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# End of the Old Order

## The Attempt to Create a Convention on Territorial Waters

On 20 March 1929, during the era of Prohibition, master John Randell stood on the deck of the British schooner *I'm Alone*, anchored off the coast of Louisiana, and delivered a short, sharp lecture on the law of the sea to the American coastguard officers trying to board his vessel. 'You have no jurisdiction,' he shouted, 'I am on the high seas.'[1]

According to a later American indictment issued against *I'm Alone*'s owners and associates for unlawful conspiracy to import liquor into the country, the schooner, registered in Canada, had made numerous trips to the United States between 1927 and 1929. Some had started in Belize, British Honduras, where it would take on cargos of liquor, one listed as '1326 sacks of whiskey, gin and rum and 92 kegs of malt'.[2] From Belize, it would sail north across the Gulf of Mexico, then anchor off the coast of Louisiana near Vermilion Bay. There, it was alleged, it was met on different occasions by the motorboats *Venus*, *May*, *City of Rome*, *Laura Lead* and *Nicholas*,[3] whose crews identified themselves to Randell by presenting him with the matching half of a torn dollar bill.[4] These boats, known in the rum-running business as 'pullers', transported the liquor back to shore, where it was transported to warehouses, disguised and then distributed northwards from the railhead at Abbeville, Louisiana.[5]

[1] UK Embassy Washington to UK Foreign Office (29 March 1929), p. 1: FO 371/13513, The National Archives, Kew, UK [hereafter, TNA].
[2] Copy of indictment, *United States v Dan Hogan et al.* (no. 5623) US District Court for the Lake Charles Division of the Western District of Louisiana (16 December 1929), pp. 3–4: FO 371/14276, TNA.
[3] Ibid., p. 4.
[4] 'I'm Alone skipper describes cruises', *New York Times* (30 December 1934).
[5] Copy of indictment, *United States v Dan Hogan et al.* (no. 5623) US District Court for the Lake Charles Division of the Western District of Louisiana (16 December 1929), p. 4: FO 371/14276, TNA.



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On this occasion, coastguard officers on the cutter *Wolcott* first spotted *I'm Alone* between ten and fifteen nautical miles off the coast – accounts differed – and instructed it by megaphone to heave to.[6] After Randell refused to allow them to board, *Wolcott* fired a warning shot across the bows, whereupon it took off in the direction of Mexico with *Wolcott* in pursuit. On the way, *Wolcott* shot through *I'm Alone*'s sails and rigging, but its gun jammed and it radioed for help. Another coastguard vessel, *Dexter*, joined the chase, and caught up with *I'm Alone* two days later, on the morning of 22 March, some 215 miles southeast of New Orleans in the Gulf of Mexico, with *Wolcott* following behind. *Dexter* instructed *I'm Alone* to heave to, Randell again refused to allow officers to board, and *Dexter* opened fire with a three-inch gun and rifles, hitting the schooner with 'some sixty or seventy shells'.[7] As *I'm Alone* went down, the crew took to the water in heavy seas, and Leon Mainguy, a French national, drowned. The others were transported to New Orleans in manacles, whereupon criminal charges were issued against them.[8]

A few days later, the US Treasury issued a statement indicating that the coastguards had intercepted the 'notorious rum smuggler' *I'm Alone* under the terms of the Tariff Act of 1922, and had given chase in accordance with the doctrine of hot pursuit.[9] Section 581 of the Tariff Act declared a four-league (i.e. twelve-mile) customs zone extending outwards from the United States' coast, empowering the authorities to hail, stop, inspect, search and examine a vessel, and if it attempted to escape, to 'pursue and arrest' those involved using 'all necessary force to compel compliance'.[10] When introduced, section 581 had antagonised the British, who saw no reason why their flagged vessels should be compelled to abide by American Prohibition laws beyond US territorial waters.[11] Thereafter, whenever the coastguard intercepted British-flagged vessels in the claimed zone beyond the three-mile limit, the British

[6] Hereafter, references to 'miles' should be taken to mean 'nautical miles'.

[7] 'The Canadian minister (Massey) to the secretary of state' (9 April 1929): *Foreign Relations of the United States* [hereafter, *FRUS*], *Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/76.

[8] For one account of the incident, see the summary of US Treasury statement, UK Embassy Washington to UK Foreign Office (26 March 1929), pp. 1–2: FO 371/13513, TNA.

[9] Ibid.

[10] Tariff Act of 1922, 42 Statutes at Large (1922), 858, 979. Section 581 applied these powers to 'any vessel', while section 586 made explicit reference to 'any vessel from a foreign port or place' (ibid., 980).

[11] Grey of Fallodon, UK House of Lords, *Hansard* (28 June 1923), vol. 54, col. 730.

protested on much the same lines as Randell: these were high seas, beyond the reach of the coastal state.

Shortly after the Treasury pronouncement on *I'm Alone*, the State Department stepped in and proposed that the schooner had in fact been intercepted under the Convention respecting the Regulation of the Liquor Traffic, concluded between Britain and the United States in 1924[12] – in other words, *not* the Tariff Act. This convention, designed to reduce the friction between the two countries over section 581, entitled British ships to lawfully carry sealed cargoes of alcohol through American territorial waters and ports provided that they were listed as sea stores or destined for elsewhere.[13] In return, the British would raise no objection to the American authorities boarding and, if justified, seizing British vessels suspected of unlawfully importing liquor, provided this happened at no greater distance than that 'traversed in one hour' from the United States' coast.[14] (This vague term got around Britain's reluctance to validate a four-league or twelve-mile contiguous zone, which they feared would set an unwelcome precedent.[15]) The convention also provided for hearings before two commissioners for compensation for the loss or injury of British vessels seized in a manner 'improper or unreasonable'.[16]

Whatever the legal basis for the interception, a case against the crew of *I'm Alone* seemed to be pending. But then the unexpected happened: on 9 April, the American authorities withdrew the charges against all of them and they were released.[17] The US Justice Department explained that the case had been dropped for lack of evidence of acts of conspiracy 'on shore or within marginal three mile limit', but that this in no way reflected on the legality of the coastguards' interception and pursuit of *I'm Alone*.[18] In London, British officials expressed their doubts about this latter claim, speculating that unnamed parties in Washington had instructed the coastguard to 'get rid of this troublesome boat', and had then decided

[12] Convention between the United States of America and the United Kingdom respecting the Regulation of the Liquor Traffic [hereafter, Liquor Convention] (signed 23 January 1924, EIF 2 May 1924) 27 LNTS 181.
[13] Article 3, ibid., 184.
[14] Article 2, ibid., 182–184.
[15] R. H. Hadow to C. W. Dixon (29 August 1929), p. 2: FO 371/13515, TNA.
[16] Article 4, Liquor Convention, 184.
[17] UK Embassy Washington to UK Foreign Office (11 April 1929), p. 1: FO 371/13513, TNA.
[18] Ibid.

against bringing the case lest their equally troublesome instruction came to light.[19]

