wrong, under Article 62 of the Rules of the Court, with a plaintiff's raising a legal issue of jurisdiction after having accepted jurisdiction. Some of the differentiations are thin, the reasoning embraces legal metaphysics;[20] but, sirs, what would you have under the circumstances?

Then the Court gives a gentle lesson in elemental due process; since Italy's claim turns on whether Albania has committed a legal wrong against Italy under international law, there is actually a dispute between Albania and Italy. Such a dispute could not be decided without the appearance of Albania.

The episode, on the whole, does not appear to be a happy one, mainly because the Court was cavalierly tossed a "hot potato" that diplomacy and international quasi-administrative law and international arbitration did not handle. The potato appears to have been tossed mainly to get rid of it, and the Court apparently has no choice but to field such tosses under Article 36.1 of its Statute. It is regrettable that it is so often assumed that the Court can settle anything—if only the parties will go to it. Such a proposition is surely not held for domestic courts; it is obviously not even remotely true internationally in today's world—certainly not true so long as the Court has no authority to command relevant sovereign parties to appear unless they have themselves consented to appear.

The Tripartite Gold Commission [or the governments behind it] should have found the facts and made the restitution award, for or against Albania, for or against Italy. That was what it was set up by international agreement in 1946 to do. The entirely distinct British claim against Albania should have been rigorously insulated from the restitution operation. The countries behind the Commission have failed to do their bit for the development of the international administrative law some have thought they have seen coming.[21] They have unilaterally modified an international agreement under which they voluntarily assumed fiduciary obligations. They put the Court in a very difficult position and it is no thanks to them that it managed to do elemental justice at the price of not solving an international problem.

It would be interesting to know what finally happened to the gold.

COVEY T. OLIVER

### THE INTERNATIONAL LAW COMMISSION'S 1954 REPORT ON THE REGIME OF THE TERRITORIAL SEA

The International Law Commission decided in 1951 to initiate work on the "Régime of Territorial Waters." This action was taken pursuant to a resolution of the General Assembly at its Fourth Session on December 6, 1949. The initiative was taken by Iceland whose proposal was adopted by a slim margin.[1] Mr. J. P. A. François of The Netherlands was ap-

[20] Literally, as in American tax cases: What is real? What is sham? Refer to the report of the case, in this JOURNAL (cited above, note 1), pp. 652–653.

[21] *Cf.* Rubin, "The Judicial Review Problem in the ITO," 63 Harvard Law Review (1949) 78.

[1] Liang, "Notes on Legal Questions Concerning the United Nations," this JOURNAL, Vol. 44 (1950), p. 533.

pointed Special *Rapporteur*—an excellent choice, since he served in a like capacity on the same topic for the Second Committee of the 1930 League of Nations Conference for the Codification of International Law, and is also the International Law Commission's Special *Rapporteur* on the High Seas. Mr. François presented a report to the Fourth Session of the International Law Commission.[2] After discussion in the Commission, revised reports were submitted.[3] At its Sixth Session in 1954, the Commission considered the reports at six of its meetings and as a result included the topic in Chapter IV of its Report for that session.[4] Its draft articles are to be submitted to governments in conformity with the provisions of the Commission's Statute.

It should be borne in mind that the International Law Commission still has on its agenda as a separate topic "The Regime of the High Seas," but clearly recognizes the connection between the two topics. The question of a "contiguous zone" and the problem of the continental shelf have been considered in connection with the high seas[5] and the International Law Commission's views on these questions are not analyzed in this comment. It seems essential, however, that the two subjects of High Seas and Territorial Sea eventually be combined, since it is not likely that governments would act on any draft convention covering one of these projects apart from the other.[6]

The Report of the International Law Commission on the Regime of the Territorial Sea is in the usual form of a black-letter text followed by comments. The "Provisional Articles" are divided into three chapters: Chapter I, "General"; Chapter II, "Limits of the Territorial Sea"; Chapter III, "Rights of Passage."

Although the term "territorial *waters*" was first used by the Commission, it has now adopted, as the *Rapporteur* recommended, the term "territorial sea." The same choice was made in the League of Nations Committee's proposals in 1930. The choice is supported by the argument, *inter alia,* that the term "territorial waters" may include "internal [inland] waters," which causes confusion. It is noted that in French the term "mer territoriale" "has gained ground since 1930."

