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Summary record of the 166th meeting

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

Extract from the Yearbook of the International Law Commission:-
1952 , **vol. I**

27. The principle of the freedom of the seas was one of international interest as distinct from national interest, and the three-mile limit was an expression of that principle. It might be argued that as States unconditionally recognized the right of innocent passage, the question of the breadth of that sea was not, perhaps, of paramount importance. However, it must be borne in mind that States had very wide powers of jurisdiction over vessels passing through that belt and might well interfere with the right of innocent passage.

28. As the proposal for a six-mile limit was no true solution, and as the principle of the freedom of the seas should not be lightly abandoned, the Commission might concentrate its attention on three matters. First, there was the possibility offered by the principle of the contiguous zone, which in some ways had tended to become part of customary international law. Secondly, there was the recognition of the right of coastal States to protect the natural resources, and particularly the fisheries, of their territorial sea — as distinct from a right to exclude foreign nationals from exploiting those resources. Thirdly, the Commission might consider a more orderly system of the régime of the high seas, which at present in some respects bordered upon anarchy and was conducive to waste.

29. In that manner it might be possible to obviate some of the problems arising out of the question of the width of the territorial sea, and it would be as well to proceed in the assumption that, given the existing political situation in the world, the possibility of devising a generally acceptable solution was remote. Even if the situation were different nothing short of an international legislature with power to impose its decisions could be effective in achieving a uniform rule. On the other hand, if some measure of agreement could be reached on the other rules adumbrated in the report, the evils of divergent national laws and of unilateral claims to a wide belt of territorial waters might be minimized.

30. Mr. ZOUREK said that, as no general treaty existed laying down a limit for territorial waters, the reply to the question asked by the special rapporteur as to whether there was a positive rule on the subject must be sought in existing practice and legislation. The information included in the commentary on article 4 showed that States did not consider themselves bound by any rule of international law in deciding the breadth of their territorial waters, and that they fixed it in accordance with their own interests. That might be a lamentable state of affairs which ought to be remedied by the progressive development of international law, but as Mr. Lauterpacht had argued, the possibility of reaching agreement at the present moment was very slight indeed.

31. He confessed himself unable to reply to the other question asked by the special rapporteur, namely, whether the Commission could propose a limit *de lege ferenda,* without first ascertaining the views of States with a seaboard. Unless their opinion was known it would be impossible to formulate a generally acceptable proposal.

32. Referring to the point raised by Mr. Hsu, he observed that Mr. Hsu himself had been the first to introduce a political element into the discussion at the preceding meeting. He (Mr. Zourek) wished to state that it was the Central People's Government of the People's Republic of China which, under international law, was alone entitled to represent that country.

33. The CHAIRMAN *ruled* that no reference to political matters or expressions of personal opinion on the status of any government could be entertained. The Commission, as a body of legal experts, had a very definite scientific task, and no political question came within its purview.

34. Mr. HSU accepted the Chairman's ruling.

35. Mr. CÓRDOVA expressed his appreciation of Mr. François' report, which was a real contribution to a study of the problem and a further proof of its author's wide knowledge and unremitting efforts to advance the codification of international law. His presentation of the report in the form of articles accompanied by detailed commentaries merited all praise.

36. If the Commission failed to find any rule in international law delimiting the breadth of the territorial sea, it would have to determine whether it should take action *de lege ferenda.* He was uncertain whether Mr. Lauterpacht believed in the possibility of stating a general rule. a matter on which legal authorities differed very considerably. For example, in the eighteenth century, Vattel, while expressing no definite opinion on the three-mile rule, said that national and economic considerations should prevail. De Martens had been in favour of a limit of three leagues, whereas Florio had held that the limit should be determined by necessity and the public interest. Hall, writing in 1880, had questioned whether the three-mile rule had ever been unequivocally determined, and Gidel had declared that it was not a positive rule of international law, but only one which existed in the municipal law of certain States.

37. He himself agreed with Mr. Scelle's view, quoted by the special rapporteur, that:

> "In reality there is no rule established by custom, merely rules laid down by States, either unilaterally, or more rarely by treaty, compliance with which they enforce within the limits of their power... In short, there is anarchy."[4]

38. The American Institute of International Law, in preparing a draft on the territorial sea in 1927, had not ventured to prescribe its limit, a matter which it had decided must be left to representatives of governments. The Harvard Research draft of 1929, on the other hand, recognized the three-mile limit.

