

Document:-
A/CN.4/SR.379

Summary record of the 379th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1956, vol. I

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The Rapporteur's new text to replace paragraphs 20 to 24 in the introduction to chapter II of the draft report was adopted, as amended.

The meeting rose at 1.05 p.m.

379th MEETING

Monday, 2 July 1956, at 3 p.m.

CONTENTS

	<i>Page</i>
Tribute to the memory of Mr. Hsu Mo	279
Consideration of the Commission's draft report covering the work of its eighth session (<i>continued</i>)	
<i>Chapter II: Law of the sea</i>	
<i>Part I: The territorial sea (A/CN.4/L.68/Add.2)</i>	279
<i>Article 1: Juridical status of the territorial sea</i>	279
<i>Article 2: Juridical status of the air space over the territorial sea and of its bed and subsoil</i>	279
<i>Article 3: Breadth of the territorial sea</i>	279
<i>Article 4: Normal baseline</i>	281
<i>Article 5: Straight baselines</i>	281
<i>Article 6: Outer limit of the territorial sea</i>	282
<i>Article 7: Bays</i>	282
<i>Article 8: Ports</i>	283
<i>Article 9: Roadsteads</i>	283
<i>Article 10: Islands</i>	283
<i>Article 11: Drying rocks and drying shoals</i>	283

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Tribute to the memory of Mr. Hsu Mo

1. Sir Gerald FITZMAURICE said that members would be shocked to hear of the untimely death of Mr. Hsu Mo, who, as one of the judges of the International Court of Justice since its creation, had commanded the universal respect of his colleagues as an unfailing upholder of its highest traditions. He proposed that the Commission convey to Mr. Hsu Mo's wife and family its profound sympathy.

2. Mr. LIANG, Secretary to the Commission, said that he had been deeply grieved to learn of the death of an eminent international jurist with whom he had worked in the past. Mr. Hsu Mo had acted as rapporteur of the Committee which had drafted chapter VI of the United Nations Charter, concerning the pacific settlement of disputes. He had made an outstanding contribution to the jurisprudence of the International Court and would

be remembered for his notable separate opinion in the Anglo-Norwegian Fisheries case. He had always followed the Commission's work with the closest interest.

3. Mr. KRYLOV, paying tribute to his former colleague at the International Court, said that Mr. Hsu Mo was an outstanding lawyer and a man of independent judgment, who approached problems without partiality.

4. Mr. SCELLE, associating himself with the previous speakers, referred to Mr. Hsu Mo's energetic and disinterested help in the work of the Academy of International Law at the Hague.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part I: The territorial sea (A/CN.4/L.68/Add.2)

5. The CHAIRMAN invited the Commission to consider chapter II, part 1, of its draft report containing the draft articles on the territorial sea and the comments thereto.

Article 1: Juridical status of the territorial sea

6. There were no observations on the substance of article 1 or on the comment thereto.

Article 2: Juridical status of the airspace over the territorial sea and of its bed and subsoil

7. Sir Gerald FITZMAURICE proposed the deletion of the somewhat cryptic last sentence of the comment, the full implications of which had not been fully discussed. The last sentence read as follows: "Consequently, the provisions of the articles concerning passage which follow are not applicable to air navigation."

8. Mr. PAL agreed with Sir Gerald Fitzmaurice. The last sentence of the comment seemed to suggest that the Commission had taken a decision concerning the right of passage of aircraft in the air space above the territorial sea, whereas in fact, as stated in the second sentence of the comment, that question had been reserved.

Sir Gerald Fitzmaurice's amendment was adopted.

Article 3: Breadth of the territorial sea

9. Mr. EDMONDS reaffirmed his opposition to article 3. In respect of that article the Commission had failed in its task, which was not only to state universally recognized rules of international law, but also to codify those upheld by the majority.

10. Mr. SANDSTRÖM suggested that, as article 3 differed from the others in more than form, it should be prefaced by a statement to the effect that the Commission had failed to reach agreement about the breadth of the territorial sea and that the text which had secured a majority simply enunciated the one principle that international law did not permit extensions of the territorial sea beyond twelve miles and recommended that the breadth within that limit should be fixed by an international conference.

