Delimitation of Maritime Frontiers: Radio Stations in the Thames Estuary

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The jurisdictional problems raised by recent efforts to control the activities of radio stations operating off the shores mainly of the European States[1] are many and it is not the intention of this short article to present a comprehensive review of them.[2] Indeed, the stations to be considered here—operating from installations affixed to or supported by the bed of the sea in the Thames Estuary—are most unlikely to survive the entry into force of the Marine, etc., Broadcasting (Offences) Act 1967. The prosecutions brought against them under the Wireless Telegraphy Act 1949, have, however, raised questions of more lasting interest.

These cases[3] raised two main problems. The first problem was to determine the legal status of the waters in which the installations were situated; were they internal waters, territorial waters or high seas? The answer to this question depended primarily on the interpretation of the Territorial Waters Order in Council 1964,[4] which,

1 The monopoly of the New Zealand Broadcasting Corporation has been challenged by similar threats especially from "Radio Hauraki". See London *Times*, 1 October 1966.

2 See H. F. van Panhuys and M. J. van Emde Boas, "Legal Aspects of Pirate Broadcasting", 60 *American Journal of International Law* (1966), p. 303 and literature therein cited.

3 This paper is concerned almost exclusively with the *Radio 390 Case* though reference will also be made to the *Radio Essex Case* in which, on 30 November 1966, Mr Roy Bates, owner of Radio Essex, was convicted by Rochford magistrates at Southend, of using a wireless transmitter without a licence contrary to the Wireless Telegraphy Act 1949. The Rochford magistrates' finding that the Knock John Tower was in internal waters as opposed to territorial waters (see London *Times*, 1 December 1966) was upheld on appeal to quarter sessions.

Radio 390 was first prosecuted before the St. Augustine, Kent, magistrates at Canterbury and convicted for broadcasting from *territorial waters* on 25 November 1966 (London *Times*, 26 November 1966). The conviction was upheld in the High Court on 13 December 1966 (*R. v. Kent Justices; Ex part Lye and Others* [Q.B. (Div. Ct.)], [1967] 1 Lloyd's Rep. 154; [1967] 1 All E.R. 560; London *Times*, 14 December 1966). Broadcasting was resumed and a further prosecution was brought *before the Rochford magistrates* (an application to the High Court for an order prohibiting this "shopping around" for a court was dismissed on 18 February 1967) and a conviction secured on 23 February 1967, London *Times*, 24 February 1967) the magistrates holding that *Radio 390* was situated in *internal waters*. The two phases of the *Radio 390 Case* will be referred to as the "Canterbury" and "Southend" phases.

4 Not published in Statutory Instruments series but in *London Gazette*, 29 September 1964, p. 8222; or see *Halsbury's Statutory Instruments*, vol. 23, p. 162.

being itself based on the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958,[5] is of particular interest for international lawyers. The second problem was to ascertain the territorial scope of the jurisdiction of the United Kingdom courts over offences under the Wireless Telegraphy Act 1949.

I. DELIMITATION IN THE THAMES ESTUARY

For the purposes of this analysis, the *Radio 390* case alone need be considered. *Radio 390* was situated in the Thames Estuary (see diagram, p. 101) 4.9 nautical miles from the nearest point on the low-water line of the Kent coast but less than 3 nautical miles from the Middle Sands, an elevation of the sea bed alleged by the prosecution to be a low-tide elevation. The Middle Sands in turn is wholly within a radius of three miles from the low-water line of the mainland.

In considering the legal status of the waters in which *Radio 390* was situated, there are three possible lines of argument:—

First, it could be argued that the Thames Estuary is a "bay" as defined in the 1964 Order in Council, and that *Radio 390*, being within the 24-mile closing line, is in internal waters.

Secondly, it could be maintained that *Radio 390* is within territorial waters and not within internal waters. There are two possible grounds for this proposition: (1) The 1964 Order in Council is null and void as being *ultra vires* the Crown's prerogative.[6] In this case the pre-1964 baselines would apply and the Crown could claim that *Radio 390* was within territorial waters as measured from the Middle Sands—a low-tide elevation.[7] (2) The Thames Estuary is not a "bay" as defined in the 1964 Order, but the Middle Sands is a low-tide elevation as so defined.

Thirdly, it could be argued that *Radio 390* is situated in the high seas. This would be so if (1) the Thames Estuary is not a "bay" as defined in the Order and (2) the Middle Sands is not a low-tide elevation as defined in the Order, in which case the general rule for the determination of baselines, as laid down in Article 2 (1) of the Order would apply.

It will be argued below that the Order in Council cannot properly be applied for the determination of the territorial scope of the jurisdiction of the criminal Courts over *indictable* offences. As the prosecution of *Radio 390* was in respect of a summary offence, however, this alternative need not be considered for the moment. The first point to be dealt with, therefore, must be whether *Radio 390* is within the closing line of a bay and so in internal waters.

