

Document:-
A/CN.4/SR.315

Summary record of the 315th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1955 , vol. I

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315th MEETING

Monday, 20 June 1955, at 3 p.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. Jaroslav ZOUREK.

Secretariat : Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Proposal to amend the Commission's Statute

1. The CHAIRMAN proposed that the Commission recommend to the General Assembly an amendment to article 10 of the Commission's Statute (A/CN.4/4) whereby members of the Commission would be elected for five years instead of three, beginning with those members whose term of office started in 1957.

The Chairman's proposal was adopted

Appointment of a special rapporteur for the topic of State responsibility

2. The CHAIRMAN proposed that Mr. García Amador be appointed Special Rapporteur for the topic of "State responsibility". Mr. García Amador had already submitted a memorandum on the question (A/CN.4/80) but the Commission had not yet taken it up because of its heavy agenda at previous sessions.¹

Mr. García Amador was appointed Special Rapporteur for the topic of "State responsibility".

¹ See "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 74, in *Yearbook of the International Law Commission*, 1954, vol. II.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (resumed from the 314th meeting)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (resumed from the 314th meeting)

Article 3 [3]: Breadth of the territorial sea (resumed from the 314th meeting)

3. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had provisionally adopted the resolution proposed by Mr. Amado on the breadth of the territorial sea.² Since that vote, all the other proposals made to the Commission concerning article 3 had either been withdrawn or rejected. It was now incumbent upon the Commission to take a final decision on the resolution proposed by Mr. Amado.

4. Faris Bey el-KHOURI recalled that the first paragraph of Mr. Sandström's proposal for article 3³ had given rise to no objections and that the proposal as a whole had been rejected only because of the reference to arbitration in the second paragraph.

5. He now proposed that Mr. Sandström's text be reconsidered since he believed that, if the reference to arbitration had been omitted, that text would have gained the necessary majority.

6. Mr. AMADO said he had not understood the vote in favour of his proposal at the 311th meeting to be in any sense a provisional decision.

7. The CHAIRMAN said the resolution proposed by Mr. Amado stood, having been duly voted. It was true, however, that that resolution had only laid down certain principles and that the need was felt to complete it with certain more specific provisions.

8. Mr. AMADO warned the Commission that it might endanger its whole work if it were to try to go any further than it had gone at the 311th meeting. His resolution did not claim to solve a problem which had baffled the legal and international world for a very long time. Its only purpose had been to take note of the existing facts in a formula which was likely to be accepted not only by the majority of the Commission—as had been significantly shown by the vote—but also by the majority of States.

9. Mr. GARCÍA AMADOR said that the resolution proposed by Mr. Amado had not been adopted in a form suitable for an article. The words "Without taking any decision as to the question of the proper extension of the territorial sea" could hardly appear in an article which purported to state what the breadth of the territorial sea was.

10. Mr. HSU said that perhaps the best course for the Commission might be to postpone further discussion until the following year. If the Commission failed to arrive at a decision at its next session, it could fall back

² 311th meeting, para. 63.

³ 314th meeting, para. 1.

on Mr. Amado's formula and add to it a paragraph along the lines of the third paragraph of his original proposal,⁴ which read as follows:

"In view of the lack of uniformity in international practice, the Commission has not been able to propose a general formula for recommendation."

The practical result would be to throw the whole matter back to the General Assembly for it to decide.

11. Sir Gerald FITZMAURICE pointed out that under the instructions it had received from the General Assembly the Commission was bound to make a proposal by its eighth session. If, however, no proposals were submitted to governments following the current session, there would be no time for comments on their part.

12. The CHAIRMAN agreed that the normal procedure would be for the Commission to take a decision at the current session, submit it to governments, obtain their comments and discuss the matter finally in the light of those comments at the following session.

13. Mr. GARCÍA AMADOR said that the Chairman had described the normal procedure. But that procedure was one to which exceptions were possible. He recalled that when the General Assembly had, in 1949, instructed the Commission to report on the rights and duties of States, the Commission had submitted its report without awaiting comments by governments.

14. General Assembly resolution 899 (IX) was drafted in such terms that it was incumbent upon the Commission to report on all the topics relating to the sea in time for its report to be included in the provisional agenda for the eleventh session of the General Assembly. It was clear from that resolution that, until the report on its eighth session was approved, the Commission could not regard its work on any of the problems to be dealt with in that report as complete.

15. Mr. AMADO said the Commission was torturing its mind in trying to find a solution to a problem which it knew to be insoluble. States which had adopted a territorial sea of more than three miles would not agree to being bridled. The position simply was that, struggle as it might, the only thing the Commission could do was to take note of the real situation concerning the breadth of the territorial sea.