11. Mr. FRANÇOIS, Rapporteur, was opposed to emphasizing the fact that the Commission had not reached agreement about any fixed limit between three and twelve miles, because that would overshadow the other positive results achieved. Furthermore, it was undesirable to give the impression that failure in that respect would make it futile to convene a diplomatic conference. He would not therefore favour Mr. Sandström's proposal, though he could agree to amplifying the sixth paragraph of the comment.
12. Mr. SANDSTRÖM believed that it would disarm criticism, at least in part, if the Commission were to make a frank admission of its failure to reach agreement on the breadth of the territorial sea.
13. Mr. AMADO did not consider that the Commission need reproach itself for having been defeated by an impossible task. In the circumstances it could not have done more than state in the article what was the present position, and give an account in the comment of the course taken by the discussion.
14. Mr. SPIROPOULOS saw no advantage in Mr. Sandström's proposal, the substance of which already appeared in the comment. On the other hand, he could have agreed to transferring to the comment the whole of the text of the article which, paragraph 2 apart, did not enunciate any principle of international law.
15. Mr. SCALLE still deplored the fact that the task of fixing the breadth of the territorial sea had not been assigned to the International Court of Justice and that article 3 should give the impression that States were entitled, within a maximum of twelve miles, to fix the limit as they pleased without any reference to their actual needs, which many authorities held to be one of the criteria.
16. Mr. PAL considered that the points made in Mr. Sandström's proposal were already adequately covered in the comment. If any amplification were required, the proper place would be in the sixth paragraph of the comment.
17. Faris Bey el-KHOURI considered that, as the Commission had reached agreement about the minimum and the maximum breadth of the territorial sea, it should at least recommend a fixed limit of six miles to the international conference so that the issue would not have been altogether left in the air.
18. Mr. SANDSTRÖM said that he had been concerned merely with the question of presentation, but in view of the objections his proposal had raised, he would withdraw it.
19. Sir Gerald FITZMAURICE presumed that when the Commission came to adopt its draft report as a whole, members would have an opportunity of stating their position on individual articles. He therefore proposed to confine himself at the present stage to making clear that he had agreed to article 3 as a compromise solution which did not entail any final stand on the part of the Commission, and to pointing out that the text was defective because it failed to register at least one point on which there was general agreement, namely,
- that a three-mile limit constituted a minimum which, if claimed, could not be contested. That point had been clearly brought out in the text adopted at the previous session.
20. Mr. SPIROPOULOS, in reply to Sir Gerald Fitzmaurice, explained that he had omitted the word "traditional" from his proposal¹ for article 3, because it seemed to create a presumption in favour of the three-mile limit.
21. Sir Gerald FITZMAURICE objected to the low position in the fifth paragraph of the comment assigned to the principle of the three-mile limit and also to its being described as a proposal; it was undoubtedly the fundamental rule and it was departures from it which should be designated as proposals.
22. He also thought it would have been more accurate in the sentence in question, opening with the words "According to a fifth opinion", to refer to "historic rights" rather than to "customary law".
23. In the sixth paragraph he suggested the substitution of the word "views" for the word "proposals".
24. In the second sentence of the eighth paragraph, in order to avoid ambiguity, the words "up to" should be inserted before the words "twelve miles".
25. Finally, the penultimate sentence of the ninth paragraph did not give a strictly accurate account of the position and should be deleted.
26. Mr. FRANÇOIS, Rapporteur, said in reply to Sir Gerald Fitzmaurice's first objection that in the fifth paragraph he had summarized the different proposals before the Commission in the order in which they had been voted.
27. He could not agree to replacing the words "customary law" by the words "historic rights" in the passage mentioned by Sir Gerald, because he was uncertain of the precise scope of the latter expression.
28. He could accept Sir Gerald Fitzmaurice's amendments to the eighth and ninth paragraphs.
29. Sir Gerald FITZMAURICE said that his first objection would be met if it were made clear at the beginning of the fifth paragraph that the proposals were being summarized in the order in which they had been voted.
30. Mr. FRANÇOIS, Rapporteur, undertook to make that clear.
31. Mr. LIANG, Secretary to the Commission, suggested that because it had acquired a political connotation, the expression "diplomatic conference" used in the comment on article 3 and in paragraph 22 of the introduction to chapter II of the draft report was perhaps a misnomer for a conference which would have to consist largely of technical experts. "An intergovernmental conference" might be a better description.
32. Mr. SPIROPOULOS considered that the term "international conference", which was very general, would be preferable.

¹ A/CN.4/SR.362, para. 66.