## The Doctrine of Hot Pursuit

States strongly resent other states' attempts to seize, never mind sink, their vessels on the high seas, especially during peacetime, and Herbert Hoover's new administration braced itself for a protest. Because *I'm Alone* was a Canadian-registered British vessel,[20] both Britain and Canada, then a British dominion, had a strong interest in the matter, and it was decided that the Canadians would raise a formal complaint with the Americans. On the day the charges against the crew were withdrawn, Canada's minister plenipotentiary to the United States, Vincent Massey, lodged a protest with Secretary of State Henry Stimson, indicating that he had reluctantly reached the conclusion that 'on the evidence now available, the pursuit and sinking of the vessel appears not to have been authorized either by the terms of the [Liquor] Convention of January 1924 or by the rules of international law'.[21]

The incident raised three legal issues. The first was whether *I'm Alone* was covered by the Liquor Convention when first intercepted by *Wolcott*. This could be settled by establishing two facts: the schooner's distance from the coast and its speed when it fled, both being necessary to calculate whether it was intercepted within an hour's sailing from the United States' coast, as specified by the convention. One difficulty was the 'one hour's sailing distance' formula, which the Canadian external affairs legal adviser John Read described as 'elastic, vague and unworkable'.[22] Another difficulty arose from the various claims about the schooner's position and speed made by the US authorities or by Randell and other crew members. Even so, if it could be shown that *I'm Alone* was outside treaty limits when intercepted, the American case would presumably 'fall [t]o the ground'.[23]

[19] R. L. Craigie minute (10 April 1929): FO 371/13513, TNA.
[20] *SS 'I'm Alone' (Canada / United States)* (1935) III RIAA 1609, 1617.
[21] 'The Canadian minister (Massey) to the secretary of state' (9 April 1929): *FRUS, Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/76.
[22] 'Memorandum' (29 August 1929), p. 4: FO 371/13515, TNA.
[23] UK High Commission Ottawa, 'Memorandum' (28 August 1929), p. 2: FO 371/13515, TNA.

The next legal question was whether the doctrine of hot pursuit could be applied to a pursuit started outside territorial waters but within treaty limits. The Canadians and British argued that it could not; the doctrine applied to pursuit commencing only from territorial waters, not from elsewhere.[24] This position was consistent with the existing doctrine, evidenced by the approach taken during the contemporaneous territorial waters debates before and during the 1930 League of Nations conference on the codification of international law.[25] There, guidance documents set out the four criteria governing hot pursuit: it had to begin in territorial waters, had to be initiated in response to infringements of a state's laws and regulations, had to be uninterrupted, and had to cease if the pursued vessel entered its own or a third state's territorial waters.[26] The Canadians pointed out that the pursuit of *I'm Alone* did not begin in American waters, and argued that it was not uninterrupted because *Dexter* had taken over the lead from *Wolcott* during the pursuit.[27]

The State Department's legal advisers countered that unless the Liquor Convention was read as providing for hot pursuit from within treaty limits, it would be 'worthless'.[28] Stimson elaborated a little, stating that the effect of the convention was to extend American jurisdiction over certain categories of British ships, and that if the Americans' right to pursue them from within the treaty limit into the high seas were denied, 'it would seem that the advantages purported to be granted by the treaty are illusory, since it would always be open to offending vessels to refuse

[24] See, for example, 'The Canadian minister (Massey) to the secretary of state' (9 April 1929): *FRUS*, *Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/76.

[25] Bases 5 and 26, drafted in 1929 as the starting point for the discussion about territorial waters at the conference, recognised the contiguous zone but did not recognise hot pursuit from it; the conference discussion about hot pursuit from the contiguous zone was inconclusive; and draft article 11 produced in the rapporteur's final report referred to hot pursuit commencing from internal waters or the territorial sea, but not from the contiguous zone. (League of Nations (LN), *Conference for the Codification of International Law – vol. III – minutes of the second committee*, C.351 (b). M.145 (b) (1930), pp. 179, 181; and ibid., annex V, appendix 1, p. 216; and W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), pp. 32–33: FO 372/2639, TNA.)

[26] Basis 26, LN, *Conference for the Codification of International Law – vol. III*, p. 181.

[27] 'The Canadian minister (Massey) to the secretary of state' (9 April 1929): *FRUS*, *Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/76.

[28] UK Embassy Washington to UK Foreign Office (9 April 1929), p. 1: FO 371/13513, TNA.

to stop when signalled, and flee to the high seas'.[29] As for the Canadian contention that the pursuit had been interrupted, Stimson countered that both *Wolcott* and *Dexter* were present at the pursuit's end, acting as a single unit 'of the same force and under one command'[30] – an idea that has endured, now applying to hot pursuits involving two or more naval vessels or a combination of naval vessels and military aircraft.[31]

The third legal issue concerned the proportionality of the coastguard's response to *I'm Alone*'s attempts to escape. The arrest of a vessel usually involves some form of compulsion, implied or otherwise; but sinking it, as the British pointed out, was 'drastic'.[32] Leon Mainguy's drowning added to the gravity of the incident. The precise question arising from the convention, however, was whether the destruction of *I'm Alone* was 'improper or unreasonable'.[33] The Foreign Office argued that it must be:

> From the Naval point of view the alleged continued firing at the vessel after she was crippled was indefensible: it would seem that she could have been forced to heave to without pushing the attack home to the point of sinking the vessel and en[d]angering the lives of all her crew; there must surely have been a period prior to the vessel's actual sinking during which she must have been quite helpless and which should have been used for the taking off of her crew rather than for the continued bombardment.[34]

Esmé Howard, the British ambassador in Washington, added that when settling the dispute, it was important to highlight the use of rifles and machine guns against *I'm Alone*, to 'put a curb on the homicidal tendencies of the Coast Guard'.[35]

Stimson gave two different responses. The first was that because Randell had refused to let the coastguards board, and because heavy seas prevented them from boarding by force, they faced a choice: they could

[29] 'The secretary of state to the Canadian minister (Massey)' (17 April 1929): *FRUS*, *Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/111.
[30] Ibid.
[31] Article 111(6)(b), UNCLOS, 439.
[32] UK High Commission Ottawa, 'Memorandum' (28 August 1929), p. 2: FO 371/13515, TNA.
[33] Article 4, Liquor Convention, 184.
[34] UK Foreign Office to UK Embassy Washington (28 March 1929), pp. 2–3: FO 371/13513, TNA.
[35] UK Embassy Washington to UK Foreign Office (4 April 1929), pp. 3, 4: FO 371/13513, TNA.

either sink the schooner or let it escape.[36] But then Stimson contradicted himself, arguing that the coastguards had *no choice*: their sinking of the schooner was 'in the circumstances, inevitable'.[37] In this second argument, he shifted the focus away from 'improper or unreasonable' compulsion and towards *necessary* compulsion to bring *I'm Alone* to a halt.

