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Summary record of the 272nd meeting

Topic:
Law of the sea - régime of the territorial sea

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Article 14

38. The CHAIRMAN put article 14 to the vote.

Article 14 was adopted unanimously.

Article 15

39. The CHAIRMAN said paragraph 2 had been dropped as the result of the elimination of article 12. He put to the vote article 15, which accordingly consisted of former paragraph 1 only.

Article 15 as amended was adopted unanimously.

Article 16

40. The CHAIRMAN pointed out that following the elimination of article 12, point (b) of article 16 should be deleted. He put article 16, as amended, to the vote.

Article 16 as modified was adopted unanimously.

Article 17

41. Mr. LIANG, Secretary to the Commission, said that draft paragraph 1 would be improved if altered to read:

"The present Convention shall be deposited with the Secretariat of the United Nations."

42. Mr. LAUTERPACHT made a proposal to that effect.

That amendment to paragraph 1 and the paragraph, as amended, were adopted unanimously.

Paragraph 2 was adopted unanimously.

43. The CHAIRMAN said by those votes article 17 as a whole, as amended, had been adopted unanimously.

Article 18

44. The CHAIRMAN put article 18 to the vote.

Article 18 was adopted unanimously.

45. The CHAIRMAN said it was the intention of the Sub-Committee to submit draft final clauses to the draft Convention on the Reduction of Future Statelessness similar to those of the Convention on the Elimination of Future Statelessness. The Sub-Committee had, however, decided that the question of reservations to the second convention was outside its competence and could only be settled by the Commission itself.

46. Mr. LAUTERPACHT suggested that, having very rapidly disposed of the final clauses to the draft Convention on the Elimination of Future Statelessness, the Commission, notwithstanding its previous decision, might continue the study of the draft articles on the régime of the territorial sea.

47. The CHAIRMAN said there was no opposition to that proposal and ruled that the Commission would

spend two days in considering the articles relating to the régime of the territorial sea.

The meeting rose at 1.10 p.m.

272nd MEETING

Tuesday, 20 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CORDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCHELLE, Mr. J. ZOUREK.

Secretariat: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (resumed from the 271st meeting)

CHAPTER III: RIGHT OF PASSAGE
(resumed from the 265th meeting)

Article 22: Charges to be levied upon foreign vessels (article 18 of A/CN.4/61)²

1. Mr. FRANÇOIS, Special Rapporteur, said the article was identical with article 7 of the report of the Second

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² Article 22 read as follows:

"1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

Committee of the 1930 Codification Conference.³ He wished, however, to withdraw the last sentence of paragraph 2 providing for non-discrimination in the levying of charges, as it was impossible to treat all States in exactly the same manner.

2. Mr. ZOUREK pointed out that the withdrawal of the clause against discrimination was in direct violation of the principle of the equality of States. It might be argued that where special conventions had been concluded the clause would not apply; it was nevertheless important to stress that a general principle of international law was involved. The principle of equal treatment had been incorporated in many treaties and he therefore proposed that the last sentence of paragraph 2 should be retained and the article adopted as submitted.

3. Mr. SALAMANCA thought the article would be improved by the deletion of the sentence in question, for its presence would not prevent discrimination.

4. Mr. HSU said the sentence in question should be retained because otherwise the important principle of the freedom of innocent passage might suffer.

5. Mr. FRANÇOIS, Special Rapporteur, said that his proposal for deleting the last sentence should not be taken to mean that he favoured discrimination. The levying of charges would still be governed by the general principles of international law.

6. The CHAIRMAN put to the vote article 22 as modified in accordance with the Special Rapporteur's proposal.

Article 22 as modified was adopted by 11 votes to none, with 1 abstention.

7. Mr. ZOUREK said he had voted in favour on the understanding that the article would be interpreted in accordance with the principles of international law.

*Article 23 Arrest on board a foreign vessel
(article 19 of A/CN.4/61)⁴*

8. Mr. FRANÇOIS, Special Rapporteur, drew attention to the very limited scope of the article. It did not

attempt to resolve conflicts of jurisdiction between the coastal State and the flag State, but merely specified in what circumstances an arrest could be made by the coastal State on board a vessel passing through its territorial waters. In the case of a collision within the territorial sea the coastal State could order the vessel into one of its ports for the purpose of an inquiry, but was granted no jurisdiction to impose penalties.