33. Mr. AMADO preferred the term "intergovernmental conference" because the words "international conference" did not necessarily imply the presence of plenipotentiaries.

34. Mr. FRANÇOIS, Rapporteur, said that the term "international conference" was altogether too imprecise. It was essential in the present instance to make clear that apart from technical experts the conference would be attended by government representatives. He therefore proposed substituting for the expression "diplomatic conference", wherever it occurred, the words "international conference of plenipotentiaries" which would be consistent with the wording used in General Assembly resolution 429 (V).

The Rapporteur's proposal was adopted.

Article 4: Normal baseline

There were no observations on article 4 or on the comment thereto.

Article 5: Straight baselines

35. Mr. SANDSTRÖM wondered whether paragraph 3 should not be transferred to article 15, which defined the right of innocent passage.

36. Sir Gerald FITZMAURICE considered that paragraph 3 was in its proper place but suggested that Mr. Sandström's preoccupation would be met by the insertion after the words "innocent passage" in that paragraph, of the words "as defined in article 15".

Sir Gerald Fitzmaurice's amendment was adopted.

37. The CHAIRMAN, speaking as a member of the Commission, suggested that a more precise reference be made in the first paragraph of the comment to the Fisheries Case between Norway and the United Kingdom, since it was the first mention of it.

It was so agreed.

38. Sir Gerald FITZMAURICE objected to the use in the first paragraph of the comment of the word "archipelago", which was a group of islands fairly compact and isolated, to describe the *Skjaergaard*, and suggested that it be replaced by the expression "island formations" used by the Court in its judgment.

Sir Gerald Fitzmaurice's amendment was adopted.

39. Mr. ZOUREK regretted that the Rapporteur should have emphasized only the special case where straight baselines were admissible owing to the particular configuration of the Norwegian coast; it would obscure the more general application of the principle admitted by the Court in the Fisheries Case.

40. With regard to the antepenultimate paragraph of the comment, he recalled that the Special Rapporteur had made it clear² that paragraph 3 of the article applied only to future cases where a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle and that cases where a State had already made a fresh delimitation were not affected by it. That interpretation of paragraph 3 was in accordance

with the International Court of Justice's decision in the Fisheries Case. To make the point quite clear, he proposed that the words "in future" be inserted in the antepenultimate paragraph of the comment after the words "The Commission was however prepared to recognize that if a State".

41. Mr. FRANÇOIS, Rapporteur, said he had no objection to the addition proposed by Mr. Zourek, although he thought it was already obvious from the existing text that the paragraph was intended to apply to future cases only.

42. Sir Gerald FITZMAURICE said he would be obliged to register his strong objections to such a change, since in his view paragraph 3 of the article laid down a general principle, which must by its very nature be applicable to all cases. He saw no ground on which an exception should be made in favour of certain States just because they happened to have staked their claim before the Commission's draft was adopted or entered into force, and he was sure that the majority of States other than those which were thus privileged would have similar objections. The addition proposed by Mr. Zourek was, in his view, wrong in principle and quite unjustified, although he would not insist on a vote if the majority of the Commission were prepared to accept it.

43. Mr. KRYLOV could not agree that any important point of principle was involved in paragraph 3; on the contrary, the paragraph was in the nature of an exception to the general rule, designed to cover certain special cases which the Commission had felt should be covered. The Rapporteur had just confirmed his own understanding that in inserting the paragraph in question, the Commission's intention had been that it should apply to future cases only. Of course, that was only the Rapporteur's opinion, but as Special Rapporteur for the topic his opinion should carry weight. And in the case in point, it appeared to coincide with that of several other members, for he (Mr. Krylov) for one would not have voted for the paragraph if he had not understood that it referred to future cases only.

44. Mr. PAL recalled that there had been two separate occasions on which the Commission had discussed the question whether an area of the high seas or of the territorial sea could or could not become internal waters by virtue of the operation of article 5, paragraph 1. On the first occasion³ Sir Gerald Fitzmaurice had claimed that that eventuality could arise as a result of the Court's decision in the Fisheries Case and that paragraph 3 was therefore necessary. He (Mr. Pal) had argued that the Court's decision involved no change in the status of the waters in question, since they had always been internal waters. And Mr. Sandström had on that occasion apparently agreed. On the second occasion⁴ Sir Gerald Fitzmaurice had submitted certain proposals part of which, by implication, again suggested that there had been some change in the status of the waters in question. He (Mr. Pal) had suggested that that part

³ A/CN.4/SR.335, paras. 1-32.