After the exchange of notes between Massey and Stimson, two commissioners were appointed to decide whether there was basis for the payment of compensation for loss or injury, as specified by the convention. The case was not concluded until 1935, but before then, the Foreign Office under-secretary Hugh Dalton was alarmed to receive a note from the Scottish Unionist MP Samuel Chapman saying that he would be bringing John Randell to visit in the hope that 'you can very kindly help him somehow or other'.[38] Dalton wrote back strongly discouraging Chapman from bringing Randell anywhere near the Foreign Office because there was 'no shadow of doubt that he was on a smuggling venture when his schooner came to grief', and that 'the extensive participation of British subjects and ships in this illegal traffic has in the past placed His Majesty's Government in a most embarrassing position vis-à-vis the Government of the United States'.[39]

## A 'Bad Patch' at The Hague

On 13 March 1930, just as the *I'm Alone* process was getting under way, the League's conference on the codification of international law opened in The Hague. This was vested with responsibility for producing treaties on three outstanding international legal questions: territorial waters, state responsibility, and nationality. In the committee considering territorial waters, two crucial issues proved contentious: the breadth of territorial waters and the recognition of the contiguous zone. Some states were pushing their jurisdictions outwards into the oceans, and the British, as the self-proclaimed guarantor of the freedom of the seas, took a hard line against this. Their intransigence contributed to the committee's failure to agree on either outstanding issue, let alone produce a draft treaty. The

[36] 'The secretary of state to the Canadian minister (Massey)' (17 April 1929): *FRUS*, *Papers relating to the foreign relations of the United States*, 1929, vol. 2, doc. 811.114 I'm Alone/111.
[37] Ibid.
[38] S. Chapman to E. H. J. Dalton (13 December 1930), pp. 1–2: FO 371/14277, TNA.
[39] E. H. J. Dalton to S. Chapman (19 December 1930), p. 2: FO 371/14277, TNA.

conference broke up on 12 April, having produced only one agreement on a different issue – the conflict of nationality laws. At the Foreign Office, Hugh Dalton, shrugging off Britain's own part in the conference's outcome, wrote a few months later, 'We have struck a bad patch lately. All recent conferences have ended in either complete, or substantial, failure.'[40]

This breakdown of the negotiations on territorial waters testified to Britain's decline as the leading maritime power. The First World War had left it crippled with debts and had deepened its dependency on invisible earnings. After the war, it was compelled to share its naval crown with the United States – an idea that would have been unthinkable a few decades earlier – while its grip on commercial shipping was being prized loose, line by line, by its European competitors.[41] The façade of British omnipotence, propped up by displays of force in the colonies, was starting to crack. By the time the conference opened in 1930, Britain still retained a huge navy and merchant marine, but its maritime policy was essentially a holding operation, designed to manage its threadbare assets and shrinking influence in the face of growing competition.

In the domain of international law, the British, having long relied on custom to legitimise their global activities, had mixed feelings about efforts to inscribe the law of the sea in a treaty. On one hand, it was necessary. On the other, they resented having to negotiate with others. This came to the surface over the conference's territorial waters committee, which they thought was 'a particularly unfavourable forum' for the airing of opinions on maritime affairs.[42] One problem, it seems, was reading the motives of the other powers, some of whom seemed to positively welcome the progressive development of the law. Another problem was that the proceedings would be run on democratic lines, where 'many States having little or no maritime interests' would be in possession of a vote.[43] If given a choice, the British would have preferred to settle law of the sea issues by judicial decision on a case-by-case basis before the Permanent Court of International Justice, where the vote-wielding states' views would not be represented to the same degree, and

[40] E. H. J. Dalton (7 July 1930): FO 372/2640, TNA.
[41] E. H. Marker, 'Jurisdiction outside territorial waters' (u.d., c. 27 March 1930), p. 4: FO 372/2638, TNA.
[42] G. R. Warner, 'Memorandum for the Cabinet' (u.d., c. 8 March 1930), p. 4: IOR L/E/9/471, India Office Records, British Library, London [hereafter, IOR].
[43] Ibid.

because it was more the sort of forum 'to whom the British view of the law might well commend itself'.[44]

In advance of the conference, the British established an interdepartmental committee to advise the Cabinet on the approach to take during the negotiations. This committee took the view that if they conceded the principle of the three-mile limit, an unstoppable deluge of new claims would follow, to the detriment of British naval operations, freight shipping and long-distance fishing. Treasury solicitor Maurice Gwyer wrote:

> It is a matter of importance both to the Navy and to the Mercantile Marine that territorial waters should be as small in area as possible; British security in time of war depends on sea power, and in foreign waters British sea power cannot be exercised; British merchant ships ply their trade on all seas, and their interests lie in the utmost possible restriction of the areas in which any measure of control may be exercised by coastal States. Furthermore, as the population of this country consumes large quantities of fish ... it is to the interests of this country that the foreign waters from which our fishing vessels are excluded shall be as small in area as possible.[45]

The problem, of course, was that this three-mile limit was not universally acknowledged. On the one hand, a score of states, including Belgium, Britain, France, Germany, Japan, the Netherlands and the United States, who between them commanded a global network of colonies, dominions and dependencies, had by the turn of the century adopted this narrow limit. [46] On the other hand, some of the smaller independent states – especially in Scandinavia and Latin America – were as likely to claim four- or six-mile territorial waters as they were to claim three. As Britain's global authority started to recede, as European security began to disintegrate, and as the use and exploitation of the oceans accelerated, adherence to three miles loosened, even among the powers. Some

[44] Ibid., pp. 4, 5.

[45] M. L. Gwyer, 'Interdepartmental committee on the codification of international law: final report' (u.d., c. 21 January 1930), p. 2: IOR L/E/9/471, IOR.

[46] G. J. Mangone, *Law for the world ocean – Tagore law lectures* (London: Stevens & Sons, 1981), p. 22. Another author, Bernard Heinzen, stated that twenty of twenty-one states accepted a three-mile zone in 1900 – *ergo*, it was custom ('The three-mile limit, preserving the freedom of the seas', *Stanford Law Review* 11 (1959), 597–664, 597, 632–634). Yet he overlooked the claims of around a dozen Latin American states, plus those of Bulgaria, China, Ethiopia, Japan, Korea, Morocco, Persia, the Philippines, Portugal, Romania and Siam, and suggested that Sweden and Norway were three-mile claimants when in fact they claimed four miles.

smaller states sought protection by claiming wider territorial waters *and* contiguous zones to go with them.

