules are by no means negligible elements in their acceptance. But at last States will accept international law, even though the rules they accept do not give them all that they would individually wish, rather than live without law at all; for without law there is that anarchy which Hobbes called "the state of Nature": a state which, as he said, was "a condition of war of each against all, in which the life of man is solitary, poor, nasty, brutish and short."

The international customary law of the sea, as you will have perceived if you have been reflecting, consciously or unconsciously, on the broad description that I gave a few minutes ago of its central feature, took for its starting point and foundation the idea that the sea, and all its resources, were the common heritage of mankind. No State could exclude the nationals of another State from, or regulate them in, the enjoyment of the resources and facilities of the sea. This great concept treats as paramount the interests that man and States have in common. The sovereign, that is to say the exclusive, powers of the coastal State in the narrow belt of territorial sea immediately adjacent to its coastline appear, in this concept, as a mere exception, recognized basically because some measure of authority in the waters immediately adjacent to the coast is necessary for the

security, defence and good government of the coastal State—and, even so, subject still to a right of innocent passage on the part of the nationals of all other States.

One of the constant reiterations of anti-Western propaganda at the conference held at Geneva in 1958 was that the international law of the sea had been made to suit the interests of the great maritime empires of the West, to the prejudice of all other States. The freedom of the seas, so the contention went, was forced on the overseas dependencies of the Western empires, regardless of local interests. Now that the small States around the perimeter of Asia and Africa have escaped from Colonialism, it was said, they should work together to reject the old concepts, and write a new law of the sea in terms of their own interests.

The concept of the freedom of the seas was, indeed, consonant with the dominant interests of the great maritime powers of the West. But the truth is that the freedom of the seas, as this concept has come down to us from history, is consonant with the dominant interests of all States, whether great or small, which depend upon access to the coasts, and to the waters adjacent to the coasts, of other countries. At no time in modern history can States such as Belgium, Portugal, Denmark, Norway, Sweden, or even, for that matter, the Netherlands, be said to have ranked as a "great power" in the ordinary sense. But they had this, at least, in common with the great maritime powers of the West—France, the United Kingdom, and, in more recent times, the United States—that their economic interests required the maximum freedom of access to the coasts, and waters adjacent to the coasts, of other countries. The same became true of Japan.

Over against this distant-waters interest stands the dominant interest of those States whose nationals are chiefly concerned in the exploitation of the waters along the coastline of their own State. Such an interest may spring from the absence of international or overseas shipping lines (or airlines), from the presence of rich fisheries along their own coastline or the absence of regular dependence on distant-waters fisheries, or from a particular concept of national defence and security. For one or more of these reasons, a coastal State may be more concerned to extend its authority in the waters adjacent to its coast, even to the point of reserving them exclusively for the use and exploitation of its own nationals, reckoning that on balance the sacrifice of access to the waters of other States would cost it less than what it would gain in its own waters.

You may perhaps have noticed that I was careful to speak about the "dominant" interest of the great maritime States. In an audience under the auspices of the Australian Institute of International Affairs, I scarcely need to explain how abstract we can easily become in our thinking about States. This or that, we say, is in the interest of Australia, or the United Kingdom, or the United States. But in fact

most States will contain interests, and perhaps organized interests, of the most conflicting character. In the United Kingdom, for example, the great fishing ports of Hull, Grimsby, Fleetwood, and Aberdeen depend for their livelihood on access to the coastal waters of Iceland. But the many fishing villages along the shores of the Moray Firth feel acutely the competition, within the Firth, of fishermen from Scandinavia, and would greatly appreciate an extension of the territorial sea, within which their own rights are exclusive. The Government of the United Kingdom, in fact, has had a most difficult task in making its choice between the claims of its own inshore fisheries on the one hand and its distant-waters fisheries on the other. Truth to say, the pattern is even more complicated than this. Not only must the Government consider the claims of different types of fisheries, there must also be considered the viewpoint of the shipping interests, to say nothing of defence needs and of aviation. Exactly the same thing is true in the United States. I think it is probably just as true in the Soviet Union.

At long last, we are perhaps in a position to appreciate some of the pressures under which coastal States have demanded in recent years an extension of their maritime rights. They are various — technological, economic, political and strategical.

On the technological side, new processes have been devised for exploiting the resources not only of the sea itself but also of the sea-bed and the sub-soil. In the case of the sea-bed and the sub-soil, these new processes have threatened the coastal State with quasi-permanent foreign installations, as of right, only a short distance from the coast. In the case of the fish-stocks of the high seas, conservation problems have appeared in many areas for the first time in history. The world catch of fish is rapidly rising. In consequence, the coastal State has felt that to be able to exercise complete control over fishing operations in its territorial sea itself is not enough.

On the economic side, the responsibility for the maintenance of rising populations has sharpened the demand of coastal States for a greater share of the resources of the waters adjacent to the coast. In particular, since by and large the richest stocks of fish are to be found in the waters nearest the land, there is a natural demand to reserve for the local fishing populations the most readily productive marine sources of food supplies.

On the political side, the numerous small States in Asia and in Africa, which have recently attained their sovereignty, are impatient of restraints upon their competence, and eager to support the claims, existing or for that matter potential, of their own citizens, more particularly perhaps as a proof that they are no longer to be bound by the rules which applied to them in former Colonial times. At the Geneva conference in 1958, the Arab States added a political objective of their own. What they wanted was such a formulation of the international law of the sea as would effectively block Israel's access to the high seas through the Gulf of Aqaba.