⁴ A/CN.4/SR.364, para. 40, and A/CN.4/SR.365, paras. 7-34.

² A/CN.4/SR.365, paras. 8 and 23.

of the proposals be omitted for the reasons he had previously given; there had been some discussion of his suggestion, and in the end he had not pressed it. It had clearly emerged from the discussion, however, that the proposed paragraph 3 was intended to apply only to cases where the State wished to make a new delimitation of its territorial sea according to the straight baseline principle. As the Rapporteur had rightly pointed out, it could thus apply to future cases only and the present text of the comment appeared to reflect the position exactly without the need for any addition.

45. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice that it would be neither consistent nor just to say that there had been no right of innocent passage through such waters before 1956 or before the date when the Commission's draft came into force or whatever was the *terminus a quo*. Mr. Zourek now proposed that the provisions of paragraph 3 should become effective, but only after that date. It was solely on the understanding that the paragraph applied to all cases that he had been in favour of it.

46. Mr. FRANÇOIS, Rapporteur, pointed out that so far very few States applied the straight baseline system. The Commission had agreed that as far as the Scandinavian States were concerned, it could not retrospectively create a right of innocent passage through the waters in question and that it was in any case unnecessary for it to do so. What Sir Gerald had at the time appeared to be most concerned about was the likelihood that other States would in future adopt the straight baseline principle and so include in their internal waters parts of the high seas or of the territorial sea which were at present used by international shipping. The question which the Commission was at present discussing was therefore purely academic. It certainly had not been the Commission's intention to draw any very sharp distinction between cases which arose before and after a certain date, so he would request Mr. Zourek not to insist on his amendment which was in any case unnecessary.

47. Mr. ZOUREK said that on consulting the summary records he had found that the Rapporteur's interpretation of the purpose of paragraph 3 was perfectly correct. There had in the past been no right of innocent passage through internal waters. The Commission was introducing that right, *de lege ferenda*, in respect of certain categories of internal waters. Since the Commission could not legislate with retrospective effect, the paragraph could clearly apply to future cases only. That being so, and in view of the fact that the Rapporteur's remarks would be placed on record, he agreed that it was perhaps unnecessary to maintain his proposal, which he accordingly withdrew.

48. Mr. KRYLOV said that for the reason given by Mr. Zourek he did not wish to insist on the addition of the words "in future" either, but would merely place on record his view that under no circumstances could article 5, paragraph 3, apply to Norway.

49. Sir Gerald FITZMAURICE said he was grateful to Mr. Zourek and Mr. Krylov for not insisting on the

proposal to add the words "in future", the adoption of which would have given a definitely false impression of the Commission's intentions. The Rapporteur's interpretation was completely accurate in that respect and he had no objection to the present text as an indication of what the Commission had decided, although for the reasons he had already indicated, he did not regard the resulting situation as sound in principle.

50. He felt it important to clarify one point with regard to Mr. Pal's comments on the results of the Court's decision in the Fisheries Case. Mr. Pal had argued as though the Court had recognized that certain baselines had always existed. It had, in fact, done nothing of the kind, but had merely stated that Norway had always had the right to establish such baselines. At the time of the dispute, Norway had only exercised that right in respect of a small part of its coastline in the north. Until a State exercised its right to establish straight baselines, the low water mark remained the baseline and the waters in front of the baseline were territorial sea, through which it was quite possible that the right of innocent passage might be exercised; once the State exercised its right, however, the status of part of such waters indubitably changed, since they became internal waters. It was to safeguard the right of innocent passage through such waters that he had proposed paragraph 3, which was only new in that it sought to apply an existing principle to the new circumstances brought about by the Court's decision.

51. Mr. PAL said that although he was not convinced by what Sir Gerald Fitzmaurice had said, he felt it would be inappropriate to pursue the matter at the present stage. The only purpose of his previous statement had been to throw light on what the Commission had decided.

52. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the words "in a bay or" in the seventh paragraph of the comment because he did not think it necessary to refer to the question of baselines drawn in a bay in connexion with article 5.

Mr. García Amador's amendment was adopted.