16. Mr. ZOUREK said that the Commission's proposals had necessarily to be submitted to governments; it was not, however, necessary for them to be submitted to governments in final form. The Commission could simply state that it had found some members in agreement with the so-called three-mile rule, while others were of the opinion that States which had proclaimed a greater distance as the breadth of their territorial sea were in the same juridical situation as States which proclaimed the three-mile distance. That would be quite sufficient to provoke the necessary comments for the

Commission to undertake its final discussion at the following session.

17. Mr. LIANG (Secretary to the Commission) said he agreed with Mr. García Amador's remarks.

18. In view of the fact that the General Assembly had imposed a time-limit it would have to accept whatever procedure that time-limit made necessary.

19. In its report on the sixth session, the Commission had submitted to governments provisional articles concerning the régime of the territorial sea. In doing so, the Commission had reported the various divergent opinions expressed on the breadth of the territorial sea (para. 68), and asked for the comments of governments thereon (para. 70).

20. So far only fourteen States had replied. If the Commission were to succeed in formulating an article at the present session, it was not certain that all governments would give their comments on the proposed article. Perhaps the best practical course would be for the Commission to indicate, in its report on the current session, that it still awaited the replies of many governments to its 1954 report. That would give governments another opportunity to reply.

21. He stressed that article 3 was the only one in respect of which any question of departure from the normal procedure arose. All the other articles, both on the territorial sea and on the high seas, had been duly submitted to governments for their comments.

22. As had been suggested, the two paragraphs of Mr. Amado's resolution could figure in the Commission's report on its eighth session if, by then, the Commission's attempts to formulate article 3 had altogether failed.

23. Mr. FRANÇOIS (Special Rapporteur) felt the Commission should submit to governments a text based on Mr. Amado's resolution so as to obtain their comments by the 1956 session.

24. In substance, there was no very great difference between the principles underlying that resolution and his own proposals.

25. Mr. Amado's resolution contained one vitally important statement: that any extension of the territorial sea beyond twelve miles was contrary to international law. In view of the text's lack of precision, however, some doubts had arisen with regard to the legal position in respect of claims to a territorial sea of more than three, but less than twelve, miles. It was essential to clarify the position so that the resolution was not misconstrued as meaning that other States were obliged to recognize the coastal State's extension of its territorial waters, provided it did not exceed twelve miles.

26. The CHAIRMAN said that as Mr. Amado's resolution had been voted, it was incumbent upon the Commission to submit it to governments and eventually to the General Assembly.

27. The resolution, however, was not framed as an

⁴ 309th meeting, para. 14.

article. It was none the less a text, and a very important text, which the Commission had adopted.

28. Mr. AMADO said that, in order to transform the resolution into the text of an article, it was sufficient to delete the words "The Commission recognizes that..."

29. Sir Gerald FITZMAURICE, with reference to Faris Bey el-Khouri's proposal (para. 5 above) for reconsideration of Mr. Sandström's text for article 3, recalled that he had voted against the text, as amended, not only because of the reference in proviso 2 to arbitration but for another, more important, reason. That proviso made reference to national necessities and the Commission, as a juridical body, could not adopt a vague provision of that nature without defining what national necessities entailed.

30. He recognized that, in view of the present international feeling, it was necessary to make certain concessions and try to meet reasonable claims on the part of certain States for the expansion of their territorial sea. He would, therefore, not be altogether averse to a reference to "legitimate requirements" (a better expression than "national necessities"), provided, however, that a definition were adopted which would lay down some bounds, thus enabling legitimate requirements to be assessed in advance. Such a definition would be more or less along the following lines:

"A legitimate requirement (or a national... necessity) is to be understood as meaning a requirement that cannot find reasonable satisfaction except by the exercise of jurisdiction over territorial waters, and in particular cannot be satisfied either by means of the exercise of special rights in the contiguous zone—or the several special rights in the various contiguous zones—or by the adoption of fishery conservation measures on the basis of the draft articles thereon adopted by the Commission."

31. The CHAIRMAN called upon the Commission to vote on Faris Bey el-Khouri's proposal for the reconsideration of Mr. Sandström's proposed text for article 3.

Faris Bey el-Khouri's proposal was rejected by 6 votes to 5, with 2 abstentions.

32. The CHAIRMAN said that the Commission was now left, by way of definition of the breadth of the territorial sea, only with Mr. Amado's resolution, the text of which could, however, be clarified before its inclusion in the report.

33. Comments by governments on that text would enable the discussion to be resumed at the Commission's eighth session.

34. Mr. GARCÍA AMADOR felt that the Commission need only examine in what manner Mr. Amado's resolution should be incorporated in its report on the present session. Presumably the purpose of any addition would be solely to eliminate the possibility of contradictory interpretations. He therefore proposed the insertion of the words "or making any judgement at the present session" after the words "without taking

any decision" in paragraph 2. The text would then constitute an objective statement of the facts.