On the strategical side, the issues are stark and clear, though not always frankly discussed. The changes in the law of the sea, in fact, tend to be looked at simply as part of the "cold war" between East and West. The Soviet group insist that a wider territorial sea than the traditioual law of the nineteenth century permitted is necessary for the defence and protection of the coastal State. The maritime States of the West on the other hand urge the necessity of the widest possible area of free passage.

Consideration of these pressures prompts further questions: where, in all this, does Australia stand, and what does Australia have at stake in this changing pattern of international law and relationships?

Australia's position is basically that of an island. The world's islands have, as such, a special interest in the substance of the international law of the sea, because all their international lines of communication, commercial, cultural and military, must lie in, or over, the sea. Australia, because of its size, its distance from the other continents, and its political associations, has an interest more acute than that of most other islands. Australia's interest in freedom of communications is accentuated, moreover, by the immense numbers of islands to the north-west, between or over which some vital traffic lines pass.

In the controversies out of which there emerges the new pattern of the international law of the sea, Australia therefore has at stake the economy, the safety and indeed the existence of her communications, by sea and by air, in peace and in war. Australia has at stake also the interests of the great States with which she is associated —particularly the United Kingdom, the other countries of the Commonwealth, and the United States. Australia has at stake, thirdly, the control of the natural resources that are to be found on the sea-bed and in the sub-soil of the Australian continental shelf—a submarine area that is narrow off our southern coasts but of great extent northwards. The right to control the living organisms that belong to the sea floor is, as you will remember, the only remaining matter at issue between Australia and Japan, all other points of difference having by now been settled.

Potentially, moreover, Australia has at stake her competence to ensure the conservation of the fish-stocks in the high seas around her coast.

Australia's position as a nation, so far as concerns fisheries, is, in fact, much simpler than that of many other countries. Australian fishermen do not regularly visit the coastal waters of other States; nor on the other hand, as I have said, does Australia have substantial foreign fishing fleets in the high seas off her coasts. But there would be no technical obstacle, in future, to visits to Australian waters from

the great mechanised fishing fleets which are currently being built in several overseas countries. The stocks of fish in Australian waters do not appear to be particularly rich or abundant. Hence there may well arise in future, for Australia's domestic industries and food supplies, a conservation problem in the high seas such as other countries are already experiencing.

Having said something about the stake that Australia has in the emerging new pattern of the international law of the sea, I turn now, briefly, to the controversies and discussions in which the new pattern is taking shape.

Hitherto, as mentioned earlier, the law of the sea has been customary rather than conventional in character—though custom was supplemented by a few isolated but very important conventions regulating, for example, passage through certain international straits and canals, and the exploitation of some great fisheries in the high seas. A body of customary law is satisfactory enough, so long as the practice which it both expresses and regulates is reasonably stable and uniform. The precise legal effect of divergencies in practice, however, is a matter that raises difficult and most obscure questions of legal theory. Various international tribunals, moreover, have laid down rather stringent conditions for the creation of new customary law. In our own century, the claims of States have diverged so much from the traditional rules that there seemed no means of clarification and stability other than to replace the traditional customary law by international agreement. In this I am thinking particularly, but by no means exclusively, of the breadth of the territorial sea.

The League of Nations essayed the task in a conference at The Hague in 1930. The conference did not reach agreement on the breadth of the territorial sea, and dissolved without adopting any substantive instruments. But the matter did not remain very long in abeyance. Article 13 of the Charter of the United Nations put squarely upon the General Assembly a duty to initiate studies for encouraging the progressive development of international law and its codification. The discharge of this duty the General Assembly entrusted in 1947 to a standing body of experts, the International Law Commission, and listed the international law of the sea as one of the subjects for study by the Commission.

Between 1949 and 1956, the Commission hammered out, in the light of its own protracted discussions and the observations on its preliminary texts furnished by governments, a comprehensive set of seventy-three draft Articles covering all the main features of the international law of the sea in time of peace. At the Commission's own suggestion, the General Assembly in 1956 convoked a United Nations conference, to take the Commission's draft Articles as the basis of its discussion, and on that footing 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".

The conference met from 24 February to 27 April, 1958. It was attended by representatives of eighty-six States—that is, practically all the members of the United Nations and its specialized agencies. The conference adopted four substantial conventions, which were very close in substance, and often even in form, to the draft Articles formulated by the International Law Commission: a most striking tribute to the industry, learning and judgment of the Commission.

Between them, the four conventions (with one vital exception) cover the whole field of the international law of the sea. They deal with—(i) the territorial sea; (ii) the general regime of the high seas; (iii) fishing, and the conservation of the living resources of the high seas; and (iv) the continental shelf. All four conventions were adopted by immense majorities.

The Geneva conference, like The Hague conference before it, failed to reach agreement on the breadth of the territorial sea. This problem is to be tackled again, at a second United Nations conference at Geneva in March, 1960. Because of the importance of the matters left unresolved in 1958, it would be going too far to say that the conference began with seventy-three Articles drafted by the International Law Commission, and ended by substantially adopting seventy-two of them—though this actual piece of arithmetic is almost literally correct. I make the point only because of the still quite prevalent impression that the Geneva conference achieved nothing, and left the international law of the sea just where it stood. This is precisely and categorically incorrect. The four conventions require ratification, and their fate—in some countries at any rate—may well depend on what is done at Geneva in March, 1960. But the text of these four conventions do embody a very substantial and impressive consensus of what the mid-twentieth-century international law of the sea ought to be.