53. Sir Gerald FITZMAURICE felt that the last sentence of the last paragraph of the comment diverted attention from the real reason why straight baselines might not be drawn to drying rocks and drying shoals, which was that the terminal points of the baseline must always be visible in order that mariners might not unwittingly trespass on internal waters.

54. Mr. FRANÇOIS, Rapporteur, agreed to amend the paragraph in the light of Sir Gerald's remarks.

Article 6: Outer limit of the territorial sea

There were no observations on article 6 or the comment thereto.

Article 7: Bays

55. Mr. ZOUREK requested that, in the third paragraph of the comment, among the criteria which the Commission had rejected for the purpose of determining the

conditions under which the waters of a bay could be regarded as internal waters, mention should also be made of economic interests.

It was so agreed.

Article 8: Ports

56. Mr. ZOUREK proposed the deletion of the last sentence of the first paragraph of the comment, reading as follows: "This important question will have to be examined at a later stage in the Commission's work".

Mr. Zourek's proposal was adopted.

Article 9: Roadsteads

There were no observations on article 9 or the comment thereto.

Article 10: Islands

57. Referring to the third paragraph of the comment, Mr. ZOUREK wondered whether it was really necessary or even desirable in view of the eight years in which the Commission could have obtained expert advice on the subject, to refer to the lack of such advice as a reason for the Commission's failure to include an article on groups of islands. The main reason had surely been its inability to agree on the breadth of the territorial sea, and the lack of expert advice had been at most a subsidiary reason.

After some discussion, *it was agreed to replace the words "by the lack of expert advice on the subject" by the words "by lack of the necessary scientific and technical data"*.

58. Mr. FRANÇOIS, Rapporteur, pointed out, with regard to the last paragraph of the comment, that the comment on the draft adopted at the seventh session had contained the further words: "while the general rules will normally apply to other islands forming a group". He had deliberately omitted those words, which appeared to be plainly misleading. The question whether the general rules applied to a particular group of islands was precisely the question which would have to be examined in each particular case.

Article 11: Drying rocks and drying shoals

59. With reference to a point raised by Mr. AMADO and Mr. FRANÇOIS, Rapporteur, concerning the words "for further extending the territorial sea" in the article itself, Sir Gerald FITZMAURICE felt that the present text should be retained since it did indicate as clearly as perhaps could be indicated within the compass of a single sentence that drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one rock or shoal to another. The most that could be done was to delete the word "further" if so desired.

It was agreed that that word should be deleted.

The meeting rose at 6.25 p.m.

380th MEETING

Tuesday, 3 July 1956, at 10 a.m.

CONTENTS

	Page
Consideration of the Commission's draft report covering the work of its eighth session (<i>continued</i>)	
<i>Chapter II: Law of the sea</i>	
<i>Part I: The territorial sea (A/CN.4/L.68/Add.2) (continued)</i>	
Article 12: Delimitation of the territorial sea off opposite coast	283
Article 13: Delimitation of the territorial sea at the mouth of a river	284
Article 14: Delimitation of the territorial sea of two adjacent States	284
Article 15: Meaning of the right of innocent passage	284
Article 16: Duties of the coastal State	284
Article 17: Rights of protection of the coastal State .	284
Article 18: Duties of foreign ships during their passage	284
Article 19: Charges to be levied upon foreign ships	284
Article 20: Arrest on board a foreign ship	284
Article 21: Arrest of ships for the purpose of exercising civil jurisdiction	285
Article 22: Government ships operated for commercial purposes	285
Article 23: Government ships operated for non-commercial purposes	286
Article 24: Passage	286
Article 25: Non-observance of the regulations	287
<i>Part II: The high seas (resumed from the 377th meeting)</i>	
Article 5: Status of ships (<i>resumed from the 376th meeting</i>)	287
Article 41: (<i>resumed from the 378th meeting</i>)	288
<i>Chapter IV: Other decisions of the Commission (A/CN.4/L.68/Add.5)</i>	288
<i>Chapter III: Progress of work on other subjects under study by the Commission (A/CN.4/L.68/Add.4)</i>	288
<i>Chapter I: Organization of the session (A/CN.4/L.68)</i>	288

Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Consideration of the Commission's draft report covering the work of its eighth session (*continued*)

Chapter II: Law of the sea

Part I: The territorial sea (A/CN.4/L.68/Add.2) (continued)

1. The CHAIRMAN invited the Commission to resume its consideration of Chapter II, Part I, of its report.