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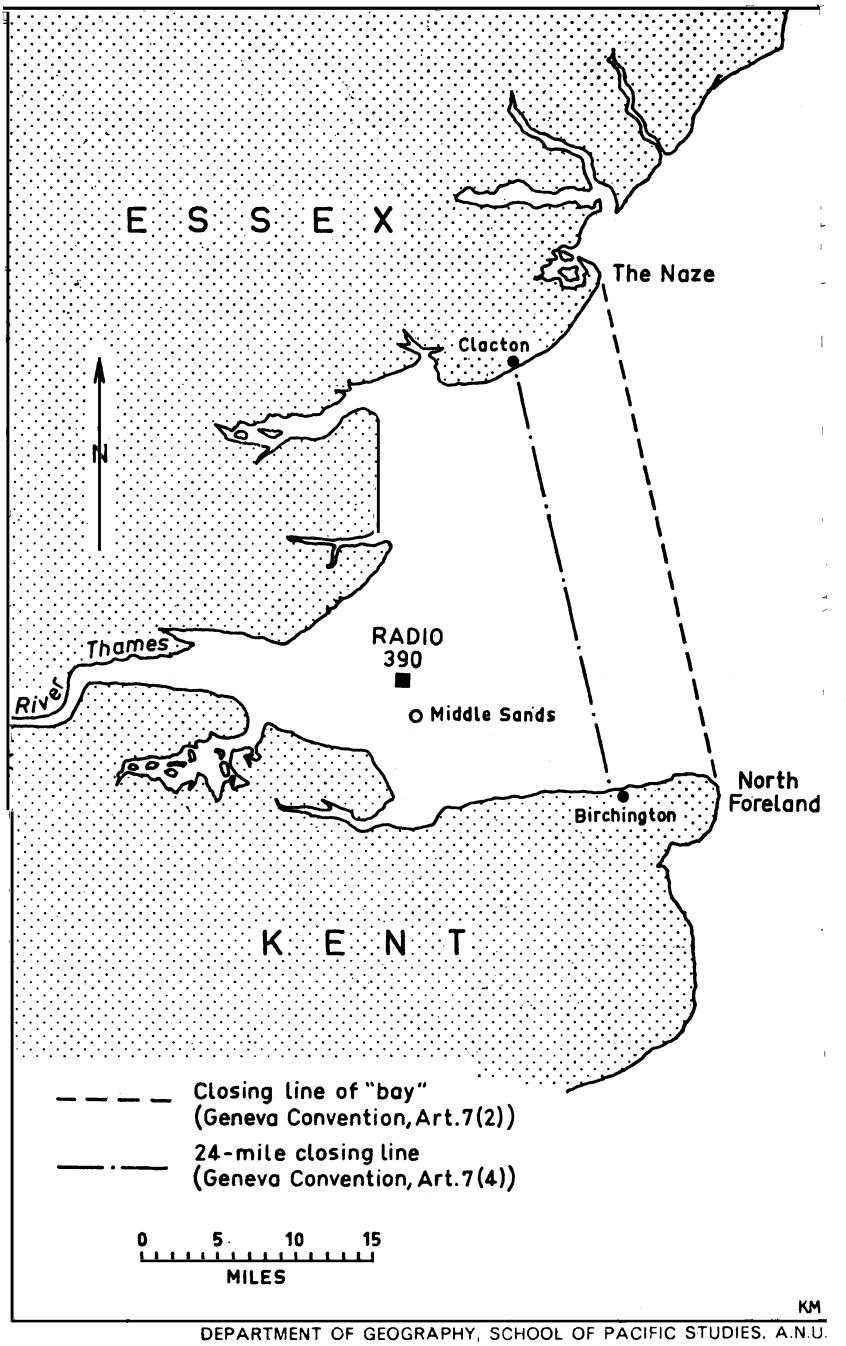
5 Cmnd. 2511 (1965).

6 See, *post*.

7 The United Kingdom recognized, even prior to 1964 that low-tide elevations might be taken into consideration for the determination of the baseline of the territorial sea, provided they were situated within the territorial sea as measured from the mainland or an island. This position is in accordance with the proposals of Subcommittee II of the Hague Codification Conference (1930) and was confirmed by the International Court of Justice (*Fisheries Case, I.C.J. Reports 1951*, 116, at p. 140) and incorporated in Article 11 of the 1958 Convention (note 5 above).



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Is the Thames Estuary a bay?