I said, and said advisedly, that the conventions embody a general consensus of what the law of the sea *ought to be*—not necessarily what it *is*. In formulating its draft Articles, the International Law Commission had considered whether it was possible or desirable to separate out those portions of its text which, in its opinion, represented existing law and those, on the other hand, which represented new proposals. Very wisely, as I think, the Commission decided to abandon the attempt altogether. It cannot therefore be assumed, of any particular provision in any particular convention, either that it represents the mere codifying of existing law or that it represents the progressive development of existing customary law into something new and different. The text of the conventions has the status of pro-

visions which the Geneva conference, acting in each case by a duly constituted majority, thought that member States could properly be asked to accept as law.

In this sense, then, let me turn to the four conventions, and take a quick look at each from Australia's point of view. I shall begin with the convention on the continental shelf, not because this was the most important intrinsically, or even perhaps ultimately the most important to Australia, but because it dealt with a branch of the law of the sea which is of relatively recent origin and in which Australia had taken a very clear stand, a stand moreover which had brought it into dispute with a great maritime State, Japan.

The convention on the continental shelf consists of fifteen Articles, of which the first supplies a lucid definition of the term "continental shelf" itself. The phrase means the sea-bed and sub-soil of the submarine areas adjacent to a coast, but outside the area of the territorial sea, to a depth of two hundred metres (i.e., roughly, 100 fathoms), or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the areas concerned.

The world's land masses are far from uniform in the pattern of their emergence from the sea. But it is a familiar configuration to find a more or less steady slope down to the point at which the sea-bed is covered by about one hundred fathoms of water, and beyond that point a much steeper fall-away to great depths. From the biological point of view, of course, the outer limit of the territorial sea is quite irrelevant. But the lawyer has no problems about the resources of the sea-bed beneath the territorial sea. The coastal State has long been recognised as validly exercising sovereign power, not only over the territorial sea itself but over the sea-bed and the sub-soil below it and the air-space above it. The lawyer's problem only begins when he gets beyond the territorial sea, and comes to consider the sea-bed which lies below waters that have the legal character of high seas. When, therefore, I speak of the continental shelf, I am to be understood as speaking of the sea-floor beyond the outer limit of the territorial sea.

What the convention mainly says about the continental shelf, so understood, is simple, and three-fold—

(i) "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources": Art. 2(1);

(ii) the natural resources referred to "consist of the mineral and other non-living resources of the sea-bed and sub-soil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the sub-soil": Art. 2(4);

(iii) "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas": Art. 3.

In 1953, the Australian Government took two important steps in relation to the continental shelf. By Proclamation on 11 September, the Governor-General declared that, by virtue of international law, Australia has sovereign rights over the sea-bed and sub-soil of the continental shelf contiguous to any part of its coasts for the purpose of exploring and exploiting the natural resources of that sea-bed and sub-soil. The Proclamation was expressly declared not to affect the status as high seas of the waters above the continental shelf. This was an executive act, which did not and could not alter the local law. Internationally, however, it was an emphatic declaration of Australia's position. Later in the same month, the Australian Parliament gave legislative effect to the rights asserted in the Proclamation, by amending the Pearl Fisheries Act 1952 so as to bring foreign nationals (in addition to Australian citizens) within its regulatory provisions.

The Japanese Government protested against this measure, claiming that it could not, without contravening international law, be applied to Japanese nationals taking mother-of-pearl shell from the oyster beds on the continental shelf off the northern coasts of Australia. The Australian Government accepted a suggestion of the Japanese Government that the legal issue should be submitted for judicial decision, and expressed itself as willing to submit the matter to the International Court of Justice by special agreement, provided only that an acceptable *modus vivendi* was agreed upon in the meantime. Such a *modus vivendi* was, in fact, reached in May, 1954, and registered with the United Nations. This Provisional Regime will operate until the matter is decided by the Court. Under it, Japanese nationals conduct pearling operations under Australian as well as Japanese licences, and in areas and under conditions determined by the Australian Government. But the provisional regime is expressed to be wholly without prejudice to the contentions of the parties in the dispute.

Agreement has not been reached between the two Governments as to the terms in which the issue is to be submitted for decision by the Court. Meantime, the two Prime Ministers have discussed the possibility of adjusting the matters in dispute, by agreement, without legal proceedings. The mother-of-pearl industry itself is, economically, in a depressed condition owing to increasing competition, in the button industry, from plastics.

In asserting, in 1953, a claim to sovereign rights over the natural resources of the continental shelf, Australia did not by any means break new ground. There was, for example, a Proclamation made by the President of the United States on 28 September, 1945. It declared

that "the Government of the United States regards the natural resources of the sub-soil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the United States, subject to its jurisdiction and control." This Proclamation was quickly followed by similar action on the part of other States. The United Kingdom took no action with regard to its metropolitan territory, but did formally assert sovereignty in respect of the continental shelf of a large number of Colonies and other communities for whose international relations it was responsible. By 1953, about two dozen States had asserted sovereign rights over the continental shelf. Some of them indeed went much further, and included the living resources of the superincumbent high seas. By the time that the Geneva conference met, in 1958, the number of States asserting rights in the continental shelf had risen to 30.