Article 1 properly describes the rights over the territorial sea as "sovereignty." In usual form, the article adds that "This sovereignty is exercised subject to the conditions prescribed in these regulations and other rules of international law." The distinction between sovereignty

[2] U.N. Doc. A/CN.4/53, April 4, 1952.

[3] Second Report, U.N. Doc. A/CN.4/61, Feb. 19, 1953; Addendum to Second Report, U.N. Doc. A/CN.4/61, Add. 1, May 18, 1953; Third Report, U.N. Doc. A/CN.4/77, Feb. 4, 1954.

[4] General Assembly, 9th Sess., Official Records, Supp. No. 9 (A/2693), 1954, pp. 12–21; this JOURNAL, Supp., Vol. 49 (1955), pp. 23–43.

[5] See this JOURNAL, Vol. 45 (1951), p. 338; Vol. 46 (1952), p. 125; Vol. 48 (1954), p. 587.

[6] *Semble contra* the United States view expressed in the Sixth Committee of the General Assembly, Nov. 29, 1954, and reproduced in Department of State Bulletin, Vol. 32 (1955), p. 62.

and its exercise is well put. Article 2 proceeds to state the established rule that this sovereignty extends "to the air space over the territorial sea as well as to its bed and subsoil." As a matter of drafting, Article 2 might well be made the second paragraph of Article 1, with the paragraph on the exercise of sovereignty added as the third paragraph to make clear that it is applicable to surface, airspace and subsurface. Its application to the superjacent airspace is of special importance.

Article 3 on the "Breadth of the territorial sea" is of course the heart of the matter. Understandably but regrettably, its drafting has been postponed. The Introduction to this Report explains that twelve different suggestions were made on this issue in the Commission's debates. Some members would set a uniform limit, but the limits of 3, 4, 6 and 12 miles all had their advocates. Some would prefer to say that the limit should "vary from State to State." Some would measure the breadth by that of the underlying continental shelf. Mr. François himself proposed a draft allowing each state to fix the breadth of its territorial sea up to a 12-mile maximum, but the Commission did not agree.[7]

Some of the views seem to cloud the distinction between the territorial sea over which the state has sovereignty, and the contiguous zone of the high sea within which the state may exercise certain rights. In his first and second reports to the Commission, the *Rapporteur* presented tables, based on a "study of current legislation, as collected by the Secretariat and others."[8] Sixty-seven states or subdivisions of states are listed in the first table. Such a table must be used with care. If one looks at the right-hand column one might get a superficial impression of utter chaos, since the figures do range from 3 to 200 miles.[9] On analysis, however, one finds, for example, under "United States of America" "3 miles" and a sub-heading, "Customs—4 leagues." One finds hereunder also four States listed, including "Louisiana 27 miles" and "Florida 3 leagues." Actually one knows that the United States Government is firm and consistent in its support of the three-mile limit as the limit of territorial waters over which a state has sovereignty. The application of customs laws outside territorial waters in the "Contiguous Zone" rests on quite different principles. In the tidelands controversy, the Department of State was careful not to support wider maritime boundaries found in some State laws.[10] Di-

[7] Second Report, U.N. Doc. A/CN.4/61, Feb. 19, 1953, pp. 6 and 11.

[8] U.N. Docs. A/CN.4/53, April 4, 1952, pp. 11–15; A/CN.4/61, Feb. 19, 1953, pp. 11–24.

[9] The Icelandic Government has stressed the divergence thus indicated in "The Icelandic Efforts for Fisheries Conservation, Memorandum submitted to the Council of Europe by the Government of Iceland," September, 1954, p. 25.