The relevant rule is contained in Article 4 (c) of the Order:—

> "4. In the case of the sea adjacent to a bay, the baseline from which the breadth of the territorial sea is measured, shall . . .
> (a) . . .
> (b) . . .
> (c) . . ., be a straight line 24 miles in length drawn from low-water line to low-water line within the bay in such a manner as to enclose the maximum area of water that is possible with a line of the length."

The essence of the definition of a bay as given in Article 5 of the Order is, for present purposes, as follows:—

> ". . . the expression 'bay' means an indentation of the coast such that its area is not less than that of the semi-circle whose diameter is a line drawn across the mouth of the indentation . . . ."

The defence argued that the Thames Estuary did not constitute a "bay", and, though the available reports are rather sparse, it would seem that it was sought to make a distinction between the rules applicable to a bay and those applicable to a river mouth.[8]

The Order does not in fact refer to the drawing of a baseline at river mouths, but it is not without interest that the Territorial Sea Convention (1958) on which the Order is based is itself not altogether clear on this point, particularly where estuaries are concerned.

Article 7 of the Convention, in addition to incorporating the geometric formula referred to above, requires that a bay should be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast". A glance at any chart of the estuary will suffice to show quite clearly that, even if it were required under the Order, the estuary would satisfy this criterion also.

It is necessary, however, to consider also Article 13 of the Convention which provides that:—

> "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks."

In the International Law Commission's final report on the Law of the Sea[9] submitted to the General Assembly in 1956, the draft Article 13 contained two paragraphs—that given above (minus a few subsequent drafting changes) and a second paragraph providing that:—

> "If the river flows directly into an estuary, the coasts of which belong to a single State, Article 7 shall apply" (i.e. the Article on Bays).

The commentary on draft Article 13[10] reflected the uncertainty of many of the members of the International Law Commission on the substance of this second paragraph when it noted that "the Commission has not the necessary geographical data at its disposal to decide whether this provision is applicable to all existing estuaries".

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8 Certainly it was so argued in the *Radio Essex Case* (London *Times*, 1 December 1966).

9 *Report of the International Law Commission covering the Work of its Eighth Session* (A/CN.4/104, 7 July 1956), Chap. II.

10 *Report of the International Law Commission covering the Work of its Eighth Session* (A/CN.4/104, 7 July 1956), p. 55.

The First Committee of the Geneva Conference on the Law of the Sea (1958) also had doubts. In particular, the United States suggested that the term "estuary" was without precise legal or geographical meaning; and, moreover, that the reference to Article 7 was unnecessary. Where estuaries fell within its definition of a bay, Article 7 would apply in any case.[11] The First Committee decided nevertheless to adopt both paragraphs but to refer the United States suggestions to the drafting committee.[12] Finally, in plenary session, the Conference, voting separately on the two paragraphs, adopted the first paragraph with drafting changes and failed to adopt the second paragraph.[13]

It seems quite clear from this drafting history that Article 13 of the Convention must be considered as irrelevant to the determination of territorial waters wherever the river in question flows into a coastal indentation falling within the definition of a bay in Article 7. If, therefore, the Thames estuary is such a bay there would seem to be no foundation in international law for seeking any distinction on the grounds that a river mouth or estuary is involved. An interpretation of the Order in Council at variance with this clear rule of international law would be most unfortunate since the Order was clearly intended to take advantage of the rules laid down in the Geneva Convention.

There seems little doubt that the Thames estuary does satisfy the definition of a bay in the Order. Whilst the writer does not possess the hydrographic skill to apply the mathematical formula laid down in the Order, there is no reason to question the calculations of the Hydrographic Department of the Ministry of Defence, on the basis of which the Rochford magistrates found that the indentation from The Naze to the North Foreland is a bay as defined in the Order and that the 24-mile line provided for in Article 4 (c) of the Order is one drawn from a point just west of Clacton on the north shore to a point between Birchington and Reculver on the south shore of the estuary.[14]

If this interpretation of the Order is correct, *Radio 390* is in internal waters and, strictly speaking, it would be unnecessary for the purposes of this particular case to consider the alternative arguments. They do, however, raise interesting questions on the manner in which the United Kingdom applies the rules of international law on delimitation of maritime frontiers.

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11 *United Nations Conference on the Law of the Sea, Official Records* 1958, vol. III, p. 245.

12 *United Nations Conference on the Law of the Sea, Official Records* 1958, vol. III, p. 194.

13 *United Nations Conference on the Law of the Sea, Official Records* 1958, in note 11, vol. II, p. 64.

14 It was so found by the Rochford magistrates in both the *Radio Essex Case* (London *Times*, 1 December 1966) and the Southend phase of the *Radio 390 Case* (London *Guardian*, 24 February 1967). See too the Petroleum (Production) Regulations 1966 (S.I. 1966/898), Schedule 1, Table 2, where a straight line from Reculver to Clacton-on-Sea is specified as the line of division between "landward areas" and "seaward areas" of the Thames Estuary.