39. Attention should also be drawn to the Panama Declaration of 1939, whereby the American States claimed that, in the waters adjacent to the American

[4] A/CN.4/53 (mimeographed English text, p. 17; printed French text, comment to article 4, para. 9).

continent, a zone 300 miles wide should be free fom hostilities by non-American belligerents.

40. The special rapporteur had included in his report a list showing the present practice of States. He had, however, appeared to accept the view that a claim to exercise only certain rights over an area of sea did not constitute a claim to the whole of that area as territorial sea. A number of States, for example, had claimed to exercise exclusive fishing rights over a breadth of twelve or more miles of the belt of sea off their coasts, but maintained that their territorial sea was still only three miles wide. Similarly, some countries claimed the right to exert customs control over a greater breadth of sea than they indicated as their territorial sea. In his (Mr. Córdova's) view, the whole sea-area over which a State claimed to exercise any rights should be regarded as the territorial sea which it claimed. If a State laid claim to a twelve-miles-wide belt of sea for the purposes of exclusive fishing rights but did not claim to exercise any other rights beyond three miles, all that that meant was that it considered itself incapable in practice, or was undesirous, of exercising other rights outside that limit. But if it claimed the right, for example, to prevent aliens from fishing in an area, it was surely claiming sovereignty over that area.

41. The debate had confirmed his view that the Commission could take no action with regard to the breadth of the territorial sea. Attention had already been drawn to the passage in the special rapporteur's report which read:

> "It seems very doubtful, indeed, that a compromise on the six-mile rule can easily be achieved. It is clear however that in view of all the conflicting views which have been expressed on this matter, no agreement will be possible if neither side is prepared to make concessions." [5]

The Commission was not composed of government representatives, and its members were not therefore in a position to make concessions or seek compromises on a political matter. The only contribution which the Commission might have made to the problem would have been to indicate a juridical basis for its solution. Unfortunately, no such juridical basis existed. The only juridical principle governing the breadth of the territorial sea which had ever been proclaimed was the principle, propounded by Bynkershoek, that the territorial sea of a State should be regarded as all areas of sea within cannon-range of its coasts. In Bynkershoek's day, the range of a cannon had been approximately three miles, and it was for that reason that a three-mile limit had been generally adopted. With modern weapons, such as rockets, that principle could clearly not provide a realistic basis for a solution of the problem. There was therefore no juridical basis on which the Commission could decide the question. It could only leave it to be settled by world-wide, or failing that by regional, agreements. In the latter connexion, even if a provision of world-wide application was agreed upon, by the General Assembly or some other competent body, it should not preclude the possibility of regional agreements fixing other limits.

42. On the other hand, he agreed with the special rapporteur that failure to lay down any rules concerning the breadth of the territorial sea need not deter the Commission from continuing to strive for agreement on the other disputed questions, in the way that consideration had deterred the 1930 Codification Conference. The questions of what constituted sovereignty over the territorial sea, and of the restrictions imposed upon such sovereignty, were, in themselves, of the utmost importance.

43. Mr. SPIROPOULOS pointed out that the Commission had already agreed that a State's territorial sea was a belt of sea over which it exercised sovereignty, by which was meant full sovereignty, subject only to the conditions prescribed by international law. Outside that area, a State could, of course, exercise certain rights, and the belts of sea over which it did so where normally called contiguous zones. The concept of contiguous zones had been accepted by the Commission at its third session, and in article 4 of part II of the Draft Articles on the Continental Shelf and Related Subjects which it had then prepared it had even defined their maximum limits.[6] The Commission could not therefore now accept Mr. Córdova's contention that the territorial sea was the belt of sea in which any rights were exercised by a State.

44. On the other hand, he agreed with Mr. Córdova that there was no legal principle for fixing the maximum breadth of the territorial sea. The right of coastal States to fix the limits of their territorial sea where they wished was subject only to the general interests of the international community. The question remained, of course, how far the territorial sea could extend before those general interests were harmed. The 1930 Codification Conference had not been faced with such great differences of view in the matter as was the Commission. At that conference no State had claimed a limit of twelve miles, and only one had claimed a limit of six miles. It had been mainly the insistence of certain countries on an extension of the limit to four miles which had caused the breakdown of the Conference. Subsequently, the example of that country which had asserted its claim to a limit of six miles had been followed by other countries in the same region. Now, however, some countries were claiming a limit of twelve miles, on grounds of national security. He did not think that the Commission, which was attempting a task of lasting codification, could base itself on an approach which was dictated by conditions which everyone hoped would be transient and which was unsupported by any well-established practice.