[10] *Cf.* statement by Jack B. Tate, Deputy Legal Adviser, Department of State, before the House Committee on Interior and Insular Affairs, March 3, 1953, Department of State Bulletin, Vol. 28 (1953), p. 486. Note, however, the blurring of the concepts of sovereignty and jurisdiction in Senate Report 2214 of Aug. 4, 1954, to accompany H.R. 9584 relative to the bill which became P.L. 680 of Aug. 27, 1954, 68 Stat. 883. The Swedish Government supplied corrections to the indications given of its claims; U.N. Doc. A/CN.4/71, Add. 1, May 13, 1953.

vergence of claims obviously exists among the nations of the world, and Mr. François is probably correct in saying that it would be impossible to get general ratification of a convention confirming the three-mile limit. It is still true that claims up to three miles are universally acknowledged to be valid under international law, while wider claims are not.[11] Although the International Court of Justice has revealed a liberal attitude in appraising a national claim to territorial waters in excess of three miles under special circumstances,[12] it is fantastic to assume that it would, for example, sustain the Peruvian claim to sovereignty over 200 miles of the Pacific Ocean as recently asserted in the case of the Onassis whaling ships.[13] The difficulty of obtaining any agreement on the breadth of the territorial sea, even among the American Republics, has been apparent in the Inter-American Council of Jurists and the Inter-American Juridical Committee.[14]

States claiming broad expanses of high sea may well bear in mind that an assertion of sovereignty carries with it the assumption of duties as well as rights, even though the traditional problem of neutral duties is now unfashionable and perhaps legally moribund.[15] On the other hand, adequate protection of legitimate national interests in fisheries, mineral rights, etc., in or under the high seas outside of territorial waters may be secured without extravagant claims to wide belts of maritime sovereignty.[16] Mr. François in his first Report to the Commission has noted the divergence of views, both governmental and doctrinal. As a *Rapporteur* for the International Law Commission he is indeed in a dilemma. The present writer believes the solution will be found eventually when the problems are approached, whether globally or regionally, on the basis of the practical

[11] See statement of Senate Committee on Interstate and Foreign Commerce in Senate Report 2214 (cited in note 10). In presenting a claim to the Soviet Government for destruction of a B-50 off Cape Povorotny in 1953, the U. S. Department of State declared: "In the opinion of the United States Government there is no obligation under international law to recognize claims to territorial waters in excess of three miles from the coast." Department of State Bulletin, Vol. 31 (1954), p. 857, at p. 861.

[12] Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951, pp. 116–144; *cf.* this JOURNAL, Vol. 46 (1952), p. 348, and pp. 23–30.

[13] New York Times, Nov. 16, 1954. *Cf.* Joint Declaration on the Maritime Zone by Chile, Ecuador and Peru, Aug. 18, 1952, *Revista Peruana de Derecho Internacional*, Vol. 14 (1954), p. 104.

[14] *Cf.* this JOURNAL, Vol. 47 (1953), p. 701. See Inter-American Juridical Committee, Draft Convention on Territorial Waters and Related Questions (Department of International Law, Pan American Union, November, 1952), *passim.* By Res. XIX of May 8, 1953, the Inter-American Council of Jurists returned the subject to the Juridical Committee for further consideration. Mr. François' arrangement of his table by regional groups brings out the fact that no regional consensus is to be found; U.N. Doc. A/CN.4/61, Feb. 19, 1953, pp. 7 and 17–24.

[15] It is notable that Mr. François does not hesitate to consider the possible applicability of neutral and belligerent rights and duties, although the Commission decided to deal only with rules in time of peace; see pp. 4 and 19 of the Report cited above in note 2.

[16] *Cf.* the familiar proclamations of the United States in 1945; this JOURNAL, Supp., Vol. 40 (1946), pp. 45–48; Allen, "A New Concept for Fishery Treaties," this JOURNAL, Vol. 46 (1952), p. 319.

interests to be regulated, including fisheries of all types, sea-bed and subsoil deposits, and surface and aerial navigation. International organizations under the United Nations may need to be set up or existing organizations may be utilized. The preparatory work requires first, scientific investigation, and second, political negotiation and legal drafting. An encouraging step in this direction was taken by the United Nations General Assembly at its last session.[17] International co-operation for conservation is by no means novel [18] and could be expanded. A more difficult task is now being undertaken in the attempt to secure "international co-operation in developing and expanding the peaceful uses of atomic energy." [19]