The Middle Sands—a low-tide elevation

If, then, it were to be assumed that the Thames Estuary was not a bay, it would be necessary next to consider whether the Middle Sands constitutes a low-tide elevation as defined in the Order. If it does, Article 2 of the Order[15] would apply and the low-water line on the Middle Sands could be taken as the baseline for measuring territorial water.

Under Article 5 of the Order, a "low-tide elevation" means "a naturally formed area of drying land surrounded by water which is below water at mean high-water spring tides".[16] Three conditions must therefore be satisfied:—

(1) There must be naturally-formed land (as distinct, e.g., from an artificially created elevation). This was not in dispute. (2) It must be surrounded by water. This was not in dispute. (3) It must be *drying* land. It is to be noted that this term is without qualification as to the time in the cycle of tides at which the land must dry.

In the Canterbury phase of the prosecution of *Radio 390*, the magistrates found that Middle Sands was in fact a low-tide elevation and, no appeal on the facts having been made, this was not in issue in the appeal to the High Court. Subsequently, however, *Radio 390* commissioned a hydrographic survey by a Commander MacMillan, R.N.R. which, it was claimed, proved that Middle Sands was not a low-tide elevation since it was 8½ inches below sea level during normal low-tide.[17] Broadcasting was accordingly recommenced and a further prosecution was brought before the Rochford magistrates at Southend. Commander Mackay of the Inshore Survey Squadron gave evidence that on 30 January 1967, the low spring tides dropped to uncover at least 600 yards of sand which was 1 foot above sea level at its crest. In reply to the defence argument that on that date the tide on Middle Sands was 10 inches below datum[18] and that the sand would have been covered in 8 inches of water had it been at its predicted level, Commander Mackay agreed that his survey was made on a day when low spring tides uncovered more of the sands than usual, but stated that this was better for illustrating their existence. The Rochford magistrates were not obliged to decide his factual question since they accepted that the Thames Estuary was a bay; the St. Augustine

15 "2 (1) ... the baseline shall be low-water line along the coast, including the coast of all islands ... .

(2) ... a low-tide elevation which lies wholly or partly within the breadth of the sea which would be territorial sea if all low-tide elevations were disregarded for the purpose of the measurement of the breadth thereof ... shall be treated as an island."

16 The criterion of mean high-water spring tides is adopted to distinguish a low-tide elevation from an island, defined as "a naturally formed area of land surrounded by water which is *above* water at *mean high-water spring tides*" (italics added) (Article 5). Unfortunately, it leaves open the question of the applicable low tide.

17 *Daily Telegraph* and *Daily Mail*, both of 24 February 1967.

18 On hydrographic terminology, see *post*.

magistrates, having examined an Admiralty Chart[19] and heard evidence from Commander Beasley of the Hydrographic Department of the Ministry of Defence, found that it was a low-tide elevation. The available reports suggest that their finding was based on the evidence of Commander Beasley "who spoke as to a calculation from an Admiralty Chart which he produced".[20] It would seem, however, from the evidence adduced by the Crown in the Southend phase of the case that the Crown was contending for rather an extreme interpretation of the term "drying land" in the Order in Council.

The Order entered into force on 30 September 1964, that is, on the same day as the United Kingdom Fishery Limits Act 1964. Though it is true that the main practical purpose behind its adoption was to increase the extent of the United Kingdom exclusive fishery limits, it was not of course limited in its application to that purpose, but was intended rather to take advantage of the new rules on baselines laid down in the Geneva Convention of 1958. In the absence of any authoritative guidance in United Kingdom municipal law, it may therefore be useful to examine which tide-lines the United Kingdom is entitled to use for the delimitation of her maritime frontiers under international law, and to consider whether the formulation of the Order in Council and, more particularly, its interpretation by the Crown are in accordance with international law.

Low-water line in international law

The textbooks on international law are understandably somewhat imprecise when dealing with the baseline of the territorial sea of a "normal" coastline. They are clear in specifying that it is the low-water line rather than the high-water line which is used, and a few specify further that it is the low-water mark or mean low-water mark at spring tides.

In view of the widespread uncertainty as to the precise meaning of "low-water mark", it may be helpful to consider briefly a few of the technical terms used in hydrography.[21] As a result of the cycle of the tides caused by the joint attraction of the moon and the sun, the maximum tide-raising effect—known as *spring tides*—occurs twice during the lunar month and at these times the highest high-waters and the lowest low-waters are experienced. Hence, *Mean Low Water Spring Tides* is the average of the heights of low-waters at spring tides throughout the year. At the other end of the cycle, at *neap tides*, the lowest high-waters and the highest low-waters are experienced. In preparing a chart of a coastal area, the depths or soundings shown on the chart are related to an arbitrary level known as the *Chart*

19 Admiralty Chart No. 1610 was used at the hearing and is useful for determining the question of whether the Thames Estuary is a bay ([1967] 1 *Lloyd's Rep.* 154, 155). The larger scale Chart No. 1607 is more helpful for determining the existence and extent of low-tide elevations.

