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...AL LAW ASSOCIATION.
...r BUILDINGS, TEMPLE, LONDON, E.C.

BUDAPEST CONFERENCE, 1908.

...lt. napló: ... sz.: 12639
... csoport ... szám.

PAPER ON

NOTES UPON THE QUESTION OF THE DELIMITATION OF TERRITORIAL WATERS.

READ AT BUDAPEST ON SEPTEMBER 25th, 1908,

AT A CONFERENCE OF THE

INTERNATIONAL LAW ASSOCIATION

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LONDON:
PRINTED BY WEST, NEWMAN & CO., 54, HATTON GARDEN.
1908.

SZEGEDI TUDOMÁNYEGYETEM
Jog- és Közigazgatástudományi Kar Könyvtára
Lelt. napló: 19397/9 sz.:
1955. XII. 31.

II. n-3

SZEGEDI TUDOMÁNY[illegible]
ÁLLAM ÉS JOGTUD[illegible]
[illegible] napló sz.: 10250/9

NOTES UPON THE QUESTION OF THE DELIMITATION OF TERRITORIAL WATERS.

By Dr. DEZSÖ DÁRDAY.

I.

The rules relating to Territorial Waters, drafted by the Institut de Droit International and accepted at the Congress of the International Law Association, held in Brüssels in 1895, declare, in terms of sections 1 to 4, as follow:—

§ 1.

That the State has sovereign rights over a certain zone of the sea washing its coasts, save in respect of the right of peaceable passage as provided by section 5.

The name of this zone shall be territorial (waters) sea.

§ 2.

That the territorial (waters) sea be deemed to extend to a distance of six knots outwards, along the whole line of coast, the distance to be measured from the lowest water-mark at ebb-tide or from the line referred to in § 3. (Sixty knots = one degree of latitude.)

§ 3.

With respect to gulfs, the territorial (waters) seas follow the indentations of the coasts, except in the case where the boundary is to be computed from a straight line drawn from headland to headland across the gulf at the narrowest point of opening towards the open sea, if this part be not more than ten knots from point to point, except where the continuous custom of centuries sanctions greater width.

§ 4.

In case of war the neutral shore State reserves the right to prolong its own zone of neutrality beyond the six mile limit, as far as the range of its shore guns. The exercise of this right may be notified by means of Manifesto or by separate Note.

. . . .

A close survey of the contents of these provisions brings us to the conclusion that in neither section 2 nor in section 4 is a decided answer forthcoming to the query: What kind of line should be held to form the boundary of the territorial waters belonging to two States at the point where the dry land territory of a shore Power abuts upon that of another? Upon this head the following open questions present themselves.

A.

The expression in § 2 "the shores in their whole extent" is not explicit enough to settle whether the boundaries of the two neighbouring territorial waters are to be sought in the prolongation of the line, not necessarily at right angles to the coast, dividing the dry-land territories of the two neighbouring States, or in a line to be drawn at right angles to the shore at the point where the dry-land boundary abuts upon the sea. Quite lacking authoritative settlement is the further point as to how these six miles are to be computed in the event of the dry-land boundary of the two States being at the summit of a tongue of land stretching out into the sea, or reaching the sea at the deepest point of a bay falling without the meaning of section 3. In the former case the line drawn at right angles to the shore leaves a neutral area about the summit: in the latter case the lines at right angles intersect one another. Finally, in those cases in which the extension of the lines of land boundaries is accepted, eventually one State would be completely deprived of the jurisdiction over territorial waters in certain gulfs, or of the greater part of such right.

In these two latter cases, the application of the principle of Clause 1 of section 10 of the rules in question referring to the straits of a width greater than twelve miles would appear to be the most proper, *i.e.*, a line drawn through the centre should be regarded as the limit of territorial waters for each side.

Clause 1 of section 10 adverted to above runs as follows:—

"Those straits whose shores belong to different States form part of the territorial seas (waters) of such States. The middle line forms the limit of jurisdiction of each State."

B.

Yet more obscure than the rules referring to the sea-boundaries, delimitated for times of peace, appears the mode of delimitation set forth in terms of section 4 of the Rules under discussion, in time of war.

