Document:-
A/CN.4/SR.167

Summary record of the 167th meeting

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

Extract from the Yearbook of the International Law Commission:-
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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.

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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).

America and other countries, had done so by way of an exception to the general rule.

4. On the other hand, he could find no evidence of a general agreement that the maximum breadth of the territorial sea should be fixed at any particular figure greater than three miles. At the 1930 Codification Conference, out of thirty-two delegations expressing concrete opinions on the subject, seventeen had been in favour of three miles, four in favour of four miles and eleven in favour of six miles. More recently a considerable number of States had claimed a maritime belt of twelve miles, but not always for a full exercise of all sovereign or jurisdictional rights, but only for certain specific purposes. Many other States had unilaterally fixed the breadth of their territorial sea at varying distances greater than three miles. But it seemed impossible to maintain that a rule of international law existed whereby a wider maritime belt was accepted by the community of States.

5. Neither could he recognize it as a rule of international law that each State had an unlimited right to determine the breadth of its territorial sea. States could only do so within a limit established by international law. He could not conceive of a rule that authorized a State to extend its maritime jurisdiction up to the coast-line of other States or that authorized two or more States bordering a particular sea to convert it, by bilateral or multilateral agreement, into a *mare clausum*. That would be the negation of law ; it would be tantamount to proclaiming the reign of force and the abolition of the freedom of the seas. He would therefore be guided in his vote with regard to article 4 by the following conclusions.

6. First, there was a rule of international law that every State had a right to exercise sovereign powers over a belt of sea adjacent to its coastline to a minimum breadth of three miles. Secondly, there was wide disagreement as to whether the territorial sea should extend beyond three miles and, if so, how far. Thirdly, in very few cases indeed was it proposed that it should exceed twelve miles. Fourthly, in the absence of any general agreement on a maximum limit of three miles or any other particular limit, the conflict could not be solved by any existing rule of customary law, and a solution would have to be sought by international agreement. Fifthly, as a body charged with the progressive development and codification of international law, the International Law Commission was fully competent to study and declare when, on a certain subject, a rule of *lex lata* was applicable or a rule of *lex ferenda* was necessary. Lastly, therefore, the Commission could properly submit to governments, for their consideration and decision, a clause such as that contained in article 4 of the special rapporteur's report, whereby States could, if they so desired, regulate the matter by international agreement and reconcile their jurisdictional needs in respect of the waters adjacent to their coasts with the vital principle of the freedom of the seas.

7. Mr. KOZHEVNIKOV, after assuring the Chairman that he always confined his remarks to legal matters even when forced to reply to statements which either clearly went outside that framework or tended to do so, wished briefly to express his views on a point raised at the previous meeting, namely, the so-called reciprocity between east and west with regard to the twelve-mile limit of the territorial sea.

8. The Soviet conception of international law derived from the belief that the function of international law was to be an instrument of peace and collaboration between countries, irrespective of their political or economic structure, and on the basis of sovereign equality and non-interference in the domestic affairs of others. The Soviet Union did not fear peaceful rivalry with the capitalist countries and it was not its fault that some of them had declined such peaceful rivalry, preferring a policy of force and adventurism. The Soviet conception of law rejected and utterly condemned the theory of force as the basis of law, which had been expounded by one member of the Commission who, invoking the alleged sovereignty of law, had proposed that the whole principle of the territorial sea be replaced by that of the high seas in the general sense of the term. Presumably, that would serve the interests of those who sought to establish a world-wide hegemony over the seas.

9. At the previous meeting, the — to him — equally absurd theory had been put forward that the three-mile limit was an international rule and should be taken as a starting point. That was nothing more than a view most frequently defended in British theory and practice. Pretensions to ascribe international significance to such a parochial attitude were naive. He could bring evidence to show that in Russia they had been exposed as totally without foundation as long ago as the 1830s. The false premise adopted by partisans of the three-mile limit as an international rule revealed the absurdity of their claim that the establishment of a wider limit was an innovation and that the onus for justifying it lay on the governments concerned. In Russia, for example, the twelve-mile limit had been established as early as 1909, in confirmation of existing practice.