20 [1967] 1 *Lloyd's Rep.* 154, 155.

21 Based on *Admiralty Manual of Navigation*, vol. I (H.M.S.O., 1964).

Datum which, by international agreement, should be a plane so low that the tide will not frequently fall below it.[22] The Chart Datum "usually approximates to Mean Low Water Springs".[23] To obtain the actual depth of water at a point marked on a chart, a navigator has to add to the given sounding the height of the tide at the time in question. This can be determined by reference to predictions contained in Admiralty tide tables. Drying land or drying rocks are marked on large scale charts by underlined figures, for example, 4 would denote the number of feet a bank of sand dries above Chart Datum.[24] As already implied, the height of low spring tides changes in accordance with known regular physical changes, for example, the lowest low-tides of the year occur at springs near the equinoxes, when the sun and the moon are on the Equator. The lowest predictable tides are known as ***Lowest Astronomical Tide.***[25] And, of course, unusual weather conditions may cause even lower tides.[26]

Article 3 of the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 provides:—

> "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State."

The fact that no reference was made in this article to mean spring tides or any other tides is not accidental. The question of giving more precision to this criterion has been under discussion since at least the Hague Codification Conference in 1930. The draft articles produced by the relevant Subcommittee of that Conference defined the low-water mark as "the line of low-water mark . . . indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides".[27]

The International Law Commission, in its commentary on the final draft of what later became Article 3 of the 1958 Geneva Convention, referred to the omission of this proviso. After noting that the traditional expression "low-water mark" may have different meanings and that there is no uniform standard by which States in practice determine this line, the Commission stated that "the omission of detailed provisions such as were prepared by the 1930 Codification Conference is hardly likely to induce government to shift the low-water lines on their charts unreasonably."[28]

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22 *Admiralty Manual of Navigation*, vol. I (H.M.S.O., 1964), pp. 376-8.

23 *Admiralty Manual of Navigation*, vol. I (H.M.S.O., 1964), p. 30.

24 Ibid.

25 Ibid., p. 378.

26 Ibid., p. 375.

27 Conference for the Codification of International Law, *Report of the Second Commission (Territorial Sea)* (League of Nations Pubn. No. C.230. M.117.-1930.V), p. 11.

28 Report of the International Law Commission covering the Work of its Eighth Session (A/CN.4/104, 7 July 1956), p. 42.

Prior to the coming into force of the 1958 Convention, it was clear that the United Kingdom regarded the Hague draft articles as containing a correct statement of the law.[29] In the application of these rules, it would have been possible to adopt even the lowest of low-tide marks (including Lowest Astronomical Tide) provided this did not result in an appreciable departure from mean low-water spring tides. But the United Kingdom appears to have accepted a more restrictive interpretation since, in 1951, the Government refused to accept that part of an Egyptian decree which suggested that the low-water mark to be taken was the lowest low-water mark instead of the low-water mark at mean low-water spring tides.[30]

This evidence refers, however, to a period prior to the coming into force of the 1958 Convention, which, as has been seen, is much less rigid. In terms of current international law, therefore, it would seem that the United Kingdom is limited only by the rules on good faith in interpreting the term "low-water line" in the Convention and that any area marked as drying land on large scale charts officially used by the United Kingdom could be taken as a baseline. The Middle Sands is such an area. It is suggested, however, that any line below Lowest Astronomical Tide (the lowest predictable) would be inconsistent with international law in that it would be contrary to good faith to recognize as drying land any area which is exposed only by freak tides.

Low-water lines and the Order in Council

The position under the Order in Council is even more indefinite. No reference is made to Charts in the Order (except in relation to the fixed points to be used for straight baselines in western Scotland) and it is not Admiralty practice to publish charts definitive of baselines or territorial waters, apparently because of the impracticability of such a policy having regard to constantly changing physical factors. In practice, this may well create difficulties. Where penal legislation is applicable to activities carried on in territorial waters, how is the subject to know whether he is within the territorial scope of the legislation or not? It would seem that it would be necessary in case of doubt for any person wishing, for example, to take part in activities to be carried on outside territorial waters to ask the Admiralty for a determination as to whether at that time the contemplated location was outside territorial waters.[31] And the official finding would only be challengeable on a factual basis; hydrographic evidence would

29 See Note dated 28 May 1951, from the United Kingdom to Egypt, par. 2 (a) *Fisheries Case*, vol. 4—*Oral Proceedings—Documents—Correspondence* (I.C.J., 1951, *Appendix No. 7*, p. 578). See also Sir Eric Beckett's argument before the Court that there is "no sensible alternative to the use of charts officially used by the coastal State". (ibid., p. 147.)