This single mode of determining the frontiers of territories by means of the range of the shore batteries is open to the grave objection that, at the point of contact of two contiguous shore-States, as a consequence of the two spheres under the influence of the two sets of guns belonging to the respective States, two arc areas will be set up as marking the limits of territorial waters, and these must intersect. As a result of declarations of neutrality or of the separate Notes issued in case of war, in respect of territorial water frontiers, the following critical positions are created:—

1. Either the territory representing the carrying capacity of the guns will, by expression or implication, be regulated, as between the two States sending out Manifestoes of neutrality or Notes, unilaterally, or;

2. By common agreement, or without, with respect to the territory falling within the effective range of the guns of the two neighbouring States, such harmonious *modus vivendi* will be found as will serve to adjust the points of difference arising upon the subject of the debateable area. This would mean the mutual regulation of territorial waters, the necessity for rules governing which has not been foreseen among the "Rules relating to Territorial Waters."

3. Or it might happen that, as touching the debateable area, both States would hesitate to declare neutrality, as a consequence of which this circular gun-swept area would be invested with unique characteristics in the eyes of the parties at war.

4. Finally, in contradiction not only to the spirit of the oft-quoted rules but also to that of the *jus gentium* itself, there would occur the practical abrogation of the rights of a State whose territory, abutting upon the sea, is not in its whole length beyond the range of a gun, that is to say, is not fifteen miles in extent. The shore States adjacent to this could,

with their guns mounted upon the point of the frontier touching the sea, completely control the territory which extends in front of the fifteen mile coast line, notwithstanding that the State in question, upon the principles of *jus gentium,* would be justified in looking upon this area as forming its own territorial waters.

It is indubitable that in such a case, in terms of the present "rules," one or both of the neighbouring States would feel justified in declaring the sea in front of the fifteen-mile long shore territory to be a neutral zone in spite of the fact that the "hinterland" thereof forms part of the territory of a foreign Power. Arguing from this it would appear that the circumstances obtaining as a result of a question of neutrality might furnish ground for three several declarations, one upon the part of the State possessing the fifteen-mile coast line and one on the part of each of the two contiguous shore States.

Practical examples may be cited of cases furnished by the Magyar territorial waters. These waters *de jure* stretch along the shores from the locality known as Cantrida, near the town of Fiume, quite to the most southerly point of Dalmatia, named Spizza, or, reckoned in a straight line, to a length of 285 knots, which is about the same extent as the sea-coast of Portugal.

At the time of the conclusion of the Peace of Campo Formio, Dalmatia was given back to the Empire of the Hapsburgs as a concession of the historical rights of the Magyar Kingdom, and, by the terms of Law XXX. of 1868, supported by many other decisions at Common Law, it was declared to be part of the territory of Hungary.

The circumstance that one part of the old Dalmatia is administratively and politically conceived as a separate kingdom amongst the kingdoms and lands represented in the Imperial Council sitting in Vienna, and that the other part, the northern island group, was administratively and politically incorporated with the province of Istria, did not alter the fact that the mainland and islands in question, together with the sea washing the shores thereof, were Magyar territorial possessions.

In the case of these territories two points arise, by a consideration of which the practical insufficiency of the regulations hitherto governing the delimitation of territorial waters becomes manifest.

The one refers to the part named Klek, lying near the Narenta River of Herzegovina, that is, of the Turkish territory now in the occupation of Austria-Hungary, which reaches the sea with a breadth of something more than four knots.

The other is the sea-coast named Suttorina, scarcely longer than eight knots, and lying in the Bay of Cattaro which belongs to Herzegovina or, really, to Turkey. The sea washing these two territories is commanded by the guns of the neighbouring Powers.

In addition to these there is a territory which forms the subject of special anxiety for Hungary. Under actual conditions it covers a length of about seventy knots of Magyar coast line. This stretch, *de jure et de facto,* politically and administratively, belongs to Hungary.

The case is as follows :—

The State frontier between Hungary and Austria reaches the sea-shore near Cantrida which lies in the Bay of Quarnero, not far from the Magyar port of Fiume, and almost at right-angles to the sea-shore. The shore, however, on the Austrian side, scarcely more than three miles from Cantrida, forms a rectangle, so that the guns mounted there and on the lower shore command the whole of the Bay of Quarnero from the Austrian shore to the islands lying opposite, a distance which never exceeds fifteen knots, which is the maximum range of modern artillery.