What had, no doubt, primarily actuated the United States in issuing the Truman Proclamation of 1945 was the rapid technological changes which made possible the exploitation of the mineral resources in the sub-soil of the continental shelf far beyond the limits of the territorial sea. It needs little imagination to envisage the confusion and embarassment that would result for a coastal State if resources of this kind were to be regarded as thrown open for exploitation by all-comers, and subject to no regulation whatever by the coastal State.

Though the United States Government doubtless had "mineral" resources primarily in mind, the actual language of the Truman Proclamation was wider: it spoke of "natural" resources. The International Law Commission discussed at some length the question whether in principle the rights of the coastal State should or could be limited to mineral resources, and came to the conclusion that they could not. The Commission thought, however, that the task of defining just which natural resources should be accepted as belonging to the continental shelf, as distinct from those which more properly belonged to the high seas above, required technical information not available to the Commission at the time.

At the Geneva conference, Australia took the initiative in an attempt to secure a really satisfactory definition of the "natural resources" of the continental shelf. The problem was delicate. Clearly enough, living organisms which either were permanently attached to the sea-bed, or were incapable of locomotion, could be said to belong to the sea-bed. But this would exclude a number of species which, while capable of locomotion, were incapable of moving off the sea-bed itself. The chank—important to both India and to Ceylon—is one of these. Our own green snail is another. Biologically speaking, it was sound enough to include these too as belonging to the sea-bed. But countries like the United Kingdom and the United States feared lest any definition which was wide enough to include living organisms, or at any rate living organisms capable of locomotion, might turn

out to be loose enough, scientifically, to enable coastal States to claim, under it, crustaceans such as the shrimp and bottom-fish such as the sole. There were moreover some grounds for these fears. Some coastal States objected to any definition which would plainly exclude creatures such as the shrimp.

In an attempt to work out a scientific and legally exact definition, the Australian delegation at Geneva was encouraged to organize a Commonwealth working party, in which marine biologists were associated with lawyers. There resulted the definition which is now to be found in the convention. I am myself too long in the tooth as a lawyer to wish to be dogmatic about the meaning that will be given hereafter to any form of words, however meticulously prepared. This definition, however, certainly resulted from a most heartening piece of Commonwealth co-operation. It is the earnest hope of its draftsmen that it will be found in practice to *exclude* the shrimp and the sole from the natural resources of the continental shelf just as unequivocally as it *includes* the mother-of-pearl shell, the pearl oyster, the beche-de-mer, the trochus and the green snail, as well as the sacred chank of India and Ceylon. If it turns out to do these things, Australia has good ground for being pleased with the result, and for being grateful for staunch support from her associates in the Commonwealth and also from the United States, France, Norway and others.

For reasons already given, it is not possible to say of this convention that it is *merely* declaratory of existing international law. Australia would certainly not concede, on the other hand, that it is wholly creative of new law either. In the long run, however, the distinction may not matter in practice. There were already 46 signatories when the list was closed last October, though of course others may still accede to it. The signatories included the United Kingdom, the United States, the Soviet Union and Australia. Japan voted against the convention at Geneva, and did not become a signatory. This, for Australia, is a matter for natural regret. But there seem to be good prospects that the convention will be very generally accepted as law.

What I have said will, I hope, succeed in banishing forever from the minds of my hearers the quite common fallacy that to claim the continental shelf is the same thing as to claim a wider territorial sea. It is perfectly true that a few States, in the act of claiming sovereignty of the continental shelf, have claimed also sovereignty of the waters above the shelf and of the living resources that they contain. This, however, is emphatically not the case with Australia, or, for that matter, with the United States and the United Kingdom and other Commonwealth countries. The Australian claim to the continental shelf explicitly denies any effect on the status as high seas of the superincumbent waters.

About the convention on the high seas, I need say little. Its subject-matter is the general regime of the high seas (the nationality of ships,

the immunity of public vessels, the duty of ships in cases of distress and collision, the punishment of piracy and the like)—relatively non-controversial, belonging more to the codification than to the development of international law, with the exception of some new rules aimed at limiting the use of "flags of convenience" for the purpose of escaping from the necessity of complying with the standards laid down by advanced labour legislation. But the third of the conventions, on fishing, and conservation of the living resources of the high seas, did, by common consent, break entirely new ground.

With modern methods of exploitation, fish stocks in the high seas cannot any longer be regarded as inexhaustible. On the contrary, problems of conservation have arisen already in various parts of the high seas. Where such problems arise within the territorial sea, the coastal State has full authority to regulate the fishing operations of all persons, nationals or foreign. Fish, however, are regrettably indifferent to the preservation of the species, and seem to give no thought to the distinction between the territorial sea and the high seas. Beyond the imaginary limit of the territorial sea, be it ever so little beyond, the coastal State, though it can always regulate and, if necessary, curtail the fishing operations of its own nationals, cannot impose any like limitations on foreigners, except by agreement with the other State or States concerned.

In particular areas, international agreement has, in fact, been forthcoming. I refer, for instance, to the International Convention for the North-West Atlantic Fisheries (1949) and the International Convention for the High Seas Fisheries of the North Pacific Ocean (1953). But coastal States felt increasingly that new rules must be evolved which would give to the coastal State sufficient initiative and authority, in cases where agreement could not be achieved on any reasonable basis of regulation for conservation purposes, to impose, temporarily and subject to arbitration, a scheme of conservation designed on a non-discriminatory basis to ensure the maximum supply of food and other marine products from fisheries in the high seas beyond territorial limits. A technical conference was convoked at Rome in 1955, and its work formed the basis of the convention eventually adopted at Geneva. The potential future importance to Australia of such a convention is clear.