30 See Note cited in note 29 *ante*.

31 As Salmon, L.J., puts it, it is "of great importance that anyone contemplating setting up in business, whether on a structure secured to the sea bed or on a ship in a certain locality, should, before embarking on the venture, be able to ascertain with reasonable certainty whether or not he will be committing a criminal offence" ([1967] 1 *Lloyd's Rep.* 154, at p. 163).

need to show that the area was never predictably (i.e. excluding freak conditions) exposed by the tides.

This seems a most unfortunate position and one wonders if there is any good reason why the low-tide line cannot be more clearly defined by legislation and marked on a chart. The fact that the actual low-tide line would rapidly become notional as a result of tidal or other physical changes may be a good argument for not having a permanent, rigid line of demarcation but it is not one for ignoring the need for certainty on the territorial scope of the law. Admiralty Charts are constantly being revised and reissued. Is there any reason why mean low-water spring tide should not be marked on them and the normal baseline defined by reference to the current official chart of a stated (large) scale? That the technical problems are not insuperable is suggested by the adoption of a similar formula in the Petroleum (Production) Regulations 1966, in terms of which the "low water line along the coast" is prescribed as the line of division between "landward areas" and "seaward areas"; and "low-water line" is defined as "the line so marked on the Ordnance Survey Maps on a scale of 1:25,000 in the edition for the areas to which they respectively relate last published prior to the date on which these Regulations are made."[32] Similarly, precision has been quite simply achieved in the series of bilateral Conventions concluded by the United Kingdom and other European States in order to determine the limits of their respective continental shelves in the North Sea.[33] In the interests of certainty, the line has been drawn by reference to fixed points on charts annexed to the Agreements. That this line may not in the future continue to be equidistant from he baselines used by he States concerned is implied in the formulation of the Agreements. For example, Article 1 of the Agreement with Denmark provides that the dividing line is to be "*in principle* a line which at every point is equidistant from the nearest points of the baselines from which the territorial sea of each country is measured". The preamble to the Netherlands Agreement is even more to the point in referring to "baselines from which the territorial sea of each country is *at present* measured". If an absolute, arbitrary line is acceptable for these purposes, a less arbitrary line with a built-in system of revision is surely acceptable for municipal purposes.

II. CRIMINAL JURISDICTION IN TERRITORIAL WATERS

The second general question raised by the *Radio 390 Case* is that of the territorial scope of English criminal law.

The position under international law is quite clear. United Kingdom legislation may be applied, and the jurisdiction of the Courts extended

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32 S.I. 1966/898, Schedule 1, Paras. 1 and 7. These maps (the scale is about 2½"—1 mile) clearly show both LWMOT (Low Water Mark Ordinary Tide) and HWMOT (High Water Mark Ordinary Tide). In Scotland, Low and High Water Marks at Ordinary *Spring* Tides are marked.

33 Agreements between the United Kingdom and Norway (10 March 1965, Cmnd. 2757-1965), the Netherlands (6 October 1965, Cmnd. 2830-1965) and Denmark (3 March 1966, Cmnd. 2973-1966).

to all activities of all persons within the outer limit of the territorial sea, subject to recognized limitations, such as those on State and diplomatic immunity and the rules now laid down in the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 on the exercise of criminal jurisdiction over foreign vessels exercising a right of innocent passage through the territorial sea.

Because, however, of the extremely rigid territoriality principle of English criminal law, doubts were raised at the time of the celebrated *R. v. Keyn* (*The Franconia*) (1876)[34] case as to whether English criminal law had extended its reach as far as might have been permitted by international law.

R. v. Keyn and the Territorial Waters Jurisdiction Act 1878

The criminal jurisdiction of English courts is founded on either (a) the common law, (b) the jurisdiction of the Admiral or (c) particular legislation (as distinct from general legislation, e.g. the Territorial Waters Jurisdiction Act 1878 extending Admiralty jurisdiction in general).

It was made clear in *R. v. Keyn* that at that time, whatever might be the position in international law, in the absence of legislation extending the application of the common law to the maritime belt, the scope of application of the common law was co-extensive with the body of the county, that is, extended so far as the land was uncovered by water.