The circumstance that the areas above-mentioned, Klek and Suttorina, form part of the territory occupied by the Austro-Hungarian Monarchy does not affect the importance of the question from a legal point of view, nor does it matter that these districts are at present in the same hands as the neighbouring sea-shores. Nor, again, is the position altered by the fact that, by international agreement, the Suttorina harbour has been declared a *mare clausum,* in which every foreign ship, in whatsoever circumstances, is forbidden to touch the Turkish sea-shore, a prohibition which is also extended to the harbour of Klek. In the case adduced, with respect to the Austro-Hungarian boundary lying in the Bay of Quarnero the juridical question is not affected by the legal relation in which Austria and Hungary stand to each other, agreeably to which the military affairs of the two States, considered in a narrow sense, form a department in common.

C.

In the cases adduced the question of the boundaries of the territorial waters centres more particularly about the point of contact of two neighbouring shore States, of which the one is at war whilst the other desires to maintain its neutrality. The importance of the question derives from the effective maintenance of neutrality and the circumscription of military action.

D.

Finally, an important case is furnished by the spectacle of two neighbouring States engaged in war with each other. In such case the commencement of hostilities or the construction of some specific act as a declaration of war is associated with the regulation of the boundary line of the territorial waters.

Whereas the "Rules," verbally construed, may mean that, since gun shots may be directed parallel to the shores before Fiume, Suttorina and Klek, the sea stretching along these coasts cannot legally be considered as forming the territorial waters of the State of Hungary; and, whereas, having regard to the fact that it was not and could not have been the intention of the Institut de Droit International to render such inference possible; I have the honour to move that the Rules relating to Territorial Waters be made, in this respect, an object of further study by the International Law Association, and be supplemented by such provisions with respect to the cases adduced and others of similar aspect as shall ensure a solution in harmony with the spirit of the *jus gentium.*

II.

In the "Rules relating to Territorial Waters" themselves, there is clearly apparent the difference existent between those rights of sovereignty exercised by a State over the tracts of sea (sometimes called 'shore-sea,' sometimes 'Territorial Waters') which stretch along its shores, in time of war, and the sovereign rights exercised over the same territories in time of peace.

The examples and questions cited above are such controversial problems that, without doubt, they might not be resolved without the application of the principle "*terræ potestas finitur ubi finitur armorum vis,*" in so far as it is a question of neutrality. In so far, however, as it is a

question of over-lordship exercised, in time of peace, by the States over the waters stretching along their coasts, it is impossible to overlook divergencies of opinion between these States on the question as to how far each may extend its effective jurisdiction in the direction of the open sea.

For example. The Customs Administrative Service of Austria-Hungary has no *locus standi* beyond the four-mile limit. England and America exercise the right of Customs supervision to a point twelve knots beyond the shore. France puts the limit at sixteen, Italy at ten knots. It is impossible not to perceive, further, an incongruity in administrative jurisdiction according to which the same State may exercise jurisdiction in one branch up to a certain distance and, in another, up to a greater or less distance. Thus, as has been pointed out, the Austro-Hungarian Monarchy projects the sphere of its Customs Administrative Service seaward to a distance from the shore of four knots, but its fishery jurisdiction extends to a distance of five knots. Belgium, Holland, Germany, and France claim fishery rights each three knots from the shore; Spain and Portugal six; Norway as far as a line drawn through certain points, which in places goes out twenty knots from the shore. Great Britain, according to the exceedingly interesting work by Professor A. H. Charteris, M.A., LL.B., Lecturer in International Law in the University of Glasgow, read at the Conference of the International Law Association held in Berlin in 1906, exercises fishery rights, and all rights of supremacy contingent thereupon which warrant the exclusion of all foreign vessels from the practice of fishing over her territory, upon an area included within a line drawn from headland to headland, according to the law practice which seems to recognise the validity of the old theory of "Kings Chambers," an expression now obsolete and used to designate the ports and havens of England. Comparing the boundary line of the Customs Service with the lines established for fishery jurisdiction, it seems that in no country do the two coincide.

From this it may be deduced that the extent of sea-territory over which States desire, in times of peace, to maintain exclusive supremacy is not dependent upon legal principle so much as upon expediency. Wherever, for example, the fish preserve is rich and the fishery more profitable, it is cultivated to a greater degree by the inhabitants of the sea-shore, and we note the natural tendency

towards extension of boundaries of the waters under the jurisdiction of the particular State; wherever the fishery, sponge, pearl or other like industry forms no considerable part of the support of the shore population, the result is rather indifference or inactivity. It is much the same with respect to the Customs and Coastguard services, which appear to adjust themselves to the incidence of commercial traffic and to the prevalence of smuggling respectively.