Undoubtedly the main convention at Geneva in 1958 was the convention on the territorial sea and the contiguous zone (another opaque expression, which I shall explain a little later). Most of its contents are highly political and controversial: the base line from which the territorial sea is measured; up to what width at the mouth a bay can be reckoned as wholly internal waters; the scope and limitations of the right of innocent passage, and when it can be suspended; how far straits are a special case; how far warships are a special case; how far a State may exercise jurisdiction, over foreign ships and nationals,

in coastal waters beyond the territorial sea, for the enforcement of its customs, immigration, health and other laws.

This convention is marked by one striking omission. You will look in vain for any Article stating the permissible breadth of the territorial sea. Nevertheless, the convention was adopted at Geneva by sixty-one votes to nil, with only two abstentions. By 31 October, 1958, when the time for signature expired, there were already forty-four signatories, with quite few reservations. This in itself is ample evidence of the utility of persevering, notwithstanding disagreement on the breadth of the territorial sea, with the attempt to secure agreement on all other matters.

The convention on the territorial sea illustrates the same tendency as the other conventions to extend the rights of the coastal State. I give three illustrations. The right of passage itself, for instance, is defined in terms that seem to leave more discretion to the coastal State than the classical doctrine permitted. The convention also provides that bays less than twenty-four miles wide at the entrance may be treated as wholly internal waters of the coastal State. This is a substantial extension of coastal jurisdiction. Previously, it had even been doubtful whether international law permitted the so-called "10-mile" rule, under which bays less than 10 miles wide at the entrance were to be treated as wholly internal waters.

In the third place, the baseline from which the territorial sea is normally measured is said to be the low-water mark on the coast. The Convention expressly permits the use of straight baselines joining appropriate points, permanently above sea-level, along the coast in any localities where the coast-line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. In effect, the convention gives general application to the rule which was laid down in 1951, with special regard to the coast of Norway, by the International Court of Justice in the fisheries dispute between Norway and the United Kingdom. The result is that, wherever a coast-line exhibits the special characteristics of deep indentation or an island fringe, the coastal State is at liberty to depart from the actual coast as a baseline and, while following its general direction, to substitute straight baselines which will inevitably result in an extension of the territorial sea strictly so called. These provisions of the convention are of special interest to Australia. Much of our coast-line is neither deeply indented nor fringed closely with islands. But there are particular localities, such for example as the Great Barrier Reef, which may well turn out to answer the description given in the convention, and may therefore turn out to be susceptible of treatment by the straight base-line method.

One provision in this convention which is of quite peculiar interest and concern to Australia is the Article (Article 16(4)) which declares that—

> "there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State".

The text of the convention on the territorial sea and the contiguous zone exhibits repeatedly the tension between the authority and special interest of the coastal State on the one hand and the desiderata of the freedom of the sea on the other. The provision about straits is a most significant example. As might be expected, it was strongly contested at Geneva. A right of passage which may be suspended whenever the coastal State forms the opinion that the passage of foreign ships constitutes a threat to the security of the coastal State is, in the emotional conditions of the modern world, rather a precarious right. It is the characteristic of international straits that they are the obvious route for vessels. Accordingly, to prohibit the suspension of the right of passage through international straits is an important guarantee, to countries like Australia, of their freedom of communication through the quite numerous straits which constitute our normal and most efficient channel of communication with countries to the north and west.

In time past there has been much difference of opinion on the question whether, in time of peace, foreign warships have the same right of passage through the territorial sea as other vessels. The British view was that they had. The view of many other States was that they had not, and, on the contrary, that the passage of foreign warship through the territorial sea required the prior authorization of the coastal State. The text proposed by the International Law Commission permitted coastal States either to require previous authorization or to be content with prior notification of the passage of warships. A separate vote was taken at Geneva on the requirement of authorization, and it failed to secure the necessary two-thirds majority. The remainder of the Article (requiring prior *notification*) was thereupon put to the vote, and was supported by the Western countries, but likewise failed to secure the necessary two-thirds majority. The convention therefore contains no substantive rule on the subject. In the result, the wording of the convention gives clear support to the British view that a warship has the same right of innocent passage through the territorial sea in time of peace as any other vessel has. But the view that authorization is required is held not only by the Soviet group of States and by the Arab States but by some European States and some Asian members of the Commonwealth as well. The supporters of this view will, no doubt, maintain that, in the absence of any express conventional provision, the matter must be determined by the customary law of nations, and, accordingly, that authorization is still required. All members of the Soviet group did in fact make an express reservation in this sense on signature of the Convention.

Countries such as Britain and Australia seem to have been generally prepared, as a matter of courtesy and comity, to give prior *notification.* An express requirement of notification would therefore have made little practical difference. But the presence of such a provision would really have made it even more difficult to contend that, by virtue of the customary law of nations, prior *authorization* was required.