For the British, as the leading advocate of a binary maritime world made up of just high seas and territorial waters beyond internal waters, claims to contiguous zones were almost as unwelcome as claims to wider territorial waters. One reason was tactical: recognition of the contiguous zone would inevitably lead to more extensive jurisdictional claims. Another was practical: the Admiralty wished to avoid situations in which a foreign state could establish a contiguous zone to 'prevent . . . interference with its security by foreign ships' – interference, this note implied, being the Royal Navy's stock-in-trade.[47] (As an indication of the scale of its activities, Royal Navy warships had made at least twenty interventions threatening or using force along the coast and in the rivers of China in 1927 alone.[48])

Of all the British government departments concerned with maritime affairs, the Board of Trade, custodian of Britain's global commerce, made the most forceful case against concessions to the idea of the contiguous zone. Its argument was that if the zone were to be recognised, it would become another weapon in the arsenal of protectionism. Norman Hill, a leading figure in the shipping industry, referenced the 1927 world economic conference's finding that import tariffs were a major barrier to free trade, and concluded that it would be disastrous if coastal states were encouraged to bring new maritime areas in behind their customs frontiers.[49] One example of this was the United States' Tariff Act, which, as well as troubling British shipping with its four-league customs zone, had raised tariffs to protect its struggling agricultural and business sector. Hill thought that rather than validating the contiguous zone, it would be better to leave issues ill-defined, or if necessary, dealt with by way of exception.[50]

The Board also feared that recognition of the contiguous zone would encourage coastal states to further discriminate against British freight carriers. As officials pointed out, Britain, including its dominions, then possessed around a third of the world's total shipping and around half of

[47] M. L. Gwyer, 'Interdepartmental committee on the codification of international law: final report' (u.d., c. 21 January 1930), p. 5: IOR L/E/9/471, IOR.
[48] J. Cable, *Gunboat diplomacy 1919–1991: political applications of limited naval force* (Basingstoke: Macmillan, 3rd ed., 1994), p. 9.
[49] N. Hill, 'Territorial waters' (7 November 1929), p. 1: FO 372/2636, TNA.
[50] Ibid., pp. 1, 2.

its ocean-going tonnage, which made it a far bigger 'target to foreign interference' than other states.[51] Yet despite the gigantic scale of Britain's operations, its commercial shipping was going through a crisis, with the freight index falling by a fifth and operating costs rising by 70 per cent in the seventeen years since 1913.[52] This was partly due to the onset of the Depression, and partly due to other states' subsidised shipping industries eating into Britain's share of the market.[53] These competitors were not above discriminating in favour of their own cargo or passenger vessels, with the Board, perhaps ignoring the beam in its own eye, giving examples:

> Before the war Germany built up her mercantile marine by diverting to her own ships a great part of the emigration stream from Eastern Europe. With the help of her so called control stations designed ostensibly to prevent the introduction of cholera into Germany, it was not difficult for her to discover that passengers intending to travel by British ships were infected persons ... After the war Italy strove to prevent her emigrants from travelling to Australia on any but Italian ships and it was only the joint action of the British, Australian and Indian governments coupled with threat of retaliation that secured for British ships equality of treatment with Italian ships in this matter. Spain and Poland have penalised our shipping and we are at this moment endeavouring to get rid of some of the flag discrimination practiced by Portugal.[54]

The recognition of the contiguous zone – covering sanitation, customs, fiscal and immigration issues – would, the Board thought, enable its European competitors to extend their 'powers of mischief' to the further disadvantage of the British shipping industry.[55]

Yet for all their opposition to the zone, the British had to proceed with caution. One reason was that they had no wish to alienate some of the others in the three-mile group, especially the United States. Another reason was their fear that if it were put to the test, an international court would side with US chief justice John Marshall, who in *Church v Hubbart* (1804) had argued that a nation's 'power to secure itself from injury may

[51] E. H. Marker, 'Jurisdiction outside territorial waters' (u.d., c. 27 March 1930), p. 2: FO 372/2638, TNA.
[52] Ibid., p. 4.
[53] N. Hill, 'Shipping subsidies as an international problem', *International Affairs* (London) 12 (1933), 327, 339.
[54] E. H. Marker, 'Jurisdiction outside territorial waters' (u.d., c. 27 March 1930), p. 3: FO 372/2638, TNA.
[55] Ibid.

certainly be exercised beyond the limits of its territory'.[56] A final reason was that Britain itself had previously made jurisdictional claims beyond its territorial limits ('e.g. under the Hovering Acts'), and it might be hard to persuade foreign governments that what was once justifiable for the British was now unjustifiable when claimed by others.[57]

## The Crucial Questions

When Ramsay MacDonald's Labour Party cabinet ministers met the day before the opening of the codification conference, they considered two questions: 'Whether our delegates are to refuse to admit any claims to territorial waters exceeding 3 miles even if this should result in the Conference failing'; and 'Whether our delegates should refuse to agree to the establishment ... of a more extended limit of jurisdiction up to 12 miles for certain purposes, such as the prevention of liquor smuggling'.[58] William Graham, the president of the Board of Trade, argued that it would be better for the conference to produce no convention on territorial waters than one that permitted expanded maritime zones.[59] Impressed by this, the Cabinet adopted an unaccommodating stance. Its decision was cabled to Maurice Gwyer, now head of the British delegation, in The Hague:

> You should adhere strongly to principle of three mile limit. Any departure whatever from this principle should be on basis of bilateral agreements subject to adequate safeguards.[60]

While this decision did not exclude special, expedient bilateral arrangements with its allies, it pre-empted the prospect of creating a multilateral convention that allowed for more extensive maritime claims. In the Cabinet view, it would have to be either a three-mile limit without a contiguous zone, or no convention at all.

When the conference committee began its work, Gilbert Gidel, the French delegate and authority on the law of the sea, suggested for

[56] M. L. Gwyer, 'Interdepartmental committee on the codification of international law: final report' (u.d., c. 21 January 1930), p. 4: IOR L/E/9/471, IOR (quoting, not entirely accurately, from *Church v Hubbart* (1804) 6 US 187, 234).
[57] Ibid.
[58] UK Cabinet decision 15(30) (12 March 1930): IOR L/E/9/471, IOR.
[59] E. H. Marker, 'Jurisdiction outside territorial waters' (u.d., c. 27 March 1930), p. 1: FO 372/2638, TNA.
[60] UK Foreign Office to M. L. Gwyer (13 March 1930): IOR L/E/9/471, IOR.

precision's sake that delegates distinguish between the different shades of jurisdiction, proposing 'internal waters', 'territorial waters' and 'adjacent waters'.[61] Responding, the Colombian delegate José Luis Arango suggested that instead of 'territorial waters' they use 'national sea' or 'jurisdictional sea', while the Cuban delegate Carlos de Armenteros proposed another alternative, 'territorial sea'.[62] (The latter term appeared in the conference regulations and the final report but would not gain legal traction until the early fifties.)