9. The questions of criminal and civil jurisdiction had from the very beginning been omitted by the 1930 Codification Conference, while in 1952 a diplomatic conference held in Brussels had drawn up a convention on the subject of penal jurisdiction⁵ which was still being studied by Governments. He therefore considered it unwise to take up the question in the Regulation.

10. Other questions, however, were also involved. For example, was the coastal State entitled to remove from a vessel passing through its territorial waters persons who had allegedly committed offences in the territory of that State or against whom an extradition order had been issued? The preparatory committee of the 1930 Codification Conference had, in accordance with the principle of sovereignty, recognized that right,⁶ but the Plenary Conference had refused to admit it on the grounds that it restricted the freedom of passage; and had laid down that the coastal State could not remove persons from a foreign vessel unless the latter stopped in territorial waters.⁷ In his opinion, if the vessel was passing through the territorial waters, arrest by the coastal State should be subject to the provisions of paragraph 1.

11. Mr. LAUTERPACHT expressed surprise that the Special Rapporteur had not wished to deal in the draft regulation with the question of criminal jurisdiction in the territorial sea especially as he had dealt with it in detail in his sixth report on the régime of the high seas.⁸ If the Commission wished to deal with the question of criminal jurisdiction of the coastal State, it should do so in the report on the régime of the territorial sea and not in the report on the high seas.

12. Since the Brussels Conference of 1952 had drawn up a convention on the same subject, the Commission

"2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination."

³ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal, 1930.V.16), p. 214.

⁴ Article 23 read as follows:

"1. A coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the vessel; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been

requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

"2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

"3. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel."

⁵ See annex to document A/CN.4/69 in *Yearbook of the International Law Commission*, 1953, vol. II.

⁶ *Conference for the Codification of International Law, Bases of Discussion*, vol. II: Territorial Waters (League of Nations Publication, V. Legal, 1929.V.2), p. 86.

⁷ *Op. cit.* (supra, footnote 3), p. 215.

⁸ A/CN.4/79 in *Yearbook of the International Law Commission*, 1954, vol. II.

should consider the matter in the light of that convention. As a matter of principle, it was desirable that the codification of any particular subject should take into account and use to the best advantage the results of any multilateral convention on the subject. On the whole, however, there was no real conflict between the Special Rapporteur's draft and the convention drafted by the 1952 Conference, since article 4 of that convention left parties free to make all reservations with regard to collisions occurring in territorial waters, while the Special Rapporteur's draft was permissive in character and not mandatory. It was important to determine the relationship between the Commission's draft regulation and existing conventions.

13. Mr. CORDOVA was concerned about the interpretation of article 23 as a whole, particularly in so far as it related to the jurisdiction of the coastal State over crimes committed on board a vessel in the territorial waters. The Special Rapporteur only provided for arrest and inquiry in accordance with the provisions of paragraph 1. In his (Mr. Córdova's) opinion the coastal State should be granted the right of punishment to cover such cases as, for example, gun-running or the forging of money on board, or even gambling.

14. Mr. FRANÇOIS, Special Rapporteur, pointed out that all reference to judicial proceedings had been intentionally omitted from the article. The coastal State was clearly entitled by virtue of international law to enforce its anti-gambling laws on ships. That, however, was a matter outside the scope of the present regulation which only enumerated the cases in which arrest was possible. Furthermore, the reference in paragraph 1 (b) to disturbance of "The peace of the country" gave the coastal State a further possibility of taking measures to safeguard its interests.

15. In reply to Mr. Lauterpacht he said that judicial proceedings were governed by the general principles of international law or by the provisions of the 1952 Convention, but not by the Commission's regulations. He had mentioned the question of criminal jurisdiction in his report on the régime of the high seas and not in his report on the régime of the territorial sea, because the latter case always involved the jurisdiction of two States, and it was impossible to provide for all the contingencies which might arise in private international law. In his opinion all questions of private international law or international criminal law arising out of the right of passage should for the time being be omitted.

16. Mr. CORDOVA thought the draft somewhat unbalanced. If the Commission was engaged in codification it should codify both the rights of passing ships and the rights of the coastal State. If the Special Rapporteur accepted the principle that ships could be stopped for investigation there was no reason for refusing the coastal State the right to punish offenders on board.

17. Mr. LAUTERPACHT said that although he had not been entirely convinced by the Special Rapporteur's arguments, there was no substantial disagreement be-

tween the Special Rapporteur on the one hand and Mr. Córdova and himself on the other. The Commission could take up the question of criminal jurisdiction at some future date when the whole subject of the territorial sea was considered in greater detail.

18. Mr. PAL thought the intention of the Special Rapporteur had been to stress the principle of the freedom of passage through territorial waters. If that were the case, the Commission should express its opinion with regard to the jurisdiction of the coastal State over offences committed while the vessel was in territorial waters. If the vessel's presence in those waters in any way altered the legal status of the persons on board, the Commission should say so. The Commission should also specify if a vessel passing through the territorial sea after leaving the inland waters lost the immunity enjoyed by vessels merely passing through the territorial sea of the coastal State.

19. Mr. FRANÇOIS, Special Rapporteur, realized that the draft regulation was incomplete, but that was inevitable since no one document could cover every situation, particularly as many of the considerations to be taken into account were of a highly technical nature. He agreed in principle that provisions relating to collisions and determining jurisdiction should be included, but if criminal liability was dealt with there was no reason for omitting civil liability. He had drafted the regulation on the lines adopted by the 1930 Codification Conference.⁹ If the Commission wished to have a more detailed draft, such a draft could be prepared, but in that case the Commission would not be able to complete its study in one or even two sessions and the General Assembly's consideration of the questions relating to the territorial and high seas would be postponed indefinitely.

20. The CHAIRMAN pointed out that the commission of criminal jurisdiction from the draft regulation was not a serious matter. The Commission had already adopted the principle of the coastal State's sovereignty in the territorial sea. The criminal jurisdiction of the coastal State in cases of collision was, he thought, implied in article 23 and the Special Rapporteur had therefore been justified in omitting any specific reference to it. He, personally, would have no difficulty in agreeing to the draft as submitted by the Special Rapporteur.

21. Mr. HSU suggested that perhaps the Special Rapporteur could make provision in article 23 for the penal jurisdiction of the coastal States by commencing the article with a phrase along the following lines: "Without prejudice to the penal jurisdiction of the coastal State..."

22. Mr. LAUTERPACHT criticized the English text of article 23, paragraph 1 (b). The terms "peace" and "good order" were practically synonymous and

⁹ *Op. cit.* (*supra*, footnote 3), pp. 214-215.

there did not seem to be any valid reason for mentioning both terms.

23. Mr. FRANÇOIS, Special Rapporteur, agreed to insert in the comment to article 23 a reservation concerning penal jurisdiction of the coastal State in its territorial waters.

24. The CHAIRMAN put to the vote article 23, paragraph 1, subject to drafting changes.

Article 23, paragraph 1 was adopted by 9 votes to none, with 4 abstentions.

25. The CHAIRMAN put to the vote article 23, paragraphs 2 and 3.

Paragraph 2 was adopted by 9 votes to none, with 4 abstentions.

Paragraph 3 was adopted by 10 votes to none, with 3 abstentions.

Article 23 as a whole was adopted by 8 votes to none, with 5 abstentions.

*Article 24: arrest of vessels for the purpose
of exercising civil jurisdiction
(article 20 of A/CN.4./61)¹⁰*

26. Mr. LAUTERPACHT said that in May 1952 the diplomatic conference held in Brussels had also adopted a convention relating to the arrest of sea-going ships for the purposes of civil jurisdiction.¹¹ That convention only allowed the arrest of a ship in respect of certain specified cases. Article 24 as drafted by the Special Rapporteur, however, did not specify the cases; it stated in general terms that arrest was permitted "in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State." Probably the difference between the two texts was not of very great practical importance. It was, however, desirable that the articles to be adopted by the Commission should be in as complete accord as possible with an existing international convention,

the provisions of which had been the result of mature consideration by leading experts.

27. Mr. FRANÇOIS, Special Rapporteur, agreed to include in the comment a reference to the provisions of the 1952 Convention, and a statement to the effect that the draft regulation would eventually be brought into line with that convention.

28. In reply to a query by Mr. Zourek, he explained that article 24, paragraph 2, concerned in particular the case of a foreign vessel which had left a port as well as the inland waters of the coastal State and which the coastal authorities were anxious to stop for urgent reasons.

29. Faris Bey el-KHOURI said that provision should be made for civil proceedings in respect of liabilities incurred by the owners of the vessel, and not merely in respect of liabilities incurred by the vessel itself.

30. Mr. LAUTERPACHT pointed out that the 1952 Convention permitted the arrest of a vessel for the purpose of civil proceedings in respect of obligations or liabilities incurred by that vessel on a previous voyage or else by a sister ship of the vessel concerned. Article 24 was indeed more restrictive than the 1952 Convention in that it only permitted arrest for the purpose of civil proceedings in respect of obligations or liabilities incurred by the vessel itself in the course of the particular voyage.

31. Mr. PAL said that the arrest of a ship to satisfy liabilities of its owners could not be permitted, for otherwise the rights of charterers would be prejudiced. The only liabilities which could warrant arrest were those incurred by the vessel itself during the particular voyage.

32. Mr. FRANÇOIS, Special Rapporteur, said that the only liabilities normally incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal State were in practice pilot and harbour dues, salvage dues (if any), and possible liability in respect of a collision. It was only such obligations which could justify the arrest of a vessel exercising its right of innocent passage.

33. It was important to bear in mind that the restriction of the right of arrest only applied to vessels which were merely passing through the territorial sea. The right to arrest or seize a vessel in connexion with civil proceedings which called at a port was much broader.

34. The CHAIRMAN put article 24 to the vote.

Article 24, paragraph 1, was adopted by 10 votes to none, with 3 abstentions.

Paragraph 2 was adopted by 9 votes to none, with 4 abstentions.

Article 24 as a whole was adopted by 7 votes to none, with 5 abstentions.

¹⁰ Article 24 read as follows:

"1. A coastal State may not arrest or divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State.

"2. The above provisions are without prejudice to the right of the coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the State, for the purpose of any civil proceedings."

¹¹ Cmd. 8954, p. 18.

Article 25: Vessels employed in a governmental and non-commercial service
(article 21 of A/CN.4/6)¹²

35. Mr. FRANÇOIS, Special Rapporteur, said that the purpose of article 25 was to treat state-owned vessels in the same manner as private vessels if they were operated for commercial purposes. That rule had been adopted in the Brussels Convention of 1926 for the unification of certain rules relating to the immunity of state-owned vessels.¹³

36. Mr. LAUTERPACHT said that the provision in question was a progressive step. It agreed with the most recent tendencies in international law and practice. He would refer to the most recent official pronouncements of the United States Government, which reversed a previous tendency to grant immunity to commercial vessels owned by foreign States. He proposed, for the sake of clarity, that the article should be drafted more simply, to provide that government vessels operated for commercial purposes were treated as private vessels.

37. Mr. CORDOVA said that it was right and proper that a State which carried on a shipping business and conducted itself like an ordinary shipping company should not be treated differently from any other ship-owner. It was quite inadmissible for a State to compete with private traders while claiming the privilege of immunity from the jurisdiction of the ordinary courts.

38. Mr. FRANÇOIS, Special Rapporteur, in reply to a question by Mr. Lauterpacht, said that article 25, like all the other articles on the territorial sea, only applied in peace time.

39. Mr. ZOUREK said that the rule of international law was that state-owned vessels were immune from the jurisdiction of the ordinary courts. Conventions such as the Brussels Convention of 1926 were instruments whereby States voluntarily waived that privilege.

40. Mr. FRANÇOIS, Special Rapporteur, said that the general trend of modern legal opinion was consistent with the view embodied in article 25 as he had drafted it.

41. The CHAIRMAN said that the Special Rapporteur would redraft the article in accordance with Mr. Lauterpacht's proposal before it was submitted for final approval by the Commission.

¹² Article 25 read as follows:

"The provisions of articles 23 and 24 are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels."

¹³ Hudson, *International Legislation*, vol. III, p. 1837.

Article 26: Passage [of warships]
(article 22 of document A/CN.4/61)¹⁴

42. Mr. FRANÇOIS, Special Rapporteur, said that the first three paragraphs of article 26 were identical with article 12 of the report of the Codification Conference of 1930. Paragraph 4 had been added to take into account the ruling of the International Court of Justice in the Corfu Channel case.¹⁵

43. Mr. SALAMANCA said that the article should contain some reference to the overriding force of the United Nations Charter, by virtue of its Article 103. For example if, under Article 43 of the Charter or otherwise, the Security Council ordered passage to be stopped or free passage to be granted, nothing should be allowed to interfere with such an order.

44. Mr. FRANÇOIS, Special Rapporteur, in reply to a suggestion by Mr. Lauterpacht, agreed to insert in the comment a statement to the effect that the words "under no pretext" in paragraph 4, however categorical, were without prejudice to Article 103 of the United Nations Charter.

45. Mr. CORDOVA said that he would propose a provision empowering the coastal State to stop passage as a temporary measure in the case of warships. On the lines of a clause he had proposed in respect of commercial vessels.¹⁶ The purpose of such a provision was to enable a State to remain neutral and avoid being drawn into complications owing to the presence of belligerent ships in its waters.

46. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Cordova's proposal was far too sweeping. With regard to straits, paragraph 4 of article 26 was a codification of existing international law which guaranteed freedom of passage through straits to a warship proceeding from one part of the high seas to another.

47. Mr. ZOUREK said that article 26 was not consistent with existing international law. He quoted a number of authorities who agreed with Gidel in considering the passage of foreign warships through the territorial sea as a concession on the part of the coastal State. He proposed that paragraph 1 of article 26 should be replaced by the following:

"The passage of foreign warships through the territorial waters shall be conditional on the consent

¹⁴ Article 26 read as follows:

"1. As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification.

"2. The coastal State has the right to regulate the conditions of such passage.

"3. Submarines shall navigate on the surface.

"4. Under no pretext, however, may there be any interference with the passage of warships through straits used for international navigation between two parts of the high seas."

¹⁵ *I.C.J. Reports 1949*, p. 4.

¹⁶ *Vide supra*, 263rd meeting, para. 26 and 265th meeting, para. 14.

of the coastal State. The right of passage shall not, in the absence of special authorization, imply the right to stop or to anchor in territorial waters."

48. He further proposed that paragraph 4 of the same article should be replaced by the following:

"In time of peace, innocent passage shall not be obstructed, so far as warships are concerned, in international straits which form an indispensable shipping lane between two parts of the high seas."

49. Mr. LAUTERPACHT said that all the authorities quoted by Mr. Zourek referred to the passage of warships through the territorial sea in general, as distinct from straits used as international shipping lanes between two parts of the high seas. Such straits were open to the passage of warships, as was generally accepted by eminent writers and as had been confirmed by the International Court of Justice. With regard to passage through the territorial sea, the views of writers were divided. Those selected by Mr. Zourek supported his case; but there were others who affirmed the right of innocent passage. Generally speaking, whether by usage or custom, that was also the tendency of international practice.

50. So far as passage through territorial waters generally was concerned, the language of paragraph 1 ("as a general rule, a coastal State will not forbid the passage...") should satisfy Mr. Córdova.

51. Mr. FRANÇOIS, Special Rapporteur, said that the Preparatory Committee of the 1930 Conference had received replies from governments¹⁷ which expressed the unanimous view that the right of passage of warships through territorial waters was generally recognized.

52. Unless Mr. Zourek was able to show in what manner international law could have changed so materially between 1930 and 1954, it was patent that the right of passage for warships was and had always been part of positive international law.

The meeting rose at 1 p.m.

¹⁷ *Op. cit.* (*supra*, footnote 6), pp. 65-75.

273rd MEETING

Wednesday, 21 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. ZOUREK.

Secretariat: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Régime of the territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (*continued*)

CHAPTER III: RIGHT OF PASSAGE (*continued*)

Article 26: Passage [of warships] (article 22 of A/CN.4/61) (*continued*)²

1. Mr. LAUTERPACHT said he wished to make his position clear concerning Mr. Zourek's proposed amendment to paragraph 1 of the article.³ In Mr. Zourek's view, the international law in force did not acknowledge the right of passage of warships in the territorial sea of a foreign State; that view was not accurate. It was true that the right of passage was not granted in the same unqualified terms for warships as it was for merchant ships. But international custom and usage in fact tended to acknowledge that right. That was the view expressed in a passage in which the controversial character of that right, as far as writers were concerned, was fully acknowledged in Oppenheim's *International Law*, vol. I, 7th edition, paragraph 188. It was also stated in the same textbook that Governments, in their replies to the questionnaire circulated in connexion with the Codification

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 272nd meeting, paras. 42-52.

³ *Ibid.*, para. 47.

⁴ *Conference for the Codification of International Law, Bases of Discussion*, vol. II: Territorial Waters (League of Nations publication, V. Legal, 1929.V.2), pp. 65-75.