There remains for discussion the breadth of the territorial sea, the focal point of half a century of controversy. For present purposes, it is not necessary to take any formal position on the question whether the traditional "three-mile" rule at any stage enjoyed, or still enjoys, the status of an actual rule of the customary law of nations. The official British view answers both questions in the affirmative. There is very strong authority for this proposition. But it has certainly not, in recent times at any rate, been a uniformly accepted proposition, either in principle or in practice. The domestic law of the United Kingdom, the United States, France, the Netherlands, and, for that matter, Australia, claims only a territorial sea of three miles. But when the Geneva conference opened only about twenty coastal States still adhered to this rule. The Scandinavian States claimed four miles. A number of Mediterranean States claimed six, as also did India and Ceylon. The Soviet Union had long claimed twelve, and had more recently been joined by all of the Soviet bloc in Europe with the exception of Poland, by some Latin-American States, and by some of the Arab States. The prospect of securing agreement at Geneva on any three-mile basis was slender indeed.

The reasons for claiming a territorial sea wider than the traditional three miles are various. Some are political, in a broad psychological sense, springing from the anxiety of newly attained sovereignties to break, and to break visibly, with limitations surviving from the pre-independence period. To many at Geneva, the emotional intensity of the antipathy to any three-mile claim displayed by many Latin-American and Afro-Asian States came as a painful surprise. This antipathy was not always capable of rational analysis. But its reality and intensity were unmistakable.

In so far as the pressure for a wider territorial sea has economic roots, they are to be found mostly in the needs, hopes and fears of the fishing industries of coastal States. Within the territorial sea, the coastal State is at liberty to give exclusive fishing rights to its own nationals if it so desires. To extend the limits of the territorial sea would therefore enable the coastal State to eliminate actual or threatened foreign competition.

A third reason frequently put forward for a territorial sea wider than the traditional three miles is the defence needs of the coastal State. This point is continually urged by the Soviet group of States. Exactly what is involved is never really made explicit—or so at least it has always seemed to me. More than two centuries ago, the Dutch

scholar Bynkershoek took as a justification for a territorial sea of three miles the broad proposition that the range of coastal batteries enabled the coastal State to impose its will on foreign nationals up to about that limit. If, under modern ballistic conditions, the range of weapons fired from the shore were still to be the criterion, the territorial sea would need to be of enormous extent. But such a proposition produces altogether absurd results, and one cannot treat it as being seriously put forward. It would lead not to a territorial sea of six or twelve miles, but of hundreds or even thousands. The Soviet-Arab-Latin claim for a territorial sea of twelve miles may perhaps fairly be regarded as a kind of compromise figure, resting on the assumption that the further foreign vessels can, in time of need, be kept from the coast, the better. But it has not escaped notice that, in modern times, the naval strength of the Soviet group seems to rest most of all on submarines, and that in time of war a territorial sea of twelve miles would give much better opportunities for manoeuvre by submarines in neutral waters than would be possible under the traditional three-mile rule.

The reasons leading other countries to contend for a narrow territorial sea are similar, but of course in reverse. These are the maritime States strictly so-called, which rely greatly—in shipping, in fishing and in strategy—on access to the coastal waters of other States. Every widening of the territorial sea must potentially increase the length of sea travel from one place to another, if only because passage through the territorial sea is liable to suspension at the discretion of the coastal State. The maritime States of the West made available at Geneva charts showing that a general extension of the territorial sea to twelve miles would potentially close off many existing sea lanes, in the eastern end of the Mediterranean, for example, in south-east Asia and in the Caribbean.

From the point of view of Australia, freedom of aviation is possibly even more important than navigation by sea. It must not be forgotten that international law recognizes no right of innocent passage through the air-space above the territorial sea. Any widening of the territorial sea must therefore curtail, more or less seriously, the margin of deviation in air travel, particularly in island-dotted seas such as those in which the Indonesian archipelago lies. The claim put forward by the Indonesian Government in 1957, but not so far at all systematically pressed, to draw straight baselines round the entire Indonesian archipelago, treating all the waters inside this gigantic frame as internal Indonesian waters and claiming a territorial sea of twelve miles on the outward side of this imaginary line, would subject Australian communications through that region, whether by sea or by air, to almost complete contingent dislocation at the discretion from time to time of the Government of Indonesia. It will be recalled that, at the time, the Australian Government protested against the Indonesian communique, and said that Australia could not accept the projected new regime as legally binding on Australian nationals.

On the economic side, those States particularly whose fishermen depend on access to the coastal waters of foreign States naturally regard any general extension of the territorial sea as a potential curtailment of their existing rights. Similarly, in the defence field, a narrow territorial sea secures the utmost freedom of manoeuvre for naval vessels in time both of peace and of war, and, in particular, restricts the areas of neutral waters in which enemy craft might find shelter in time of war.

Basically, one of the reasons for recognizing the sovereignty of the coastal State in a belt of territorial sea was the virtual impossibility of enforcing the law of the coastal State unless it was lawful, at least in some marine area immediately adjacent to the coast, to compel everybody, including foreign ships and nationals, to comply with the local law. In practice, however, the traditional three-mile territorial sea has been found progressively inadequate for law-enforcement purposes — particularly with the escape potential of fast-moving modern craft. Hence has come the demand for international recognition of the right of the coastal State to enforce obedience to its laws in a marine area, contiguous to its coast indeed, but wider than the territorial sea. The prevalence of smuggling on the English coast led, for example, to the "hovering" laws of the eighteenth century. The prohibition era in the United States led to similar claims. The Hague conference of 1930 refused to give recognition to a twelve-mile "contiguous zone" for law-enforcement purposes, but the Geneva convention does give express recognition to such a zone, not exceeding twelve miles in breadth from the baseline of the territorial sea, in which the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or health regulations.