10. All that was consistent with modern international law, which did not lay down any definite limit as an international standard. It was a sovereign right of each State to determine the breadth of its territorial sea ; the remarks made in the Commission about anarchy and arbitrary action were inapposite. The characteristic features of international law as the regulator of relations between States, and the nature of those relations themselves, which demonstrated that the action of governments in respect of their territorial sea was not arbitrary but based on legitimate considerations recognized as such by international law, had been forgotten. Under the guise of suppressing alleged anarchy an effort was being made, which the Commission must oppose, to establish a supra-national dictatorship which would inevitably lead to the destruction of sovereignty and consequently of international law itself.

11. Mr. LIANG (Secretary to the Commission) said that he had listened with great interest to the debate.

With regard to the relationship between the terriorial sea and contiguous zones, the commentary to article 4 in Part II of the Draft Articles on the Continental Shelf and Related Subjects [2] which the Commission had approved at its third session showed clearly the reasons why the Commission had accepted the concept of contiguous zones, namely, that the jurisdiction of a state in the territorial sea was general while in the contiguous zone it was fragmentary and supplementary. He suggested that it would be inconsistent now to argue that contiguous zones were merely an extension of the territorial sea, or that adoption of that concept robbed the concept of the territorial sea of all its meaning. He thought it was more accurate to state that contiguous zones were an attempt to alleviate the conditions brought about by the fact that the recent tendency to extend the area of sea in which a State wished to exercise certain rights was not yet reflected legally in an extension of the territorial sea.

12. He recalled that, after the 1930 Codification Conference, Gidel had stated that the idol of the three-mile limit was broken. Even if that were true, he did not think it had been broken as a result of that Conference. In any case there was no agreement on the matter. In the comment on article 2 of the Harvard Research draft [3] it was stated : " The practice of States reveals no general acquiesence in the inclusion of a belt of more than three miles in width ". In his view the truth was that by successive challenges a rule of international law might gradually lose all its authority, but that it was difficult to say exactly when it became obsolete. He did not think, however, that it was necessary for the Commission to decide whether the three-mile rule still existed. All that was required of it was to submit a concrete proposal, which, in the present case, should clearly be accompanied by a commentary conforming in all particulars to the provisions of article 20 of its Statute.

13. It had been suggested that the maximum limit should be set at twelve miles. He merely wished to remind the Commission that there were two sides to the question. Many States, including several major Powers, did not wish other States to extend their territorial sea beyond three miles. Adoption of a maximum limit of twelve miles would require a great concession on their part.

14. Mr. FRANÇOIS felt that the debate, which was the first on the subject in an international gathering since the 1930 Codification Conference, had been most instructive. He had been particularly interested in the views expressed by Mr. Scelle, but feared that they might give rise to some misunderstanding. Mr. Scelle had argued that there was nothing to prevent a State extending the belt of sea in which it claimed to exercise certain rights to as far as its interests required. That did not mean, however, that a State could extend its sovereignty over as large a belt of sea as it wished, for Mr. Scelle rejected the whole concept of State sovereignty over any portion of the seas. His view must be considered as a whole.

15. The great mapority of the Commission, however, accepted the concept of State sovereignty over the territorial sea, but did not agree that States could extend the breadth of that sea at will. He felt that Mr. Scelle had painted the position in too dramatic a light. The problem was not whether to remove all restrictions on the breadth of the territorial sea, but only whether to increase it to six miles, or, as some States claimed, to twelve miles. In his view the few States that claimed more than twelve miles were confusing the territorial sea with the continental shelf.

16. Mr. Scelle had also stated that the concept of the contiguous zone robbed the concept of the territorial sea of all its significance. He would only recall that the Commission had already, at its third session, considered that question at length and agreed to permit contiguous zones for the exercise of certain specific rights of control. What the Commission was now considering was the breadth of the zone in which States should be permitted to exercise sovereign rights.

17. Mr. Lauterpacht had suggested that he (Mr. François) had omitted from the list given in his report certain of the States which at present applied the three-mile limit ; he would point out, however, that, as stated in his report, that list included only the States which applied that limit " either alone or in combination merely with a contiguous zone for customs, fiscal or sanitary control (the only contiguous zone which the International Law Commission declared its readiness to accept) ".

18. With only thirteen States applying it, it really could not be claimed that the three-mile rule was still in force. On the other hand, almost no voice had been raised in support of the view that there should be no limit.