Whatever the terminology, the discussion was confined to the law applicable to maritime zones during peacetime, not to issues relating to war – a deliberate adjustment of focus after states' long-standing preoccupation with the codification of the laws of naval warfare. It was understood, however, that wartime and peacetime regimes were not mutually exclusive: the peacetime law of the sea would continue to apply to relations between neutrals, and between neutrals and belligerents during conflicts. Furthermore, the breadth of territorial waters, if decided, would apply during both peace and war.[63]

The fate of the negotiations in the committee hinged on the three most important bases of discussion, covering the breadth of territorial waters and the recognition of the contiguous zone. These stated:

> **Basis of Discussion No. 3.**
> The breadth of the territorial waters under the sovereignty of the coastal State is three nautical miles.
>
> **Basis of Discussion No. 4.**
> Nevertheless, the breadth of the territorial waters under the sovereignty of the coastal State shall, in the case of the States enumerated below, be fixed as follows: – [to be endorsed by the committee]
>
> **Basis of Discussion No. 5**
> On the high seas, adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its Customs or sanitary regulations or interference with its security by foreign ships. Such control may not be exercised more than twelve miles from the coast.[64]

[61] LN, *Conference for the Codification of International Law – vol. III*, p. 30.
[62] Ibid., pp. 36, 32.
[63] M. L. Gwyer, 'Interdepartmental Committee on the Codification of International Law: final report' (u.d., c. 21 January 1930), p. 16: IOR L/E/9/471, IOR.
[64] LN, *Conference for the Codification of International Law – vol. III*, p. 179.

Basis 3 set out the rule: three-mile territorial waters. Basis 4 set out the exception: some states could claim wider territorial waters based on 'historic right or geographical or economic necessity' if the conference agreed to their doing so.[65] Basis 5 moved beyond territorial waters, recognising a high seas zone adjacent to them, limited to twelve miles from the coast, in which states could exercise limited control over foreign vessels.

Before examining the disagreements between states about the breadth of territorial waters, there was one thing that united them: the premise that all coastal states possessed them. As Basis 1 indicated:

> A State possesses sovereignty over a belt of sea round its coasts; this belt constitutes its territorial waters.[66]

This statement set off a long discussion about the character of the state's possession of them. The Colombian José Luis Arango, for example, portrayed the state's authority in territorial waters as a kind of jurisdiction short of sovereignty:

> Strictly speaking, the State has no 'sovereignty' over the waters of the sea around its coasts; it has only a body or group of rights over those waters, a kind of 'competence' or 'jurisdiction' (I would emphasise those two words). This competence or jurisdiction, however, necessarily accords the coastal state a certain right of ownership or dominion limited by international law, which is placed above all sovereignty.[67]

Others stressed that the state *did* possess sovereignty over territorial waters, exactly as Basis 1 stated. Maurice Gwyer, for example, expressed his surprise that the word 'sovereignty' had 'occasioned such terror' among the forty sovereign states in attendance.[68] He did not share their fears because he assumed that they all agreed that the state exerted precisely the same rights over territorial waters as those exercised over its land territory (territorial waters being 'subject, of course, to such reservations as may be prescribed hereafter in the Convention').[69] Implicit in this view was the idea that the possession of territorial waters sprang from sovereignty, a state being no more able to abdicate its

[65] M. L. Gwyer, 'Interdepartmental committee on the codification of international law: final report' (u.d., c. 21 January 1930), p. 2: IOR L/E/9/471, IOR.
[66] LN, *Conference for the Codification of International Law – vol. III*, p. 179.
[67] Ibid., p. 36.
[68] Ibid., p. 37.
[69] Ibid.

command over them than over its land territory. As the Egyptian delegate Abdel Hamid Badawi said, 'I do not think ... that a State could conceivably refuse to admit that it has sovereignty over its own territorial waters.'[70]

## Un-splendid Isolation

In the conference committee, it was clear that states would find it difficult to agree on bases 3, 4 and 5 on the breadth of territorial waters and the contiguous zone, so the discussion of these was postponed until after most of the other bases (on passage, ports, bays, islands, straits and more) had been considered. By the end of March, halfway through the negotiations, the German committee chair M. Göppert decided it was time to grasp the nettle. He invited delegates from 'the more important Powers' – among them, Britain, France and Italy – to a private meeting to consider territorial waters.[71] After this discussion, Gwyer thought that the chance of reaching agreement was remote, especially with the Italians:

> The French would, I think, be willing to admit the Scandinavian claim [to four-mile territorial waters] as an exceptional case, provided that no other exceptions were made; but the attitude of the Italian Delegation, who demand a belt of six miles for all purposes, has hitherto been a fatal obstacle. The Italian Delegation have tentatively suggested a six mile belt for the whole of the Mediterranean.[72]

The matter was sent back to the committee, where the issue was finally discussed on 3 April 1930. At the start of this meeting, the Italian delegate Amedeo Giannini – backed by Greece, Portugal, Spain, Sweden and Yugoslavia – tried to force a vote on territorial waters, offering a choice between three or six miles, the principle of the latter being 'not three miles'.[73] After an inconclusive discussion, this move was eventually blocked by the Japanese delegate Mushanokōji Kintomo, who suggested that instead of taking a vote, each delegation should simply state their nation's view on the breadth of territorial waters.[74] The ensuing discussion revealed with brutal clarity that the British could not command a

[70] Ibid., p. 23.
[71] M. L. Gwyer to UK Foreign Office (1 April 1930), p. 5: IOR L/E/9/471, IOR.
[72] Ibid., pp. 5–6.
[73] LN, *Conference for the Codification of International Law – vol. III*, p. 119.
[74] Ibid., p. 123.

simple majority, never mind the required two-thirds, for the three-mile limit.

The approach of the latter was based on two connected premises: that the breadth of territorial waters should be restricted to three miles, and that this should apply uniformly to all. Gwyer might simply have stated, as he did in an internal report, that the three-mile limit was 'the one and only rule which international law recognises or which it should recognise'.[75] But in the committee, in the face of abundant evidence to the contrary, he had to choose his words more carefully. He explained that three miles was the minimum viable breadth for territorial waters: no 'civilised' nation, as he put it, had ever claimed it should be less.[76] And while he did not know much about the origin of the rule, it was certainly of long standing:

> It has been said, in my own country that the rules of the common law, as distinguished from those of Acts of Parliament, find their ultimate origin in the bosom of God. I am not prepared to make so high a claim as that for the three-mile rule, but I do say that it is a rule now of very respectable antiquity.[77]

He argued that over the centuries the three-mile limit had acquired 'growing support from the great majority of maritime nations',[78] and that this group now possessed around 80 per cent of the world's shipping tonnage.[79] As a result, 'the general concurrence of the maritime nations of the world is a matter which I think cannot reasonably be left out of account'.[80] His hint that the views of those possessing the greatest shipping tonnage should be accorded special consideration earned him a sharp rebuke from the next speaker, Amedeo Giannini, who said: 'I am quite aware of the size of the British Empire and of the United States, but . . . [h]ere, we believe in the equality of States, so that the British case is worth no more than my own.'[81]

Another British premise was that all territorial waters should be of the same uniform breadth. Gwyer did not make much of a case for this in

[75] M. L. Gwyer, 'Interdepartmental committee on the codification of international law: final report' (u.d., c. 21 January 1930), p. 2: IOR L/E/9/471, IOR.
[76] LN, *Conference for the Codification of International Law – vol. III*, p. 140.
[77] Ibid.
[78] Ibid.
[79] Ibid., pp. 140–141.
[80] Ibid., p. 141.
[81] Ibid., p. 142.

committee, merely stating that if every nation were able to choose their own breadth, it 'would produce a state of chaos, and the codification of international law on this subject would go backwards rather than forwards'.[82] But other states, pointing to Basis 4, disagreed. What was stopping them from fixing the limit of their territorial waters according to their own circumstances, provided it was within the limits of reasonableness and in conformity with international law? Norway, claiming four miles, argued that it was 'neither possible nor desirable' to fix a uniform breadth,[83] while Sweden, also claiming four miles, stated that a uniform breadth could only justly be imposed on states whose circumstances were the same.[84] Yugoslavia, claiming six miles, proposed that every state should have the right to fix the limit up to a maximum of six miles.[85] And the USSR (whose breadth of territorial waters was unclarified, but who had claimed a twelve-mile 'marine customs area' in 1909 and a twelve-mile fishing zone in 1927),[86] suggested that the conference declare that established rights of usage, in their varied forms, should not be overturned.[87]

At the conclusion of the debate, the British Admiralty's representative, W. H. Hancock, totted up the various countries' positions. Eleven states supported the three-mile limit without a contiguous zone, these being Britain; its dominions Australia, Canada, the Irish Free State and South Africa; its colony India; plus China, Denmark, Greece, Japan and the Netherlands (with around half prepared to support a zone if necessary).[88] Eight more states claimed three-mile territorial waters plus a contiguous zone: Belgium, Chile, Egypt, Estonia, France, Germany, Poland and the United States.[89] Four Scandinavian states – Finland, Iceland, Norway and Sweden – claimed four-miles with or without a contiguous zone. And twelve states, almost all from Latin America and the south and east of Europe, claimed six miles with or without a contiguous zone, these being Brazil, Colombia, Cuba, Italy, Latvia, Persia, Portugal, Romania, Spain,

[82] Ibid., p. 20.
[83] LN, *Conference for the Codification of International Law – bases of discussion – vol. II – territorial waters*, C.74.M.39 (1929), p. 30.
[84] LN, *Conference for the Codification of International Law – vol. III*, p. 137.
[85] Ibid., p. 145.
[86] 'Russian territorial waters' (14 December 1953), pp. 2, 3: FO 371/1665, TNA.
[87] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), p. 9: FO 372/2639, TNA.
[88] Ibid., p. 8.
[89] Ibid.

Turkey, Uruguay and Yugoslavia.[90] (Hancock did not here mention the USSR, but a later report indicated that the Soviet delegate supported those states claiming more than three miles.[91])

Hancock concluded from this that while it was impossible for Britain to secure the required two-thirds of the vote for three-mile territorial waters without a contiguous zone, it might have been possible to round up enough votes for three-mile territorial waters plus a contiguous zone.[92] This seems very doubtful: with nineteen likely supporters among forty delegations, Britain still would have had to find at least five or six votes from among the Scandinavian four-milers (some of whom had claimed four miles for longer than Britain had claimed three) and the impoverished six-milers (who would lose half their breadth if they reverted to three), as well as relying on abstentions and no-shows to make up the numbers. What the figures really showed, as the Belgian jurist Charles de Visscher would later note, was that the three-mile limit had been 'shattered'.[93] The question was, what would take its place?

## The Allure of the Contiguous Zone

The debate about the contiguous zone proved just as contentious. The central question was whether the zone's features were derived primarily from the high seas or from territorial waters. The British position was that waters beyond three miles were high seas, except where a bilateral treaty recognised an exception (the Liquor Convention, for example). But as Gilbert Gidel was at pains to point out, the zone was also determined by its relationship with the coastal state. For one thing, it could be defined as an adjunct to territorial waters, hence Gidel's proposal that the contiguous zone be called 'adjacent waters'. For another, it met the state's need to prevent or punish infringements of certain laws or regulations committed, or expected to be committed, *within its sovereign domain*. These enforcement rights were restricted – Gidel stated that a nation 'only enjoys special, limited and incomplete rights for particular purposes'[94] – but even so, contiguous zones were being put to more uses

[90] Ibid., p. 9.
[91] 'Russian territorial waters' (14 December 1953), p. 4: FO 371/1665, TNA.
[92] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), p. 9: FO 372/2639, TNA.
[93] C. de Visscher, and P. E. Corbett (trans.), *Theory and reality in public international law* (Princeton, NJ: Princeton University Press, 2015), p. 212.
[94] LN, *Conference for the Codification of International Law – vol. III*, p. 31.

in 1930 than were later permitted, allowing not only for the prevention and punishment of infringements of customs, fiscal, immigration or sanitary laws and regulations,[95] but also for the protection of national security and the conservation of fish stocks.

In 1930, the delegates expressed most interest of all in using the contiguous zone as a buffer against the ultimate threat to national integrity – military assault. Fears of another war hung heavy over the proceedings, and allusions to the rights of neutrals percolated through the committee's debates.[96] Gwyer reported that national defence 'seemed to be at the back of the minds of most of the Delegates who spoke', and especially the French, 'who are preoccupied with the question of [incursions from] the air'.[97] He also suggested that instead of calling for security zones, states facing imminent danger should rely instead on the doctrine of self-defence; after all, 'no country in the world would criticise that State for going beyond its territorial waters in order to repel that attack'.[98]

Yet states were already claiming security zones during this period, and they fell into two distinct clusters. One cluster was made up of independent but vulnerable non-European states who considered themselves at risk of incursions by the maritime powers. They already included Chile, Ecuador and Honduras, who each claimed four marine leagues within which to maintain state security and enforce fiscal regulations;[99] plus El Salvador, who joined them in 1933;[100] China, who in 1931 claimed twelve miles ostensibly to prevent smuggling but in fact 'to put a stop to Japanese vessels continually entering Chinese territorial waters';[101] and Persia, who in 1934 claimed twelve miles for the execution 'of laws and agreements relating to security, defence and national interests and for the preservation of shipping routes'.[102] Another cluster of states claiming

[95] Article 24(1)(a), Convention on the Territorial Sea and the Contiguous Zone [hereafter, Territorial Sea Convention] (signed 29 April 1958, EIF 10 September 1964) 516 UNTS 205, 220; and article 33(1), UNCLOS, 409.

[96] See the comments of the Swedish and Portuguese delegates: LN, *Conference for the Codification of International Law – vol. III*, pp. 129, 138.

[97] M. L. Gwyer to UK Foreign Office (12 April 1930), p. 8: IOR L/E/9/471, IOR.

[98] Ibid., p. 141.

[99] H. K. Grey, 'Annex no. 2: claims of various states to limits beyond territorial waters for special purposes' (1 January 1937), pp. 56, 58 and 63: ADM 116/5709, TNA.

[100] Ibid., pp. 68–69.

[101] Ibid., p. 56.

[102] Ibid., p. 68. (Earlier, in 1929, minister of court Abdolhossein Teymourtash handed the British representative a draft law proclaiming an eight-mile zone that would subject

security zones consisted of insecure European nations, including France (who had imposed peacetime restrictions in 1913 on warships within six miles and in 1928 on aircraft in the vicinity of naval ports),[103] Italy (who in 1912 declared a peacetime zone of ten miles)[104] and Poland (who in 1932 claimed a six-mile belt for coastal defence).[105] The delegates of Finland, Latvia and Romania were tempted to follow suit because they were troubled by Soviet warships conducting exercises just outside their territorial waters, thereby impeding access to navigable channels into their ports and rivers.[106]

An emerging trend among states was to claim a contiguous zone to regulate fishing and thereby conserve fish stocks. At the conference, Portugal and Denmark, supported by the Irish Free State, insisted on rights beyond their territorial waters to control trawling, which, they observed, had a particularly destructive effect on fish fry.[107] The Danish delegate V. L. Lorck, for example, wanted to insert the phrase 'or fry-protection,' into Basis 5, so that its purposes included 'customs, *or fry-protection*, or sanitary regulations or interference with its security by foreign ships'.[108] As the British noted, states were not directly claiming *exclusive* fishing rights, but rather couching their claims as the right to regulate the method and amount of fishing that took place in the contiguous zone in order to conserve fish stocks for all.[109] And when responding to these proposals, the British, keeping in mind their own large trawling industry, insisted that the question of conservation be shelved on the grounds that it was a fisheries question, and therefore beyond the remit of the committee.[110]

vessels to police supervision including quarantine checks, saying: 'There was no divine law . . . to prevent a microbe being carried on a warship': R. H. Clive to A. Chamberlain (25 February 1929), p. 1: FO 371/13773, TNA.)

[103] Ibid., pp. 61, 62.

[104] United Nations Law of the Sea Conference, 1960 [hereafter, UNLOSC II], vol. 1, A/Conf.19/4 (8 February 1960), p. 160.

[105] H. K. Grey, 'Annex no. 2: claims of various states to limits beyond territorial waters for special purposes' (1 January 1937), p. 68: ADM 116/5709, TNA.

[106] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), p. 13: FO 372/2639, TNA.

[107] See comments by the Danish and Irish Free State delegates: LN, *Conference for the Codification of International Law – vol. III*, pp. 25, 26.

[108] Ibid., p. 25. Emphasis added.

[109] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), p. 13: FO 372/2639, TNA.

[110] Ibid., pp. 13–14.

These claims to a fishing zone stretched the concept of a contiguous zone. Instead of using the zone to enforce laws pertaining to the sovereign domain, claimant states were now addressing issues arising from the contiguous zone itself. As Edwin Dickinson noted in 1926:

> Fishery regulations are unlike revenue legislation in that they are intended to conserve and protect an interest in the sea itself. Fishery zones are claimed for what they contain in resources and not primarily as a means of territorial security.[111]

Later, as will be seen, the contiguous zone and the fishing zone would be separated, with the fishing zone evolving into the exclusive economic zone.

When Gwyer delivered his speech on the contiguous zone, he stated in accordance with his instructions that his government opposed its universal application because it would entail too great an incursion into the high seas, although exceptions could be admitted by bilateral agreement in 'special and peculiar circumstances'.[112] The responses from other delegates showed how isolated Britain was on the issue, with almost all stating their support for some kind of contiguous zone. Even delegates from British dependencies such as India and South Africa wobbled on the issue.[113] Gwyer thus found himself stranded on the rock of British intransigence as new ideas swept past him, while Hancock, who observed the debate, reported to the Admiralty:

> It would in fact appear that we stand practically alone in declining to recognise any general right of control outside territorial waters . . . Other countries differ as to the extent of this control, the purpose for which it is to be exercised, and to what distance, but there is undoubtedly almost complete agreement that some such general right exists, and, more emphatically, that it is necessary.[114]

## *I'm Alone* Again

The case of *I'm Alone*, which addressed the reach and rights exercised from within a contiguous zone, had been proceeding at a glacial pace.

[111] E. D. Dickinson, 'Jurisdiction at the maritime frontier', *Harvard Law Review* 40 (1926), 1, 15.
[112] LN, *Conference for the Codification of International Law – vol. III*, p. 126.
[113] Ibid., pp. 25, 130.
[114] W. H. Hancock to A. Flint (6 April 1930), p. 5: FO 372/2639, TNA.

In the early stages, the British had advised the Canadians to drag their heels because they feared that if the two commissioners found against the United States, Washington might renounce the Liquor Convention, which gave British shipping the special right to move alcohol through American waters.[115] Whether for this reason or others, the commissioners did not produce their interim report until 1933, and their final report until 1935, nearly six years after the schooner had gone down. By then, Prohibition had been lifted, which removed Britain's own rationale for adhering to the Liquor Convention: it no longer enjoyed any special rights, while the Americans retained the right to board its ships for suspected non-payment of duties.[116]

Interested parties paid close attention to the discussion of the right of hot pursuit at the codification conference. Although the case was *sub judice* between Canada and the United States, the issues it raised inevitably seeped into the discussion. Hancock reported:

> In view of the 'I'm Alone' case, special interest was aroused by a proposal by the Finland delegate, supported by the French, that the same right of pursuit should apply in an 'adjacent [contiguous] zone'. This was opposed by the British and Canadian delegations in emphatic terms. The United States did not take part in this discussion and the question was dropped on the understanding that the Finnish proposal would be merely recorded in the minutes and not in the Report. No other course was possible at that stage as it had not been agreed to insert any draft article which recognised the existence of an 'adjacent zone'.[117]

Clearly the delegates could not agree on whether a hot pursuit could be commenced from the contiguous zone. There was, however, consensus over some of the other conditions governing a pursuit. The Danish delegate V. L. Lorck put forward an amendment suggesting that before it commenced, the patrol vessel must establish by 'bearings, sextant angles, or other like means' that the suspect vessel was within territorial waters.[118] And the American delegate suggested adding a reference to boats associated with the suspect vessel[119] – an acknowledgement of the constructive presence of a mothership that remains on the high sea while dispatching its

[115] G. Thompson minute (2 April 1929): FO 371/13513, TNA.
[116] P. R., 'Memorandum: the future of the Liquor Convention' (14 November 1933), p. 2: FO 371/16602, TNA.
[117] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), p. 33: FO 372/2639, TNA.
[118] Ibid., pp. 32, 33.
[119] Ibid., p. 33.

boats to operate inside another state's territorial waters. (A case in point was the *Tenyu Maru*, a Japanese schooner arrested when its boat was found taking seals within the United States' waters off Alaska in 1909.[120])

The Danish amendment also specified that the patrol vessel had to get close enough to give the suspect vessel an audible or visible signal to stop (wireless transmission not being sufficient),[121] and that the suspect vessel had to be within territorial waters when sighted and signalled to stop, whereas the patrol vessel did not.[122] Lorck explained why this was necessary when patrolling a coastal fishery:

> Inspection usually takes place along the line and outside the line [of territorial waters], because as soon as the trawler sees the inspection ship, he cuts his fishing-gear and goes outside the line. It nearly always happens, therefore, that they have to be taken outside the line.[123]

These Danish proposals would reappear in the 1958 high seas convention and the 1982 UN law of the sea convention.[124]

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Returning to the *I'm Alone* case, the commissioners did not reach either 'agreement or disagreement' on the central question of whether American coastguard vessels had the right of hot pursuit outside territorial waters but inside treaty limits.[125] Instead, they worked on the assumption that the right existed, but agreed that the intentional sinking of the schooner was not justified either by the Liquor Convention or by any principle of international law.[126] They therefore ordered the United States to apologise and make a 'material amend' of US$25,000 to Canada, as well as paying compensation to crew members or their representatives, including the family of the deceased French national, Leon Mainguy.[127]

Another aspect of the case concerned the amount of force a state could use to apprehend a vessel subject to a hot pursuit. The Liquor

[120] *The Tenyu Maru* (1910) 4 Alaska Reports 129.
[121] W. H. Hancock, 'Report on international conference' (u.d., c. May 1930), pp. 32–33: FO 372/2639, TNA.
[122] Ibid., p. 32.
[123] LN, *Conference for the Codification of International Law – vol. III*, p. 100.
[124] Article 23, Convention on the High Seas [hereafter, High Seas Convention] (signed 29 April 1958, EIF 30 September 1962) 450 UNTS 82, 94–96; and article 111, UNCLOS, 439–440.
[125] *SS 'I'm Alone' (Canada/United States)* (1933) III RIAA 1609, 1614.
[126] Ibid., 1617.
[127] Ibid., 1618.

Convention had referred to 'improper or unreasonable' exercise of rights relating to the interception and seizure of suspect vessels, but instead of trying to reverse this formula, the commissioners (following *Church v Hubbart*[128]) instead decided that compulsion had to be '*necessary* and reasonable'. They considered the possibility that

> the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur *incidentally*, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless.[129]

They found, however, that in the case of *I'm Alone*, 'the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention'.[130]

Shortly afterwards, one of the British legal advisers, Gerald Fitzmaurice, protested that 'necessary' and 'reasonable' did not always coincide: 'The force which is necessary to achieve an object is not necessarily reasonable force, unless it be admitted that the object is one which the party trying to achieve it is entitled to achieve at all costs – the very conclusion which the Commissioners negatived.'[131] But the formula stuck. Seventy years after the sinking of *I'm Alone*, the International Tribunal for the Law of the Sea referred to 'reasonable and necessary' force when deciding the 1999 case of *M/V 'Saiga'*,[132] which involved Guinean patrol-boat officers firing indiscriminately as they boarded the St Vincent and the Grenadines-registered oil tanker, seriously injuring two crew members. The tribunal held that even if force was necessary as a last resort, 'appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered'.[133]

## 'A Capital Mistake'

In 1930, the territorial waters committee's negotiations stalled because the British could not compel other states to accept three-mile territorial waters,

[128] *Church v Hubbart* (1804) 6 US 187, 235.
[129] *SS 'I'm Alone' (Canada/United States)* (1933 and 1935) III RIAA 1609, 1615, 1617. Emphasis added.
[130] Ibid.
[131] G. G. Fitzmaurice, 'The case of the *I'm Alone*', *British Year Book of International Law* 17 (1936), 82, 99.
[132] *M/V 'Saiga' (No. 2) (St Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10 [155].
[133] Ibid., [156].

and the other states could not compel the British to accept a contiguous zone. The American delegate David Hunter Miller eventually proposed that delegates abandon the idea of producing a convention and instead produce a final report summarising the committee's work.[134] This was agreed. The report, written by the Dutch rapporteur J. P. A. François, set out thirteen non-binding draft articles relating to some, but not all, of the issues discussed in the committee, as an invitation to further discussion.[135]

Upon his return to London from The Hague, Maurice Gwyer proved to be almost wilfully unreflective about the committee's failure to reach agreement. The problem, he wrote, was that there was not enough time for discussion. Had the conference been longer and had delegates spent less time on secondary issues, they would have eventually reached agreement, at least on baselines and some of the other 'technical' questions.[136] This claim sidestepped the essential problem: *Pax Britannica* was over. As a Foreign Office official would put it years later: 'The real force behind a legal system which kept maritime limits narrow was naval power'; and that if the law governing territorial waters was in flux, 'I think we must accept the fact that the ultimate cause is the relative decline of British naval power'.[137]

Four years after the conference broke up, Gilbert Gidel published a piece in *Recueil des cours* in which he argued that the British might have won endorsement for three-mile territorial waters in the proposed treaty if only they had been prepared to accept the contiguous zone as part of the package.[138] It must be said that this conclusion does not seem to be borne out by Gidel's tallies of the various states' positions, which put the number of states supporting the plain three-mile position even lower than Hancock's figures, at nine states.[139] Nevertheless, Gidel's message was absorbed, however reluctantly, and Whitehall eventually came around to the same view.[140]

[134] LN, *Conference for the Codification of International Law – vol. III*, p. 147.
[135] Ibid., annex V, appendix 1, pp. 212–217.
[136] Draft, 'Meeting of the Inter-departmental Committee on Territorial Waters' (u.d., c. May 1930), p. 1: FCO 372/2640, TNA.
[137] 'Attitude of Her Majesty's Government towards the I.L.C.'s deliberations' (u.d., c. May 1952), p. 1: LCO 2/5783, TNA.
[138] G. Gidel, 'La mer territoriale et la zone contiguë', *Recueil des cours de l'Académie de Droit International de la Haye* 48 (1934), 133, 190, 192.
[139] Ibid., 189.
[140] UK Foreign Office to UK Embassy Washington (19 May 1950), p. 2: CO 323/1926/1, TNA.

In 1950, with the wisdom of hindsight, the Foreign Office notified the British embassy in Washington of a shift in their position over the contiguous zone:

> It is now thought that at the Hague Conference in 1930, His Majesty's Government made a very bad error of tactics. There were, before the Conference, drafts which had a great deal of support, which (1) prescribed three miles breadth of territorial waters and (2) admitted a contiguous zone, outside the three mile limit in which the lit[t]oral State could exercise jurisdiction over foreign shipping to the extent necessary to protect its revenue and fiscal interests.[141]

They concluded that their predecessors had made 'a capital mistake' by not conceding a contiguous zone to protect their greater interest in three-mile territorial waters,[142] and no longer saw any objection to accepting claims to contiguous zones provided that they were limited in scope and jurisdiction.[143] This, they hoped, might enable them in the future to salvage the three-mile limit from the wreckage of the 1930 conference.

[141] Ibid.
[142] Ibid.
[143] Ibid.