45. He agreed, therefore, with the special rapporteur's suggestion that the maximum limit should be fixed at

[5] A/CN.4/53 (mimeographed English text, p. 20; printed French text, comment to article 4, para. 21).

[6] See Report of the International Law Commission covering its third session, *Official Records of The General Assembly, Sixth Session, Supplement No. 9*, p. 20. Also in *Yearbook of The International Law Commission, 1951*, vol. II, p. 144.

six nautical miles. If that limit were accepted by the great majority of States, some progress in the work of codification would have been made. If that was impossible, however, he agreed that the question could be left open and that the Commission could usefully concentrate on the other aspects of the special rapporteur's report.

46. Mr. SCELLE said that he had listened with great interest to the statements by Mr. Lauterpacht, Mr. Córdova and Mr. Spiropoulos, all of which had confirmed him in his view that no rule of international law existed fixing the breadth of the territorial sea, and that none could exist. The only rule which applied in that respect was not a rule of law, but one of expediency, namely, the rule that the limits of the territorial sea ended *ubi finitur armorum vis*. In other words, the territorial sea was the area of sea which, at any given time, a State felt that it needed and that it could effectively defend. The State concerned would not extend that area so far as to provoke undue opposition from other powerful States. At one time, for example, the United States of America had wished to extend far beyond the three-mile limit the area in which it could search ships suspected of smuggling alcoholic liquor; it had proceeded to do so, concluding treaties for the purpose with those States whose opposition it had felt it worthwhile avoiding at that cost.

47. He agreed, in fact, with Mr. Lauterpacht that the Commission should move in the direction of the concept of contiguous zones; for, if that concept were adopted fully, the concept of the territorial sea would be robbed of all its meaning. In reality, each State claimed to exercise certain rights in certain zones, the breadth of which depended on its needs and strength. The fact must be faced that, in almost all respects, those needs were steadily expanding. The trend was therefore towards increasing conflicts and eventual anarchy. The best that could be hoped for in present circumstances was that there would be a rough equilibrium between the claims of the various countries with, perhaps, the possibility of recourse to arbitration or conciliation in case of dispute. What Mr. Lauterpacht and Mr. Córdova had said encouraged him to assert that, in the long run, no solution to the problem would be possible until an international legal authority, possessing obligatory jurisdiction over the various States, had been constituted.

48. Mr. AMADO felt that the concept of contiguous zones must be kept distinct from that of the territorial sea. The former related to the régime of the high seas, and it was in that context that it had been discussed at length at the previous session.

49. Mr. SCELLE said that his point was that if a State was permitted to exercise one right after another in zones extending beyond the limit of its territorial sea, the concept of the territorial sea became void of all significance. In his view, it was not a question of the exercise of sovereignty, but of particular rights (servitudes) possessed by the coastal State under international law. The only sovereignty which could be exercised on the high seas was the sovereignty of the international community, expressed through international law.

50. Mr. CÓRDOVA asked whether Mr. Scelle did not agree that treaties delimiting the breadth of the signatory States' territorial sea constituted an element of international law.

51. Mr. SCELLE agreed that such treaties were international law for the signatory States. Their application could not however be world-wide or lasting, for the reasons he had already given.

52. Mr. SPIROPOULOS asked Mr. Scelle whether he would not consider it contradictory to international law for a State such as Italy to proclaim that the whole of the Adriatic, for example, was *mare clausum*.

53. Mr. SCELLE replied that in his view all areas of sea were international public domain. He did not recognize any State's sovereignty over any part of it. Still less, therefore, could he recognize the principle of *mare clausum*.

54. Mr. HSU said that he had listened with great sympathy to the statements supporting a limit of three miles, since his own early training in the matter had been based on that principle. Viewing the question as a member of the Commission, however, he felt bound to state that the arguments advanced in its favour were unconvincing. It was true that the majority of States had conformed to it in the past, but majority usage did not make international law. Moreover, those States which at present claimed to exercise various rights outside the three-mile limit, while still formally claiming that their territorial sea was only three miles wide, could not really be regarded as supporters of that limit.

55. On the other hand, he agreed with Mr. Lauterpacht that there were no good reasons in favour of a six-mile limit. Taking all considerations into account, he was convinced that a twelve-mile limit was the best, even though it might be too optimistic to hope for its immediate universal acceptance. If the Commission stated that a coastal State should exercise sovereignty over its territorial sea, he thought it was obvious that it must at least attempt to narrow the divergence of views on the limits of that sea. If it proposed a reasonable limit which would meet practical requirements, it would contribute to a solution of the problem, even though that solution lay somewhat outside its own responsibility.