19. The objections to a twelve-mile rule were obvious : few claimed it, and many would oppose it. Its adoption, however, would make the rule of almost universal application, and almost entirely eliminate the problem of contiguous zones, whose maximum breadth the Commission had already fixed at twelve miles. Particularly as regards fishing rights, however, its adoption would be injurious to the interests of a number of countries. For that reason, therefore, he wondered whether the Commission could justifiably state that such a rule should be made a rule of international law.

20. In his view the Commission should, first, recognize that international law did not require the territorial sea to be restricted to three miles in breadth and, secondly, state that existing international law did not permit the territorial sea to be extended to more than six, or, if the Commission so decided, twelve miles in breadth. Agreement might be reached in an international

[2] 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.

[3] Harvard Law School, *Research in International Law. Nationality. Responsibility of States. Territorial Waters.* Special Supplement to *American Journal of International Law*, vol. 23 (1929), p. 250.

convention on a precise delimitation, but, as had been pointed out, such agreement, involving as it did political, economic and strategical considerations, lay outside the Commission's competence. There was no reason, however, why the Commission should not suggest to governments that a diplomatic conference be convened with a view to reaching such agreement and determining in what circumstances States should be permitted to depart from the limit agreed.

21. Mr. YEPES said that the three-mile rule neither conformed to existing international law, nor reposed on any scientific or technical basis. An examination of the figures quoted showed that all American States favoured a higher limit, so that a kind of American international maritime law did exist in the matter. A higher limit was also favoured by all European States, except the United Kingdom, Germany and the Netherlands. It was favoured also in Asia and Africa. Consequently 80 per cent of the world's population was opposed to the three-mile rule. In his view a minority could not be permitted to impose on the majority in regard to a question such as the freedom of the seas, which directly affected the interests of all peoples. Furthermore, the three-mile rule, which had been formulated for the first time by an Italian writer of the eighteenth century, was devoid of any scientific basis. Its strength had derived from its acceptance by the United Kingdom which, up to the beginning of the twentieth century, had been the greatest sea power in the world.

22. It was an established tradition in customary international law that all coastal States enjoyed the right to exercise sovereignty over a belt of sea along their coasts. It was also established in customary international law that that belt was limited in breadth. It was the Commission's duty to limit the breadth of the territorial sea so as to put an end to the anarchy which at present prevailed in that respect. The territorial sea was one of the most important questions before the Commission in the progressive development of international law.

23. In conclusion, he added that the maximum breadth of the territorial sea should be stated in kilometres and not in miles, so as to bring the approach to the problem up to date and into line with contemporary world conditions.

24. Mr. SPIROPOULOS observed that it was hardly necessary for Mr. Yepes to have addressed himself at such length to proving that the three-mile rule no longer existed, since the Commission, with the exception of Mr. Lauterpacht, seemed to have taken that general view, and even Mr. Lauterpacht had not expressed himself in very absolute terms.

25. It was, on the other hand, of interest to ascertain whether or not the right of States to fix the breadth of their territorial sea was restricted. In his view, the answer to that question was in the affirmative. Until the Conference for the Codification of International Law in 1930, the general opinion had been that the territorial sea should be three miles in breadth. At that time, however, a movement had started in favour of its extension to six miles. According to his recollection, the initiative had come from the Italian Government, which had been prompted by considerations of prestige, but he was never able to understand what real interest there could be in such an extension.

26. True, if a dispute were taken to an international tribunal, it was doubtful whether the three-mile rule would be upheld, but, on the other hand, if a State laid claim to a belt of over six miles, it was doubtful whether that would be found to be in conformity with international law and the principle of the freedom of the seas. It had been argued that a twelve-mile rule would have a greater chance of adoption, but it was very doubtful whether, in the light of the opinions expressed by representatives of the great Powers at The Hague Conference in 1930, such a proposal would in fact secure universal acceptance. In present conditions it would probably only be supported by some half-dozen States.

27. He also doubted whether a diplomatic conference such as proposed by Mr. François would achieve anything useful if it tried to establish a uniform rule delimiting the territorial sea, since at best any proposal could only be adopted by a majority. It would be in vain to expect unanimity.

28. Mr. HSU agreed with the Secretary that adoption of a twelve-mile rule would require a sacrifice on the part of States which still adhered to the three-mile limit. That should not be impossible, however, particularly since such States had already to a considerable extent impaired the validity of the three-mile rule under cover of establishing contiguous zones. The elimination of anarchy and protection of the freedom of the seas from further encroachment were of sufficient importance to warrant States making concessions.