Chapter II of the International Law Commission articles continues to deal with measurement problems. Here they naturally rely on the views of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* and on the recommendations of a group of geographic and hydrographic experts which met with the *Rapporteur* at The Hague in April, 1953.[20] The late S. Whittemore Boggs, the distinguished geographer of the United States Department of State for many years, was among the experts, and the method he advocated of measurements by means of a continuous series of arcs of circles is reflected in the proposals adopted by the Commission.[21] The Commission proposes in Article 4 as the "normal base line" the traditional low-water line, but Article 5 would permit as an exception straight base lines as approved by the International Court of Justice in the *Anglo-Norwegian Fisheries Case*. The Court's views, however, have been modified by the Commission in accordance with recommendations of its experts as representing "a progressive development of international law."

The drafting of Article 7 on Bays is postponed pending agreement on Article 3.

Articles 8 and 9 cover ports and roadsteads. Permanent harbor works, including jetties and dikes, etc., are regarded as forming part of the coast. Roadsteads, wholly or partly outside the outer limit of the territorial sea, are included therein and are not to be treated as inland waters. The Commission considers that both of these articles reflect existing law.

Article 10 states the rule that "Every island has its own territorial

[17] See discussion and text of resolution in Department of State Bulletin, Vol. 32 (1955), pp. 64–67.

[18] *Cf.* Jessup, "L'Exploitation des Richesses de la Mer," Hague Academy, *Receuil des Cours*, Vol. 29 (1929), p. 405; Leonard, International Regulation of Fisheries (1944); Hayden, International Protection of Wild Life (1942).

[19] See Department of State Bulletin, Vol. 31 (1954), p. 918, at p. 919.

[20] The list of the experts is printed in the Report (cited above, note 4), at p. 12. The report of the experts is an annex to U.N. Doc. A/CN.4/61, Add. 1, May 18, 1953.

[21] *Cf.* Boggs, "Delimitation of Seaward Areas under National Jurisdiction," this JOURNAL, Vol. 45 (1951), p. 240. The International Court of Justice in the Norwegian Fisheries Case stated that this method was not "obligatory by law." For an interesting discussion of specific measurement problems off the coasts of the United States, see Shalowitz, "Boundary Problems Raised by the Submerged Lands Act," Columbia Law Review, Vol. 54 (1954), p. 1021.

sea." For this purpose an island includes only areas permanently above high water and does not include, for example, a lighthouse built on a submerged rock or reef or technical installations such as those used to exploit oil in the continental shelf.[22] On the other hand, "drying rocks or shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." (Article 12.)

Articles 13 through 16 deal with particular problems of delimitation, *i.e.*, in straits (Article 13); at the mouth of a river (Article 14, postponed); between the coasts of two opposite states (Article 15); and of adjacent states (Article 16). In these situations the Commission took advantage of the suggestions of its group of experts without following them in every particular. The proposals are practical suggestions for solving problems and do not purport merely to reflect existing law.

Chapter III begins with an explanation of the meaning of the right of passage (Article 17). Although Article 18 proceeds to assert the recognized right of "*innocent passage,*" this familiar term is not itself characterized but must be determined by implication. Following the 1930 Conference precedent, Article 17 first states what "passage" means, then devotes a paragraph to what passage is not innocent, and finally notes that passage includes incidental or necessary stopping and anchoring. The result of these three paragraphs seems to be that a vessel passing through territorial waters en route to or from a port of the coastal state is considered to be exercising a right of innocent passage. It is believed that the contrary view expressed in the Comment to Article 14 of the Harvard Research Draft on Territorial Waters is the correct one.[23] This was the view strongly stated by the United States delegate at the 1930 Hague Codification Conference and supported by Great Britain. Other delegates, however, such as those from Belgium, Norway, Germany and Japan, wished to include vessels en route to or from a port. The British delegate then modified his proposal to include vessels leaving a port for the high seas. The text finally recommended included passage to or from inland waters. However, as the Belgian delegate made clear, he and others were influenced by the desire to avoid being more restrictive than the 1923 Statute on the International Regime of Maritime Ports.[24] Access to ports should, however, properly be considered a topic separate from innocent passage. The jurisdictional rights of a coastal state are different in the two cases, exercise of jurisdiction over ships entering or leaving ports being in many instances reasonable or even necessary, while such exercise over a vessel in innocent passage could not be justified. The point is not

[22] Such installations are dealt with in the Commission's draft articles on the Regime of the High Seas, especially Art. 6; see Report of the Commission on its Fifth Session (1953), A/2456, p. 12. *Cf.* Szasz, "May the United States Build Radar Platforms on its Continental Shelf?", Cornell Law Quarterly, Vol. 40 (1954), p. 110.