The scope of the Admiral's jurisdiction was less clear from the judgment. It certainly extended to acts committed on British ships either by British subjects or foreigners whether on the high seas or in territorial waters. There seemed no doubt either that it covered acts of British subjects in territorial waters, whether on board a foreign ship or not on board any ship. It was held by the majority not to apply to acts of foreigners on board foreign vessels in territorial waters. How far seaward the Admiral's jurisdiction extended to British subjects not on board a British ship was less clear but the better view, borne out subsequently by *R. v. Dudley and Stephens*,[35] seems to be that, in the absence of legislation, the Admiral's criminal jurisdiction did not extend beyond the territorial sea.

Finally, it was recognized in *R. v. Keyn* that, if particular legislation were declared to extend to the territorial sea, his would confer jurisdiction on the courts in respect of offences committed in the territorial

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34 (1876), 2 Ex. D. 63.

35 (1884), 14 Q.B.D. 273. Under the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 687, all offences against property or persons committed either ashore or afloat out of the Queen's dominions by any master, seaman or apprentice who, when the offence is committed, is or within three months previously has been, employed in any British ship, are punishable and triable *as if they were offences committed within the Admiralty jurisdiction*: In *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273, which was decided under the corresponding section of the Merchant Shipping Act 1854, it was held that the judge of assize sitting at Exeter had jurisdiction to try seamen formerly belonging to a British ship, which had been wrecked, who committed murder in an open boat on the high seas.

sea. Examples were given of such legislation, applicable even to foreigners in foreign ships, and concerned, *inter alia,* with the prevention of breaches of the revenue and fishing laws.

The Territorial Waters Jurisdiction Act 1878 effected a change only in respect of the jurisdiction of the Admiral. Thereafter, the Admiral's jurisdiction extended to all "acts, neglects, or defaults" committed by any person (including those done by foreigners on foreign vessels) *on the open sea within territorial waters* if such acts would have been *indictable offences* if committed *within the body of a county in England.*[36]

The above developments form the background to two questions which were raised in the *Radio 390 Case.* The first relates to the extent of territorial waters for purposes of criminal jurisdiction. The second question is whether the courts have any jurisdiction to try summary offences committed in territorial waters.

Extent of Territorial Waters for purposes of English Criminal Law

Very briefly, defence counsel argued[37] that:—

(1) Section 7 of the 1878 Act had defined United Kingdom Territorial Waters in terms of one marine league, i.e., three nautical miles, measured from low-water mark.

(2) The prerogative right of the Crown to lay down the limits of Territorial Waters had thereby been abrogated.

(3) The 1964 Order in Council, made in the exercise of the prerogative, was therefore *ultra vires.*

(4) The extent of Territorial Waters for the purposes of the Wireless Telegraphy Act 1949 must therefore be as laid down by the legislature in 1878.

Lord Parker, C.J., pointed out[38] that the 1878 Act had clearly been intended to counteract the majority view in *R. v. Keyn,* had been aimed primarily, therefore, at offences committed on a foreign ship and had dealt only with indictable offences. It was not laying down a definition of Territorial Waters for all purposes but only for those laid down in the Act. It did not therefore abrogate the Crown's prerogative right to lay down the limits of territorial waters for other purposes and the Order was therefore *intra vires.*

This conclusion seems to be unassailable so far as summary offences are concerned and, of course, the Court in this case was dealing only with such offences. The position is perhaps less clear, however, as regards indictable offences. As has been seen, the primary purpose of the Territorial Waters Jurisdiction Act was to reverse the majority opinion in *R. v. Keyn* and re-assert criminal jurisdiction over acts committed even by foreigners on foreign vessels in the territorial sea. In fact, however, its terms are wider since it refers to any indictable offence committed by anyone, British or foreign, on the open sea

36 Section 2 and, for definitions of "offence" and "territorial waters", s. 7.

37 Before the Canterbury magistrates (London *Times,* 26 November 1966) and in the High Court hearing ([1967] 1 *Lloyd's Rep.* 154, 156).

38 [1967] 1 *Lloyd's Rep.,* at pp. 159-60.

within Territorial Waters. Moreover, for the purposes of the Act, Parliament determined the precise extent of these Territorial Waters, a matter which is normally within the Crown's prerogative. This determination must clearly be taken as definitive of the scope *ratione loci* of the Admiral's jurisdiction in the maritime belt whether as regards acts committed by foreigners or British subjects and whether on board foreign vessels or not on board any vessel. By passing this legislation, Parliament indicated its intention that the Crown, in relation to the substance of the Act, should in future act only in accordance with the statute (including its definition of the territorial sea) and not in accordance with its prerogative power (including the power to declare the extent of the territorial sea). Thus, the Act "abridges the Royal prerogative while it is in force to the extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance".[39] It follows that the Crown had no powers to declare the extent of Territorial Waters (or to lay down new base-lines for their determination, which amounts to the same thing) in relation to the territorial scope of the Court's jurisdiction over indictable offences other than those committed on British ships.