35. Mr. FRANÇOIS (Special Rapporteur) considered that members were free to propose amendments to Mr. Amado's text because it had been adopted purely on a provisional basis. At the time those who had considered it to be insufficient had assumed that it would be supplemented by further proposals, but all such proposals had now been rejected.

36. In the circumstances he proposed that paragraph 2 be replaced by the following text:

"The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles."

37. Mr. KRYLOV considered that the Commission would have to decide by a two-thirds majority to reconsider Mr. Amado's proposal before it could vote on a text which conflicted with paragraph 2 thereof.

38. Mr. AMADO wondered whether it was correct to state that international law did not recognize an extension beyond three miles.

39. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Chairman had interpreted Mr. Amado's text in that sense.

40. The CHAIRMAN explained that he had stated that according to paragraph 2 of Mr. Amado's text extensions beyond twelve miles were contrary to international law, but nothing was said about extensions beyond three miles but not further than twelve.⁵

41. Mr. SANDSTRÖM observed that the conclusion to be drawn from Mr. Amado's text was that extensions beyond three miles had to be justified, if challenged.

42. Mr. SCALLE agreed with the interpretation of Mr. Amado's text given by Mr. Sandström and the Chairman, but wished to make certain that all other members of the Commission supported the proposition that any unilateral extension of the territorial sea beyond three miles was not valid for another State. The question of how it could be challenged was an entirely separate issue, with which the Commission need not concern itself at the present moment. Some of Mr. Amado's remarks seemed to imply that any extension once fixed was final.

43. Mr. AMADO asked in what manner the three-mile limit had originally been established—was it by international treaty, or a judicial decision?

44. Mr. SCALLE replied that the three-mile rule had been established by international law because it was the minimum required by States. It had won general con-

⁵ See *supra*, 311th meeting, para. 52.

sent and, unlike greater extensions, had never been challenged.

45. Mr. SANDSTRÖM could not agree with Mr. Krylov that before the Special Rapporteur's amendment could be voted, a motion to reconsider Mr. Amado's proposal would have to be carried by a two-thirds vote. For, unlike the Special Rapporteur's previous proposal which provided a procedure for delimitation, his amendment merely laid down that other States were not bound to recognize a unilateral extension beyond three miles.

46. Sir Gerald FITZMAURICE said that if the Special Rapporteur's amendment were put to the vote he would support it, not because it affirmed the principle of the three-mile limit as the only permissible one, but because it made two points about which there was general agreement: first that a claim to a three-mile limit could not be opposed and secondly that the Commission had decided that claims beyond twelve miles were inadmissible. The Commission would then not have pronounced in favour of any of the claims between those minimum and maximum limits. It was an exact statement of the position to say that there was no obligation to recognize an extension beyond three miles.

47. The CHAIRMAN, speaking in his personal capacity, said that Mr. Amado's text accurately reflected the present practice but not the legal position, since any State which applied a limit beyond three miles affirmed that it should be recognized by other States.

48. Sir Gerald FITZMAURICE said that he was of the opposite opinion. The text seemed to him to reflect the juridical position though perhaps not universal practice. There was no juridical basis upon which States that applied a limit exceeding three miles could demand that it be recognized, since no other rule had replaced the three-mile rule prescribed by international law.

49. Mr. HSU said that it was difficult to examine the Special Rapporteur's amendment without a written text. His impression was that the Special Rapporteur was seeking to revive his earlier proposal. A two-thirds majority would certainly be necessary before the text could be discussed.

50. Mr. AMADO said that he could not accept the thesis that international law laid down a three-mile limit, though he was perfectly well aware of the long-established practice of certain States, which, however, others did not follow. He had been very careful throughout the discussion to bring out the distinction between law and practice.

51. Sir Gerald FITZMAURICE, observing that Mr. Amado appeared to recognize the three-mile limit as a minimum, suggested that there was no rule of international law recognizing six or twelve miles as a minimum.

52. Mr. SCALLE said that he did not wish to complicate the discussion any further by raising difficult issues as

to what was law and what was not. There was general agreement about the existence of an international custom to fix the limit of the territorial sea at three miles, and it was admitted that any State had a provisional right to extend that limit but that any other State was entitled to challenge its action. If the coastal State took no notice whatsoever of the challenge, the whole question was removed from the domain of international law.

53. An extension beyond three miles was only legal when it had enjoyed uninterrupted tacit acquiescence or had been established as a prescriptive right by a judicial decision. It was unquestionable that a three-mile limit was recognized by international law and that anything beyond it was a claim which had to secure recognition.