[23] This JOURNAL, Spec. Supp., Vol. 23 (1929), p. 295.

[24] See League of Nations, Acts of the Conference for the Codification of International Law, Meetings of the Committees, Vol. III, Minutes of the Second Committee, Territorial Waters, League Doc. C. 351 (b). M. 145(b). 1930. V., V. Legal. 1930. V. 16, pp. 58 ff. For the Statute on the International Regime of Maritime Ports, see Hudson, International Legislation, Vol. 2 (1931), p. 1162, at p. 1163.

discussed in the Comment on Article 17 of the International Law Commission draft or in the Report of the *Rapporteur* to the Commission. Either modification of the text or supporting argument in favor of the rule advocated is called for. The International Law Commission could clarify this and subsequent articles by devoting a separate article or section to "Access to Ports."

The Comment on Article 17 states:

> This chapter applies only in time of peace; rights of passage in time of war are reserved.
>
> No provision in this chapter is meant to affect the rights and obligations of members of the United Nations under the charter.

The Commission does not deal with the interesting question whether fishing vessels may enjoy the right of innocent passage, a subject which elicited divergent views at the Conference on United States-Ecuadoran Fishery Relations in 1953.[25]

Article 19 is another interesting example of the way in which the International Court of Justice contributes to the clarification of international law, since the article is based on the judgment of the Court in the *Corfu Channel Case*.[26] It reads in part:

> The Coastal State is bound to use the means at its disposal to ensure respect in the territorial sea for the principle of the freedom of communications and not to allow the said sea to be used for acts contrary to the rights of other states.

Article 20, *de lege lata*, appropriately provides that the coastal state may take necessary steps of self-protection, but in the drafting, the first clause of paragraph 1 might well point up the applicability of this right to vessels in innocent passage. If the view expressed above about vessels bound for ports (or inland waters) were accepted, the second clause of this paragraph, which deals with such vessels, could be eliminated or shifted to a section on "Access to Ports." Paragraph 2 of this article permits the coastal state "temporarily and in definite areas of its territorial sea" to suspend the right of innocent passage. The Comment explains that this can be done only "in exceptional cases" and for "compelling reasons"; it may be questioned whether the text of the article adequately brings out these qualifications.

Article 21 correctly asserts the duty of vessels in passage to comply with appropriate laws and regulations of the coastal state. Article 22 also states existing law in respect to levying charges upon vessels in passage.

Articles 23 and 24 deal with the exercise of criminal and civil jurisdiction over vessels in passage, and take the sound view that the right to exercise such jurisdiction is limited. In regard to arrests and criminal investigations, the exceptions listed are the standard tests commonly mentioned in connection with ships in port, *i.e.*, if the consequences of the

[25] See the excellent discussion of this matter by Selak, in this JOURNAL, Vol. 48 (1954), p. 627. It seems probable that this issue had not been brought to the Commission's attention when its report was written.

[26] I.C.J. Reports, 1949, p. 4; this JOURNAL, Vol. 43 (1949), p. 558.

crime extend beyond the vessel, or the crime is of a kind to disturb the peace of the coastal state,[27] or if the assistance of local authorities is requested. Paragraph 2 of this article is open to question, since it reserves the right of the coastal state to deal with vessels "lying in its territorial sea, or passing through the territorial sea after leaving the inland waters." If, as it would seem, such vessels are not in innocent passage at all, the case should not be covered here. The expression "lying" does not seem to be the equivalent of "stopping and anchoring" which is permissible under Article 17, paragraph 3. Even under the Commission's view that vessels bound to or from inland waters are in innocent passage, the brief statement in the Comment is not a persuasive argument for making a distinction between a vessel exiting from, and a vessel about to enter, inland waters or ports, although it conforms to the British suggestion in 1930. The Comment notes that the Commission is not now dealing with problems of conflict of jurisdiction in criminal law or with collisions. It is indicated that at least the latter topic will be studied later.