This conclusion would be of no great concern if it were permissible to read the definition of Territorial Waters in the 1878 Act to mean Territorial Waters as determined from time to time. Lord Parker clearly found this viewpoint attractive, noting that the reference to international law in the definition supported it. This seems to be a most strained, if perhaps convenient, interpretation of the definition in section 7. This definition is in two parts, one general, the other particular. The general part provides that:—

> " 'the territorial waters of Her Majesty's dominions', in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom . . . as is deemed by international law to be within the territorial sovereignty of Her Majesty."
>
> The particular part provides:—
>
> "; *and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral* (italics added), any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions".

Clearly it would be possible to link the two parts of the definition and to say that the legislative intention was that the particular definition was intended to be read in the light of any subsequent changes in international law. This, however, is a statute dealing with criminal jurisdiction and, as such, must be construed strictly and in the light of the principle that the criminal law should be certain.[40] It seems most unlikely that Parliament envisaged such an imprecise mode of determining a penal jurisdiction. Why then insert the general

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39 *A.-G. v. De Keyser's Royal Hotel*, [1920] A.C. 508; [1920] All E.R. Rep. 80, per Lord Atkinson, at pp. 539-40.

40 Salmon, L.J., adopted these same criteria as his starting point in construing the meaning of territorial waters in the Wireless Telegraphy Act 1949 ([1967] 1 *Lloyd's Rep.* 154, 162).

definition at all? Looked at in historical perspective this does not seem to be difficult to understand. A substantial part of the judgment of Cockburn, C.J., in *R. v. Keyn* was devoted to an examination of the views of writers on international law and of State practice to determine what degree of sovereignty or jurisdiction a coastal State was entitled under international law to exercise over the territorial sea. He was clearly unimpressed by the degree of uniformity and precision he was able to discover. It was hardly surprising, therefore, that the legislature should declare in the recital to the Act that, "whereas the rightful jurisdiction of Her Majesty extends and always has extended over the open seas adjacent to the coasts of the United Kingdom . . ."— in order both to make clear the government's understanding of international law and to indicate that the particular definition given for the purpose of the Act was consistent with international law. The general part of the definition in section 7 follows on from this by indicating that the area within which jurisdiction is claimed is an area "deemed by international law to be within the territorial sovereignty of Her Majesty". This being, however, somewhat vague for the purposes of a criminal statute, a precise delimitation is then laid down.[41]

That disquiet was felt about the extension of penal jurisdiction by the exercise of the prerogative was clear not only from the dissenting judgment of Salmon, C.J., who could not believe that Parliament intended to create a criminal offence which would depend upon the prerogative but also from the judgment of Blain, J., who hoped he might be proved wrong by a higher court.[42]

For the reasons given below, this seems unlikely in relation to the type of offence with which the Court was dealing, a summary offence. In relation to indictable offences there seems to be room for considerable doubts as to the validity of the Order.

Jurisdiction to try summary offences committed in Territorial Waters

It follows from the above discussion of the effect of the Territorial Waters Jurisdiction Act that, even after its passage, acts done in territorial waters (other than on British ships) which would have been summary offences if committed on land, were still outside the scope of both the common law and the Admiral's jurisdiction, and would only be punishable if made so by particular statute.

It was accordingly argued by defence counsel in the *Radio 390 Case* that, even if *Radio 390* were in territorial waters, the courts had no jurisdiction to try what was a summary offence under he Wireless Telegraphy Act. The Act created an offence but not a jurisdiction, it was argued. The response of the magistrates to this argument was that, "The Wireless Telegraphy Act of 1949 is silent on the question of

41 Salmon, L.J., suggests as the motivating factor fear of the "prospect of volumes of Pufendorf, Westlake, Oppenheim, Grotius and others being referred to whenever anyone is prosecuted under this Act and the preliminary question of jurisdiction taking weeks to decide"! ([1967] 1 *Lloyd's Rep.*, at pp. 162-3).

42 [1967] 1 *Lloyd's Rep.*, at pp. 162 and 169 respectively.

local jurisdiction but the territorial waters in question join the coast of Kent and for that reason we are of the opinion that the justices of the County of Kent have jurisdiction in this matter." The High Court too wasted little time in disposing of this argument, all three judges holding that when the Wireless Telegraphy Act 1949 made the offence a summary offence, it was impliedly creating a jurisdiction in justices to try the case.[43]

It would seem, therefore, that a statute, which creates summary offences and is declared to extend to acts committed in the territorial sea, will be deemed also to create a jurisdiction in the justices of the nearest adjacent county.

43. See, e.g., per Lord Parker, C.J., [1967] 1 *Lloyd's Rep.*, at p. 161.