It would appear from this that, as regards the supremacy to be exercised over the sea, the State does not upon its own initiative lay down fixed conditions, because the State administration can only have its being where there are a sufficient number of administrative subjects under its control. Again, in those territories where a great number of administrative subjects exist and questions are to be adjusted, the State in question cannot evade the necessity of interfering with administrative activity.

That boundary marking the limit of such administrative objects and subjects or departments depends upon the measure of the vigour spontaneously springing out of the economic factors in the life of the population, which is capable of bringing within the scope of its economic dominion more or less of the surface of the sea.

Marine security, marine hygiene, quarantine regulation, the pilot and marine signal services, marine Customs, fisheries, certain branches of Admiralty Court jurisdiction, the laws of inshore flotsam, jetsam, and ligan—these form subjects of administrative activity to be exercised over the sea near the shore, the exclusive exercise of which premises that of the ships, merchants, fishers, in a word, of all the persons and property thus employed in the debateable area, the overwhelming majority shall be drawn from the members of the shore State. If the waters be thus overwhelmingly peopled and occupied by the subjects of the shore State, it is natural that without the framing of any rule of International Law the shore State, as regards the whole of the departments of administrative activity, will have the right to develop and regulate them by means of national laws.

In terms of this deduction, therefore, instead of a hard-and-fast geometrical determination to be applied indifferently to all shores, as to how many sea miles shall fall within the jurisdiction of a State, it would be more desirable and politic to establish a rule, the interpretation of which would

solve the question of the nationality of the territorial waters stretching along the shore, as in many States the nationality of a ship is determined by incidence of ownership. For example, in the case of Hungary the ship may only be registered as Hungarian if at least two-thirds, in value, forms the property of Hungarian citizens. On the model of this rule it might be declared that to the sphere of activity of every State belongs the exclusive right of extending its supremacy beyond the boundaries determined and recognised upon the territorial seas which extend along the shores of such State, if a certain overwhelming percentage of affairs incident to the economic development of life upon the littoral, and of administrative branches exercising jurisdiction thereover and over an equal percentage of individuals, the subjects of such State, belong thereto. On the contrary we may infer from this rule a legal proposition corresponding to existing practice with reference to the relations between single States, that no foreign State is bound to suffer or recognise the claim of a shore State which, deviating from hitherto valid usage, seeks to exercise Customs, fishery, quarantine, water-police rights of administrative supremacy to a greater distance from the shore than hitherto, if the State withholding acknowledgment has, in the debateable area, permanently and undisturbably, an overwhelming majority of its administrative subjects, exercising their fishery or other rights, such as are allowed to everybody in the open sea.

Whereas the enunciation of such a rule does not cut across existing rules regulating the existing boundaries of territorial waters, and is not opposed to the text laid down by the International Law Association by the "Rules relating to Territorial Waters," I have the honour to move that the International Law Association consider this question with a view to the extension of the rules in the direction indicated. In connection with this, perhaps at the same time, the question might form the subject of consideration whether or no it might be desirable to disassociate the conception of "*Territorial Waters*" or "*Territorial Seas*" which appears to be bound up with the idea of gun-firing and defence, a conception which is, *in esse*, of a restrictive nature, from the idea of such *seawaters* which, in respect to merely peace administration, would come under the administrative supremacy of the shore States; which, again, in contrast to the conception of "Territorial Waters," are independent

of any auxiliary conception, including gun range and defence and are representing an expansive principle. The better to give expression to this intention of disassociation, I have the honour to suggest that the phrase "*Territorial Waters*" or "*Territorial Seas*" might be applied exclusively to determine seawaters in the former sense, while the terms "*Shore Waters*" or "*Shore Seas*" (mer costiére, Küstengewässer, &c., &c.) should be used exclusively to determine seawaters in the latter sense.

I think that if the International Law Association could see its way to adopt this terminological distinction, it would thereby greatly contribute to making more recognisable the two opposing tendencies known under the denominations of "*Territorial Restriction*" and "*Territorial Extension*," and also to the theoretical solution of these troublesome questions.