At no stage has there been any doubt, as between the States that seek to extend and the States that seek to limit the breadth of the territorial sea, where Australia stands. There must be very few States in which all the community's substantial interests point in the same direction. Australia's certainly do not. In the particular circumstances of the Australian fishing industry, there would, for example, be no disadvantages, from the point of view of Australian fishing interests, in an extension of the breadth of the territorial sea. But it is quite otherwise with Australia's interests in overseas communications. Not as a mere survival from the Colonial period therefore but in the exercise of deliberate national choice, Australia has rated the maximum freedom of communications, by sea and by air, as the highest desideratum whenever the international law of the sea is under consideration. This has brought, and kept, Australia broadly in line with the policy adopted — though in some respects for quite different reasons — by the United Kingdom and the United States.

At the Geneva conference there were, at one stage, no less than ten proposals regarding the breadth of the territorial sea, though half of these were eventually withdrawn. Ultimately, the conference had to choose between three main propositions.

The first was that each State should be at liberty to fix the limits of its own territorial sea at any distance between three and twelve miles. This was put forward initially by India and Mexico jointly, but, in the later stages, was sponsored by a group of eight Latin-American and Asian States, including Mexico but not including India. (The Soviet Union put forward independently a proposal very similar in substance, except that it admitted the validity, in special circumstances, of a territorial sea wider than twelve miles.)

Secondly, Canada put forward a proposal which took full account of the fact that for most small and middle States the most persistent pressure for a wider territorial sea sprang from a demand for a wider area of exclusive fishing rights. Canada therefore put forward the novel suggestion that the zone of exclusive fishing rights should no longer be determined by the limits of the territorial sea, but that, while retaining for all purposes of navigation a territorial sea of the traditional three-mile breadth, there should appertain to the coastal State an exclusive fishing zone of twelve miles from the coast. In effect, fishing laws would be added to the list of laws (fiscal, health etc.) which the coastal State was to be recognised as permitted to enforce within the "contiguous zone".

The United Kingdom, convinced (however reluctantly) that no three-mile solution could secure the necessary majority for acceptance, put forward a straight six-mile territorial sea for all purposes, but proposed to attach a special condition or reservation, by virtue of which foreign ships and nationals would continue to possess the same right of passage in or over the outer three miles of the six as they formerly had in this particular zone, as high seas outside a territorial sea of three miles. The fact that this proposal had been put forward by the United Kingdom itself, one of the most determined supporters of the three-mile rule, marked something of an epoch in the history of the territorial sea. But as it was eventually withdrawn in favour of a subsequent United States plan, I have not reckoned it among the three for ultimate choice.

The third proposal was put forward as a compromise by the United States, in the belief that neither the Canadian nor the British proposal could secure a sufficient majority for acceptance. The compromise was for a territorial sea of six miles, for all purposes and unqualified, and a further contiguous zone of six miles in which the coastal State would possess exclusive fishing rights, subject however to the recognition of the right of nationals of any State whose nationals had fished in that outer zone regularly, for the previous five years, to continue to fish in the outer zone.

On the same day, Canada filed a revised proposal, also for a territorial sea of up to six miles and a further six-mile zone of exclusive fishing rights, but without any necessity for continuing to recognise the established fishing practice of foreign nationals. (If the territorial sea of any State was less than six miles in breadth the outer fishing zone would be more, but so as not to exceed twelve in all.)

The judgment both of the United States and of Canada was that if the demand for a wider fishing zone could be satisfied, the territorial sea could be held at six miles—but not at three. With this view the United Kingdom eventually concurred. It was clear that unless one variant or the other of the six-plus-six compromise could get a two-thirds majority, there was no likelihood of any agreed rule emerging from the conference, and every likelihood that in the resulting anarchy and confusion there would be a drift, more or less gradual, towards a twelve-mile practice by individual unilateral action.

The United States were at first disposed to support the Canadian proposal. But when reactions to it became known the United States revised their views, and formed the conclusion that without the support of a sizeable group of distant-waters-fishing States, mainly in Western Europe, there was little likelihood of securing a two-thirds majority, and that both justice and expediency required some concession to their claims. Within the United States themselves, too, distant-waters-fishing interests protested vociferously against the exclusion not only from Canadian, but from Latin-American waters which adoption of the Canadian proposal would almost inevitably produce. The result was the American compromise plan, with its provision for the recognition of "established rights".

For Canada, this proposal of the United States created a most painful situation. As a matter of record, it was primarily the continued presence of United States trawlers off the east coast of Canada that had led Canada, in 1956, to propose a twelve-mile exclusive fishing zone for coastal States. Ever since 1911, Canadian trawlers had been forbidden to operate within 12 miles of the coast, in the interest of the village fishermen along the coast. But the prohibition could not apply to United States trawlers, and their operations not only threatened the livelihood of the small Canadian fishing villages but created a sense of injustice among Canadian trawlers who saw foreign nationals operating in fishing areas forbidden to Canadians themselves. The American compromise would in effect, so far at least as the east coast was concerned, largely nullify the ostensible concession of an exclusive fishing zone.

Canada pointed out with some justice, moreover, that, as drafted, the United States plan was very widely expressed and could, in theory at least, operate harshly against coastal States. Any regular operation by nationals of a foreign State for five years — by however few and

small craft in however restricted an area — would found an entitlement to operate in perpetuity, by however many and large craft, and off the entire coast so long as it was in the outer six-mile zone. This went far beyond the protection of existing operations. But the hurried final days of a conference offer little scope for the detailed technical examination required to meet, or even consider, objections of this kind, and the United States proposal had to be dealt with as it stood.