54. Mr. KRYLOV observed that the whole issue had been posed quite differently in Mr. Amado's text.

55. Mr. ZOUREK said that there was no need for him to recapitulate his views concerning the three-mile limit, but he was bound to intervene because the Special Rapporteur had re-introduced the notion that extensions beyond three miles must be justified. He personally disagreed and knew of no rule whereby extensions called for express recognition provided that, as was ensured elsewhere in the provisional articles, the right of innocent passage throughout the territorial sea was safe-guarded.

56. The four-mile and six-mile limits had an older history than the three-mile limit and, as he had already argued, there was no rule of international law concerning the delimitation of the territorial sea. Coastal States were free to delimit their territorial sea according to their particular needs on the juridical grounds that they exercised sovereignty in that area.

57. Mr. AMADO said that it was unacceptable that States adhering to a three-mile limit should impose on others the obligation to secure express recognition of their practice.

58. The CHAIRMAN said that as there were no more speakers on the list, the Commission might vote on Mr. García Amador's amendment (para. 34 above).

59. Mr. FRANÇOIS (Special Rapporteur) observed that his amendments (para. 36 above) were farthest removed from the original text and should be voted first.

60. Sir Gerald FITZMAURICE said that the Commission should vote on the Special Rapporteur's two paragraphs together because they formed a whole.

61. He asked whether the Special Rapporteur could accept the insertion of the words "subject to historical rights" in the second paragraph after the words "considers that".

62. Mr. FRANÇOIS (Special Rapporteur) agreed that his two paragraphs formed a whole. He would in fact have had no objection to combining them in one.

63. While prepared to support Sir Gerald Fitzmaurice's amendment, he would not incorporate it in the text because he would prefer it to be put to the vote separately, lest it should endanger acceptance of his own text.

64. Mr. KRYLOV proposed that the two paragraphs of the Special Rapporteur's amendment be put to the vote separately.

65. The CHAIRMAN asked whether the Commission thought it necessary first to vote on a motion to reconsider Mr. Amado's text; such a motion would require a two-thirds majority.

66. Mr. HSU formally proposed a motion to that effect.

67. Mr. FRANÇOIS (Special Rapporteur) felt that such a motion was unnecessary in view of the fact that the Commission had originally taken only a provisional vote on Mr. Amado's text.

68. Mr. EDMONDS agreed with the Special Rapporteur that rule 124 of the rules of procedure was inapplicable, because the previous decision had been provisional.

69. The CHAIRMAN said that in order to extricate the Commission from the present difficulty he would put to the vote the question whether a vote on the Special Rapporteur's amendment should be regarded as constituting reconsideration of Mr. Amado's text.

The question was decided in the negative by 6 votes to 2, with 4 abstentions.

70. Mr. GARCÍA AMADOR asked whether Sir Gerald Fitzmaurice could withdraw his amendment to the Special Rapporteur's text since the Commission had decided to postpone consideration of objective criteria until its next session.

71. Sir Gerald FITZMAURICE withdrew his amendment for the insertion of the words "subject to historical rights", which had been designed to render the text more acceptable to certain members such as Mr. Sandström, in view of the fact that it would raise difficulties for others.

72. Mr. SANDSTRÖM, invoking rule 91 of the rules of procedure, opposed Mr. Krylov's request for separate votes on the two paragraphs of the Special Rapporteur's amendment because they formed an indivisible whole.

73. Mr. KRYLOV insisted on his proposal because the first paragraph was a perfectly complete and coherent statement and could stand by itself.

74. Mr. ZOUREK, supporting Mr. Krylov, pointed out to Mr. Sandström that if the second paragraph were rejected its substance could be re-introduced in the form of a new amendment.

75. Mr. SANDSTRÖM said that he would not press his objection if the Special Rapporteur considered a separate vote feasible.

76. Mr. FRANÇOIS (Special Rapporteur) said that the two paragraphs could be put to the vote separately.

77. The CHAIRMAN then put the Special Rapporteur's amendment to the vote paragraph by paragraph.

The first paragraph was adopted by 8 votes to none, with 5 abstentions.

The second paragraph was adopted by 7 votes to 6.

78. Mr. ZOUREK said that adoption of the Special Rapporteur's amendment entirely altered Mr. Amado's text, which he would now be forced to oppose.

79. The CHAIRMAN then put Mr. Amado's text to the vote as amended. It read:

"1. The Commission recognizes that international practice is not uniform as regards traditional limitation of the territorial sea to three miles.

"2. The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles."

That text was adopted by 7 votes to 6.

Further consideration of item 3 of the agenda was adjourned.

The meeting rose at 6.25 p.m.

316th MEETING

Tuesday, 21 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA