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Summary record of the 281st meeting

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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. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, 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).

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER IV : RÉGIME OF THE TERRITORIAL SEA
A/CN.4/L.48/Add.4)
(*resumed from the 280th meeting*)

1. The CHAIRMAN invited the Commission to consider the revisions made by the Rapporteur in the introduction and the various articles of chapter IV of the draft report (A/CN.4/L.48/Add.4)¹ in the light of comments by members of the Commission.

INTRODUCTION

*Paragraphs 4, 7, 8 and 13 (59, 62, 63 and 68) **

2. Mr. FRANÇOIS, Rapporteur, proposed the following text for paragraphs 4, 7, 8 and 13 of chapter IV :²

"During its fourth session (1952), the Commission considered the question of the juridical status of the territorial sea; the breadth of the territorial sea; the question of base lines; and bays. To guide the

¹ *Vide supra*, 277th meeting, para. 1 and footnote 1.

² *Ibid.*, paras. 52-54, 57, 58-60 and 65-70.

* The numbers within parentheses refer to the corresponding paragraph numbers in the final report of the Commission on its sixth session.

Rapporteur, it expressed certain preliminary opinions on some of these questions.

"7. In compliance with this request, the Rapporteur, on 19 February 1953, submitted a second report on the regime of the territorial sea (A/CN.4/61).

"8. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur. Its members were : Professor L. E. G. ASPLUND (Geographic Survey Department, Stockholm);

Mr. S. Whittemore BOGGS (Special Adviser on Geography, Department of State, Washington, D.C.);

Mr. P. R. V. COUILLAUT (Ingénieur en Chef du Service central hydrographique, Paris);

Commander R. H. Kennedy, O.B.E., R.N. (Retd.) (Hydrographic Department, Admiralty, London) accompanied by Mr. R. C. SHAWYER (Administrative Officer, Admiralty, London);

Vice-Admiral A. S. PINKE (Retd.) (Royal Netherlands Navy, The Hague).

"The group of experts submitted a report on technical questions. In the light of their comments, the Rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1) in which the report of the experts appears as an annex.

"13. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made:

"(1) That a uniform limit (3, 4, 6 or 12 miles) should be adopted;

"(2) That the breadth of the territorial sea should be fixed at three miles subject to the right of the coastal State to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

"(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal State to extend this limit to twelve miles, provided that it observes the following conditions:

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal State may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal State may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

"(4) That it should be admitted that the breadth of the territorial sea may be fixed by each State at a distance between three to twelve miles;

“(5) That a uniform limit should be adopted for all States whose coasts abut on the same sea or for all States in a particular region ;

“(6) That the limit should vary from State to State in keeping with the special circumstances and historic rights peculiar to each ;

“(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf ;

“(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal State is entitled to fix the breadth of its own territorial sea in accordance with its needs ;

“(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.”¹

3. The CHAIRMAN put the paragraphs, as redrafted, to the vote.

Paragraphs 4, 7, 8 and 13, as redrafted by the Special Rapporteur, were adopted.

Comment to article 1³

4. Mr. LAUTERPACHT proposed that the first paragraph of the comment to article 1 should be replaced by the following text :

“Paragraph 1 emphasizes the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which it exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies of the Governments in connexion with The Hague Conference of 1930 and the report of its Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. This is also the view underlying some multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat territorial waters in the same way as other parts of State territory.”

5. Mr. FRANÇOIS, Rapporteur, accepted the text.

The text proposed by Mr. Lauterpacht was adopted.

6. Mr. FRANÇOIS, Rapporteur, proposed that the second sentence of the second paragraph of the English text should read as follows :

“It is of the opinion that the term ‘territorial waters’ lends itself to confusion for the reason that it may be used to describe both internal waters only and internal and territorial waters taken together.”

The proposed text was adopted.

The comment to article 1 was adopted as a whole as amended.