Australia's own position was like that of a good many other States in the small and middle group. There was little practical difference between the two proposals, in their application to Australia's circumstances. No real hardship would be caused either by the recognition of established foreign fishing, if any, that acceptance of the United States proposal would require. On the other hand, no Australian fishing off foreign coasts would be jeopardised by adoption of the Canadian proposal. The choice was painful, just because it involved parting from either Canada or the United States. But either proposal was equally consistent with Australia's own essential interest in making the least possible extension of the territorial sea. The Australian Government at first supported the Canadian proposal and later, on the footing that the United States proposal offered in the end the best chances of obtaining a sufficient majority for acceptance by the Conference, gave its support for the latter plan.

The United States proposal fell short of the two-thirds majority required for a convention, but polled 45 votes for, 33 against, with 7 abstentions, thus gaining the support of an absolute majority of the conference. The unqualified-fishing-zone part of the Canadian proposal got a majority of those voting, by 35 to 30; but there were 20 abstentions. The so-called "eight-power" proposal (allowing each State to fix its own limits up to 12 miles) also received a simple majority, polling 39 to 38, with 8 abstentions. The Soviet proposal was rejected by 47 votes to 21, with 17 abstentions. Accordingly no proposal found its way into the convention.

The Geneva chapter in the history of the law of the sea, however, does not stop at this point. The General Assembly has authorised the convocation in March, 1960, of a second conference at Geneva, with the same States invited, to deal with the great matters left unresolved in 1958. The issues, and the forces at work, are by now familiar. If a reconciliation can be effected between the two unfortunately divergent six-plus-six plans, it may and should be possible to stabilise the law of the territorial sea on that basis. The need for thorough discussion in advance of the next conference is well understood. I feel some optimism as to the outcome.

The opponents of any attempt to stabilise the law of the territorial sea on a six-mile basis are, and will continue to be, active. At the General Assembly in November, 1958, for example, the Soviet bloc

put forward again and again the thesis, not indeed that there is now no rule of customary law fixing the breadth of the territorial sea, but that according to the present law each State has the right to fix for itself whatever breadth of territorial sea it requires, and that all other States are under a legal duty to accept, vis à vis that State, the breadth so fixed. This view, is, of course, a plain invitation to States to go ahead and assert whatever claim they think fit, without any need to wait for the further conference, or the adoption of a convention.

Speaking simply as a lawyer, I think this Soviet contention is quite incorrect. Certainly the International Court of Justice, in the Norwegian Fisheries case in 1951, seems to me to have said precisely the opposite, and to have made quite clear that one State cannot by unilateral act impose on others the duty of accepting its own fixation of the breadth of the territorial sea. Their consent is necessary—either by usage or by treaty. But the seductiveness of the Soviet contention is apparent. Incidentally, it would give at once to the Soviet's own twelve-mile decree of 1927, reaffirming an earlier Czarist proclamation, a general international recognition which it has never so far received.

The issue in this highly contemporary contest is whether the principle of the freedom of the sea will survive or whether the sea, and the air above it, will come to be divided up between scores of territorial sovereignties, its resources and facilities available only by leave and licence of one or more coastal States. Looking at the Geneva conventions as a whole, as we have tried to do tonight, we can fairly conclude that the corpus of agreed law they represent still finds a real and substantial place for the general freedom of the sea. There is no mistaking the increased authority of the coastal State. But it is still the special rights of the coastal State rather than the general rights that are common to the nationals of all States, that are enumerated, spelt out in detail and, though now there will be more of them, carefully limited and defined.

In the great issues at Geneva, the nations of the Commonwealth played an active and conspicuous, not to say a leading, part. India, which had itself not long before proclaimed a six-mile territorial sea, pursued energetically a reconciling role, seeking solutions, even in novel forms, which might form the basis of a satisfactory convention, particularly on the breadth of the territorial sea. Ceylon had the chairmanship of the important committee on the continental shelf, Australia that on the territorial sea and the contiguous zone. Canada maintained her own independent and leading line. But of course it was upon the senior member of the Commonwealth, the United Kingdom, that the greatest role in this field naturally fell.

The closing stages of the first Geneva conference, concentrated on the breadth of the territorial sea, witnessed in one sense a historic

and costly retreat, when the United States, the United Kingdom and all the other members of the Commonwealth joined in acceptance of the principle of a six-mile territorial sea. But it was a forecast of new constructive achievement, when the United States and (save on the ultimately minor issue of "established rights") the whole of the Commonwealth were united in the endeavour to hold the position there, and preserve the historic substance of the freedom of the sea.

Post-script.

The task is a continuing one. Upon the failure of the first Geneva conference to reach agreement on the breadth of the territorial sea, the United Kingdom and the United States formally reverted to their established three-mile position. Since then, some few additional States have asserted a claim to a twelve-mile territorial sea. The General Assembly has now fixed 17 March, 1960, as the date for the resumption, at Geneva, of consideration of the related questions of the breadth of the territorial sea and fishery limits. The issues remain just as important as they were in 1958. Now, as then, the effective choice appears to lie between, on the one hand, a territorial sea for all purposes of up to twelve miles, and on the other hand some "six-plus-six" formula. The question of the treatment of established foreign fishing rights in the outer six, which proved so troublesome at the first conference seems in principle by no means insoluble.