29. He could not agree with Mr. Spiropoulos that it was illusory to suppose that a uniform generally acceptable rule could be devised.

30. Mr. AMADO said he had already stressed the importance of not confusing the territorial sea with the contiguous zone. Any reasonable government was aware of its weighty responsibilities in respect of the territorial sea and was therefore interested in its limits being clearly defined. On the other hand, the responsibilities associated with a contiguous zone were of a transitory nature.

31. Mr. Yepes had stated that an anonymous Italian authority had formulated the three-mile rule, but that was not the way in which rules of international law were established.

32. He would not for the time being comment on Mr. François' proposal for convening a diplomatic conference as he had had no time to reflect upon it.

33. Mr. SANDSTRÖM said that he shared the view expressed at the previous meeting by Mr. Lauterpacht but, in order to advance the progressive development of international law, would vote in favour of Mr. François' proposal for a six-mile limit.

34. Mr. SCELLE said that while he had not been guilty of confusing the territorial sea with the contiguous zone, he nevertheless felt that the difference was only one of words. It perhaps consisted merely in States claiming 90 per cent sovereignty over the territorial sea, and only 50 per cent of sovereignty over the contiguous zone, and 20 per cent sovereignty over the continental shelf.

35. Mr. François had suggested that the breadth of the territorial sea be delimited at six or twelve miles. Indeed there was no reason why it should not be twenty-four miles. Since stress had been laid by certain members on the necessity of acceptance by governments, he might argue that by the time some kind of international agreement were reached on the subject, a twenty-four-mile rule would have a better chance of acceptance.

36. Mr. LAUTERPACHT said that, as he understood it, Mr. François had proposed, first, that the Commission should ascertain whether or not the three-mile limit had ceased to be a rule of international law and, second, that the Commission should declare that States were not entitled to extend their territorial sea beyond either six or twelve nautical miles. The first problem was of course of great legal interest and he suggested that the Commission treat it separately from the second.

37. Mr. CÓRDOVA considered that the Commission was more or less agreed that no three-mile rule existed in international law ; there was, however, another issue to be decided, namely, whether the Commission should propose a limit for the territorial sea. He, himself, and probably Mr. Scelle too, would reply in the negative. The Commission would then discuss whether or not to recommend a six-mile limit, and the calling of a diplomatic conference in the matter.

38. Mr. KOZHEVNIKOV said that, although the Chairman seemed to assume that Mr. François' proposals were to be taken as the basis for further discussion, a formal decision on the part of the Commission was necessary.

39. Mr. HSU considered that there was no need for the Commission to take up time in discussing whether or not to recommend a six or twelve-mile limit. The way in which the issue had been expressed by Mr. François was preferable.

40. Mr. CÓRDOVA said he had understood Mr. François to argue that the Commission should declare itself in favour of adopting a six-mile limit, but Mr. François had not explained in his report any juridical reason for that rule. Furthermore, countries with a six or twelve-mile limit were definitely in a minority.

The meeting rose at 11.40 a.m.

168th MEETING

Monday, 21 July 1952, at 2.45 p.m.

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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. Georges SCELLE, Mr. J. M. YEPES, 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).

Date and place of the fifth session (item 7 of the agenda) (*resumed from the 150th meeting*) [1]

1. The CHAIRMAN said that he had received the following communication from Mr. Kozhevnikov :

" Dear Mr. Chairman,

" Now that I have looked more closely into the question of where the next session of the Commission should be held, I find that I too am disposed to vote in favour of Geneva.

" I should therefore be glad if you would arrange for this statement to be included in the summary record.

" I have the honour to be etc.

(*Sgd.*) F. I. Kozhevnikov."

2. Mr. el-KHOURI recalled that he too had abstained from the vote at the 150th meeting. As it now appeared that all other members of the Commission were in favour of holding the next session in Geneva, he would rally to their unanimous decision.

3. Mr. ZOUREK said that, as the last of those who had abstained from the vote at the 150th meeting, he too wished, on reflection, to vote in favour of the fifth session of the International Law Commission being held in Geneva.

4. Mr. CÓRDOVA said that he wished to place on record that, if he had been present on the occasion of the vote on the place of the next session, he also would have voted in favour of Geneva.

[1] See summary record of the 150th meeting, para. 90.