Comment to article 4⁴

7. Mr. FRANÇOIS, Rapporteur, proposed that the last sentence of the first paragraph of the comment to article 4 should read as follows :

“This is the Commission’s interpretation of the judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries case between the United Kingdom and Norway.”

The proposed text and the comment to article 4 as amended were adopted.

Comment to article 5⁵

8. Mr. FRANÇOIS, Rapporteur, proposed that the last paragraph of the comment should be replaced by the following text :

“The Commission considers that these additions express in concrete terms the general guidance given by the Court and are in conformity with the intention behind the Court’s decision. While of the opinion that the provisions in question are part of the international law in force, the Commission does not wish to claim, however, that the figures adopted (five and ten miles) are recognized in positive international law.”

9. The last paragraph of the comment to article 5 as drafted in document A/CN.4/L.48/Add.4 had in fact only been adopted by 2 votes to 1, with 1 abstention, and he feared that it did not reflect the view of the majority.

10. The CHAIRMAN wondered if the words “and are in conformity with the intention behind the Court’s decision” really reflected the view of the Commission.

11. Mr. FRANÇOIS, Rapporteur, replied that the phrase in question embodied an idea proposed by Mr. Lauterpacht. Mr. Lauterpacht had wished to go even further and to say : “these additions express in concrete terms the decisions of the Court”.

12. Mr. LAUTERPACHT agreed with the compromise solution proposed by the Rapporteur. It would be difficult, in his opinion, to deny that certain passages of the judgement of the International Court of Justice did in fact restrict the right to draw straight base lines.

13. Mr. ZOUREK was unable to accept the text proposed by the Rapporteur which he thought gave too narrow an interpretation of the Court’s decision. The latter had not intended to restrict the right of drawing straight base lines to exceptional cases ; on the contrary, it had found that in the case of certain coastlines it was the only possible method.

⁴ *Ibid.*, paras. 47-54.

⁵ *Ibid.*, paras. 55-63.

³ *Vide supra*, 278th meeting, paras. 14-44.

14. He therefore proposed that the Commission should reconsider its decision with regard to the comments to article 5.

There were 6 votes in favour of the proposal, none against, with 5 abstentions. The required two-thirds majority having been obtained it was decided to reconsider the decision.

15. Mr. FRANÇOIS, Rapporteur, withdrew the words "and are in conformity with the intention behind the Court's decision" at the end of the first sentence of the revised text submitted by him at the present meeting.

16. The CHAIRMAN put to the vote the Rapporteur's revised text of the comment as amended.

The revised text was not adopted, 4 votes being cast in favour, 4 against, with 3 abstentions.

17. The CHAIRMAN ruled that, as a result of the vote the last paragraph of the comment to article 5 should be retained as drafted at the 278th meeting.

Comment to article 16⁶

18. Mr. FRANÇOIS, Rapporteur, proposed that the following text should be inserted after the third paragraph:

"A third solution would be to adopt as a demarcation line the geographical parallel of the point at which the land boundary meets the coast. However, that solution is not applicable in all cases.

"A fourth solution might be provided by a line drawn at right angles to the general direction of the coast line. The adoption of this line... etc."

This text and the comment to article 16 as amended were adopted.

Comment to article 17⁷

19. The CHAIRMAN proposed that the first paragraph of the comment to article 17 should be replaced by the following:

"This article follows the lines of the regulation proposed by Sub-Committee II of the 1930 Conference, but the Commission considered that 'fiscal interests'—a term which according to the 1930 comments should be interpreted very broadly as including all matters relating to customs and to export, import and transit prohibitions—could be included in the more general expression 'such other of its interests as the territorial sea is intended to protect'. This expression comprises *inter alia* questions relating to immigration, customs and health as well as the interests enumerated in article 21."

20. Mr. FRANÇOIS, Rapporteur, accepted the text.

The text submitted by the Chairman and the comment to article 17 as a whole as amended were adopted.