56. Mr. HUDSON agreed with the special rapporteur "that a proposal to fix the breadth of the territorial sea at three miles would have no chance of success". He also agreed with him that "the problem must be solved, since if each State were left absolutely free to determine the breadth of its territorial sea itself, the principle of the freedom of the seas would suffer to an inadmissible extent".[7]

57. Of the 48 independent States mentioned in the list given in the special rapporteur's report, he calculated

[7] A/CN.4/53 (mimeographed English text, p. 18; printed French text, comment to article 4, para. 16).

that only 22 accepted the three-mile limit — and even some of those extended that limit for certain purposes; another 16, making 38 in all, accepted a maximum limit of six miles; 10 were in favour of a greater breadth, but only two of them, Chile and El Salvador, claimed more than twelve miles. He had come to the conclusion, and he thought the special rapporteur agreed with him, that the Commission could not attempt to formulate a rule which would cover the practice of all States without exception. The special rapporteur had suggested that the limit should be not less than three but not more than six miles. That would exclude a considerable number of States, and he asked therefore whether the special rapporteur would not agree to the maximum breadth being raised to twelve miles.

58. It was true, he agreed, that whatever the limit set, certain States would continue to seek to establish certain zones in which they would exercise control for specific purposes. Those zones, however, would not necessarily be contiguous with the territorial sea. Furthermore a larger limit such as 12 miles would tend to discourage the establishment of those zones, and in that connexion it was worth pointing out that less than half the States which had expressed their views on the question at the 1930 Codification Conference[8] had favoured the concept of contiguous zones. Whatever the figures chosen, provision would also have to be made for certain exceptions, established by history, with regard to the waters of certain seas and gulfs.

Further discussion was adjourned.

The meeting rose at 1.5 p.m.

[8] See Conference for the Codification of International Law (The Hague, March-April 1930), Report of the Second Commission (Territorial Sea), League of Nations Publication, *V. Legal, 1930, V. 9* (document C.230.M.117.1930.V), pp. 15—17.

167th MEETING

Friday, 18 July 1952, at 9.45 a.m.

CONTENTS

Chairman: Mr. Ricardo J. ALFARO.

Rapporteur: Mr. Jean SPIROPOULOS.

Present:

Members: Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat: Mr. Ivan S. KERNO (Assistant Secretary-General in charge of the Legal Department), 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 5 of the agenda) (A/CN.4/53) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the Draft Regulation contained in the special rapporteur's report on the régime of the territorial sea (A/CN.4/53).

ARTICLE 4: BREADTH (*continued*)

2. The CHAIRMAN, speaking in his capacity as a member of the Commission, recalled that the first point which the Commission had been considering was whether a rule of international law existed with regard to the territorial sea and its breadth. His view on that point was that both the writings of international law authorities and the attitude of governments showed that it was a universally recognized rule that coastal States had a right to exercise sovereignty, or at least very wide powers, over a belt of sea extending outwards from their coasts, and that that belt had a minimum breadth of three miles. On the other hand there was no agreement that the breadth should be limited to three miles. As Mr. Scelle had pointed out, no uniform rule existed in that connexion, and both writers and governments displayed an anarchy of thought and action; in their theories, proposals and official pronouncements the breadth of the jurisdictional maritime zone had been variously proclaimed as anything from 3 to 300 miles, on different grounds and for different purposes. He could only subscribe therefore to Gidel's statement that:

> "There is no rule of international law concerning the extent of the jurisdiction of the coastal State over its adjacent waters other than the minimum rule whereby every coastal State exercises all the rights inherent in sovereignty over the waters adjacent to its territory to a distance of three miles, and partial jurisdiction beyond that distance in the case of certain specific interests."[1]

3. The three-mile rule had only been opposed in so far as it set a maximum limit. He knew of no authority who had attacked it on the ground that sovereign or jurisdictional powers over the maritime belt should be exercised within a lesser distance than three miles. Even those who opposed the three-mile rule recognized its existence, as could be seen from the passages by Borchard and Hyde quoted in the special rapporteur's report. Furthermore, a number of important international treaties had explicitly or implicitly recognized the three-mile limit as the accepted international rule, while other treaties stipulating a wider limit of maritime jurisdiction for specific purposes, such as the prohibition treaties between the United States of

[1] Quoted in document A/CN.4/53 (mimeographed English text, p. 17; printed French text, comment to article 4, para. 9).