Article 24 soundly takes the view opposite to the decision of the United States-Panama Claims Commission in the *David Case*[28] prohibiting enforcement in civil proceedings against a vessel in innocent passage or persons on board such a vessel. Query, whether it is desirable to include the exception which permits the arrest of the vessel in a civil action arising from a collision, or for salvage, or "in respect of obligations incurred for the purpose of the voyage" connected with the passage. Since such an action can follow the ship into other jurisdictions, the rights of claimants against the vessel would not be prejudiced if this exception were eliminated. The second paragraph of this article might well be eliminated or included elsewhere, since it deals with vessels which are not exercising the right of innocent passage, *i.e.*, vessels in inland waters, vessels "lying" in the territorial sea, and vessels exiting from inland waters. Again query the distinction between the last category and those about to enter inland waters.

Article 25 contains the salutary declaration in line with the Brussels Convention of 1926 that the articles apply to "Government vessels operated for commercial purposes."

Article 26 is more controversial. Although some members of the Commission disagreed, paragraph 1 accords the right of innocent passage to warships "without previous authorization or notification." The Comment contains one paragraph which is not clear:

> The right of passage does not imply that warships are entitled, without special authorization, to stop or anchor in the territorial sea. The Commission did not consider it necessary to insert an express stipulation to this effect for Article 17, paragraph 3, applies equally to warships.

[27] The use of the word "country" in Art. 23, par. 1(b), instead of "coastal state" might be questioned.

[28] This JOURNAL, Vol. 28 (1934), p. 596. See comments by Borchard on this holding, *ibid.*, Vol. 29 (1935), p. 103.

But if this paragraph does apply—as it must in the stated cases of *force majeure* and distress—then the first sentence of the paragraph is in error. The article continues to specify the coastal state's right of regulation and the applicability of Article 20 (right to prohibit). Submarines must navigate on the surface. The fourth paragraph, prescribing the right of warships to pass through straits connecting parts of the high seas, is drafted in reliance on the International Court of Justice's judgment in the *Corfu Channel Case.*

Article 27, paragraph one, which states that warships are bound to respect the laws and regulations of the coastal state, seems redundant, since this duty naturally flows from the right of the coastal state to make such appropriate laws and regulations, as provided in paragraph 2 of Article 26. The second paragraph is sound in providing that, if the warship does not comply, it may be required to leave the territorial sea. Only this second paragraph was included in the *Rapporteur's* draft in his reports to the Commission.

As Professor Briggs has pointed out,[29] governments have not co-operated well in responding to requests for comments or information to assist the International Law Commission. In regard to the project on the territorial sea, governments were requested to reply only on the problem of "the delimitation of the territorial sea of two adjacent States." Sixty requests elicited only twelve replies, of which, Professor Briggs dryly notes, ten "contained information of value." One of the most important by-products of the League's codification effort was the compilation of data on state practices. Even though one is not sanguine that the International Law Commission can make much progress in actually codifying international law,[30] a relatively slight effort on the part of governments could contribute a like supplementary promotion of the rule of law. As has been pointed out, however, the International Law Commission's work will not be of enduring value if the United Nations does not reproduce its documentation in printed form. The present hard-to-get and perishable mimeographed documents imply an unjustifiable disparagement of the value of its work.

PHILIP C. JESSUP

### PREPARATION FOR REVIEW OF THE CHARTER OF THE UNITED NATIONS

The Tenth General Assembly of the United Nations, in the fall of this year, will have to decide whether it shall summon a conference for review of the Charter of the United Nations. Article 110 provides this opportunity to take stock, after ten years of experience.[1] Various factors, such as the "cold war," the demand for economic development, and the rise of the anti-colonial majority, have shaped the course of the United Na-

[29] This JOURNAL, Vol. 48 (1954), p. 603.

[30] *Cf.* Charles de Visscher, *Théories et Realités en Droit International Public* (1953), p. 181.

[1] See the editorial by P. B. Potter, in this JOURNAL, Vol. 48 (1954), p. 275.