Comment to article 23⁸

21. Mr. FRANÇOIS, Rapporteur, proposed that the penultimate sentence of the fourth paragraph of the comment should be replaced by the following text:

"Again, the Commission did not deal with the matter of collisions because, since 1952, a convention relating to the subject has been in existence and this convention has not yet been ratified by a considerable number of States; the convention in question is entitled 'International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation', and was signed at Brussels on 10 May 1952. The Commission proposes, however, to study this topic later."

The proposed text and the comment to article 23 as amended were adopted.

Comment to article 24⁹

22. Mr. FRANÇOIS, Rapporteur, proposed that the following text should be inserted before the last sentence of the second paragraph of the comment:

"Two conventions materially affecting questions of civil jurisdiction were drawn up at the Brussels Conference referred to in the comment to the previous article, namely, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision and the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, both dated 10 May 1952."

The text submitted by the Rapporteur was adopted.

The comment to article 24 was adopted as amended.

Comment to article 26¹⁰

23. Mr. CORDOVA and Mr. ZOUREK proposed that the following text should be inserted after the first paragraph of the comment to article 26.

"Some members of the Commission pointed out that under the international law in force the passage of foreign warships through the territorial sea was a mere concession and was subject to the consent of the coastal State. They also expressed the view that the right of passage does not imply the right of warships to stop or anchor in the territorial sea unless specially authorized to do so."

24. Mr. FRANÇOIS, Rapporteur, thought the last sentence of the proposed text unnecessary as the provisions of paragraph 3 of article 17 applied also to warships.

⁸ *Ibid.*, paras. 36-42.

⁹ *Ibid.*, paras. 43-45.

¹⁰ *Ibid.*, paras. 49-52.

⁶ *Vide supra*, 279th meeting, paras. 5 and 6.

⁷ *Ibid.*, paras. 7-12.

25. Mr. ZOUREK thought that article 17, paragraph 3, was intended to apply primarily to merchant vessels.

26. Mr. FRANÇOIS, Rapporteur, proposed that the following new paragraph should be inserted after the first paragraph of the comment:

"The right of passage does not imply the right for warships to stop or anchor in the territorial sea unless specially authorized to do so. The Commission decided that it was unnecessary to include a special provision to that effect since the provisions of paragraph 3 of article 17 apply also to warships.

"The Commission was of the opinion that the right of passage should be granted to warships without prior authorization or notification.

"Some members of the Commission pointed out, however, that, under the international law in force, the passage of foreign warships through the territorial sea was a mere concession and hence subject to the consent of the coastal State."

It was so agreed.

27. Mr. CORDOVA proposed that the last paragraph of the comment to article 26 should end with the word "judgement", and that the remainder of the sentence should be deleted.

It was so agreed.

28. The CHAIRMAN put the comment, as amended, to the vote.

The comment to article 26 was adopted as amended.

Voting on the articles relating to the territorial sea

29. The CHAIRMAN put to the vote as a whole the articles relating to the régime of the territorial sea as adopted at previous meetings.

The articles as a whole were adopted by 9 votes to 1 with 1 abstention.

30. Mr. LAUTERPACHT said that, while voting for the draft, he was unable to approve of the comment to article 5, article 17, article 20 and the system of Chapter III, inasmuch as it created the impression that some of the provisions of the draft, i.e., in the matter of the obligation of the coastal State to give notice of the dangers to navigation, did not apply to warships for reasons which he had given in the course of the debate.

31. Mr. EDMONDS said he had abstained only because he had not attended the meetings of the Commission at which most of the articles had been discussed.

32. Faris Bey el-KHOURI said he had voted in favour of the draft articles in the hope that the circulation of the draft to Governments, together with a questionnaire concerning the breadth of the territorial sea, would provide the Commission with fresh information. The decision taken by the Commission should not be considered as final.

33. Mr. CORDOVA also expressed the hope that the replies of Governments would make it possible to improve the draft. In particular, he hoped that the Commission would in the future attach as much importance to the rights of the coastal States as to the interests of the freedom of navigation.

34. Mr. ZOUREK said he had voted against the draft because, in his opinion, it departed in several respects from the international law in force, for example, the provisions concerning the maximum lengths of five and ten miles for the straight base lines, the exceptional character attributed to the system of straight base lines, the adoption of a uniform system for determining the territorial sea of two adjacent States, and, above all, the clauses relating to the regulation of the right of passage.

35. The CHAIRMAN expressed certain reservations with regard to article 5. The Commission, by the text it had adopted, had provided for a much more restricted application of the method of straight base lines than the International Court of Justice; under the provisions as adopted it was impossible to take into account the special needs of the Scandinavian States, for example, whose coast lines were very irregular and bordered by archipelagoes.

Voting on chapter IV as a whole

36. The CHAIRMAN put to the vote chapter IV of the Commission's report as a whole, as amended.

Chapter IV was adopted by 9 votes to one.

CHAPTER V: OTHER DECISIONS (A/CN.4/L.48/Add.6)¹¹

*Paragraphs 1, 2, 3, 4 and 5 (73, 74, 75, 76 and 77) **

37. The CHAIRMAN put these paragraphs to the vote.

Paragraphs 1, 2, 3, 4 and 5 were adopted.

Paragraph 6 (78)

38. Mr. LAUTERPACHT said that the Commission should expressly authorize the Chairman to consider and if necessary accept any proposals made by the competent bodies of the General Assembly concerning the date and place of the Commission's next session.

39. Mr. LIANG, Secretary to the Commission, said the Chairman clearly had the required authority, but for practical reasons it was not desirable to include a specific reference to that effect in the report.

¹¹ This document was mimeographed only. It was incorporated in the report of the Commission on its sixth session as chapter V. The report is included in *Yearbook of the International Law Commission, 1954*, vol. II. It was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*.

* The numbers within parentheses refer to the paragraph numbers in the Commission's report on its sixth session.

40. Mr. LAUTERPACHT noted that the Chairman had wide authority in the matter.

41. The CHAIRMAN put the paragraph to the vote.

Paragraph 6 was adopted.

Paragraph 7 (79)

42. The CHAIRMAN put the paragraph to the vote.

Paragraph 7 was adopted.

43. The CHAIRMAN put chapter V as a whole to the vote.

Chapter V as a whole was adopted.

Other business

Question of stating dissenting opinions in the report

44. Mr. ZOUREK submitted a proposal to the effect that any member of the Commission who did not concur in a decision taken by the latter with regard to draft rules of international law should be allowed to insert in the Commission's report a short statement giving his view on the decision in question.

45. The CHAIRMAN thought it would be preferable to consider that question at the beginning of the next session.

By 5 votes to 2, with 2 abstentions, it was so decided.

46. The CHAIRMAN agreed to place the question raised by Mr. Zourek on the agenda of the next session.

Question of rules of procedure for the Commission

47. Mr. LAUTERPACHT gave notice that he intended to communicate to the Chairman a proposal to the effect that the Commission should consider, at the commencement of its next session, the question whether, in the light of experience, the rules of procedure applicable to the General Assembly and its Committee are best calculated to further the task of the Commission and, if not, what other rules, if any, should be adopted.

Closure of the session

48. The CHAIRMAN thanked the Director-General of UNESCO for the facilities he had so generously placed at the disposal of the Commission. He also thanked all the members of the Secretariat for their valuable assistance in the Commission's work. He was equally grateful to the Rapporteur and the Special Rapporteurs.

49. Mr. LAUTERPACHT paid a tribute to the Chairman for the skill and courtesy with which he had conducted the proceedings.

50. Mr. CORDOVA, Mr. AMADO, Mr. PAL, Faris Bey el-KHOURI, Mr. ZOUREK and Mr. EDMONDS associated themselves with the tribute paid to the Chairman.

51. The CHAIRMAN thanked his colleagues and declared the sixth session of the International Law Commission closed.

The meeting rose at 12.05 p.m.