Document:-
A/CN.4/SR.254

Summary record of the 254th meeting

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

Extract from the Yearbook of the International Law Commission:-
1954 , **vol. I**

Conference of The Hague had shown that there were no rules in international law defining the breadth of the territorial sea. Consequently, it was for each State, by virtue of its sovereignty, to fix the breadth of its territorial waters in keeping with its particular needs and with the provisions of international law. In taking up that question the Commission might waste time without achieving a great deal. He saw no objection to preparing a draft on the régime of the territorial sea which did not delimit the breadth of that sea, though after the receipt of the replies of Governments the question might be reconsidered.

60. Mr. SCELLE said that the arguments for and against immediate consideration of article 4 appeared equally good, and that he would therefore abstain from voting. He thought that every State had to have a territorial sea, but the Commission should not, in his opinion, fix a uniform limit; even a maximum limit might meet with objections, as the Special Rapporteur had himself admitted. Every case should be treated individually, and the best solution from the legal point of view would be to resort to arbitration or to apply to the International Court. That solution would be difficult to accept, but there were already a number of precedents. On the other hand the Commission should definitely oppose the tendency observable in certain States to identify the territorial sea with the continental shelf and to claim, for example, that their sovereignty extended over a maritime belt of 200 miles. Such an attitude he thought was the very negation of general international law.

61. The CHAIRMAN recalled that in the first report on the régime of the territorial sea (A/CN.4/53)[10] the Special Rapporteur had recognized even if for the time being it was impossible to adopt a uniform breadth for the territorial sea, it was nevertheless worth while to endeavour to agree on the other disputed points. Many Governments would probably like to know what was the exact position in the matter of the territorial sea; but the General Assembly would understand the Commission's inability to agree on a question with which it had been grappling unsuccessfully for three years. Furthermore, it was doubtful whether the Commission, being composed of experts and not of representatives of governments, was in a position to find an answer to it.

62. Mr. FRANÇOIS, Special Rapporteur, said he had not changed the views he had expressed in his first report. He nevertheless deemed it desirable to establish rules concerning the territorial sea and not to interrupt the work the Commission had undertaken. In the course of three years the problem had only been considered once by the Commission, and he was surprised that members should wish to dismiss his suggested solution without even discussing it. In the course of the present session, all that the Commission was being asked to do was to prepare a draft and to request Governments to comment on it: if the draft were to contain no provisions relating to the territorial sea, Governments would consider it very incomplete and would not be very disposed to answer.

63. Mr. LAUTERPACHT doubted whether the provisions of many of the draft articles were really affected by the issue concerning the limits of the territorial sea.

64. The CHAIRMAN said that, in his opinion, article 5 (base line) was unaffected by that issue.

65. Mr. HSU said that, as opinion in the Commission seemed to be deeply divided, it should decide whether the question of determining the limits of the territorial sea was within its terms of reference or not.

66. The CHAIRMAN said that, for the moment, the Commission was merely deciding the order in which the articles would be discussed. He then called for a vote on his proposal that article 4 should be discussed after the other articles had been dealt with.

The proposal was adopted by 5 votes to 4, with 2 abstentions.

67. Mr. SCELLE said that he would propose, at a subsequent meeting, a new draft article giving a definition of the territorial sea. That definition was an essential preliminary question; the Commission could not continue to discuss the territorial sea without first defining it, with special reference to the distinction between that sea and the high seas.

68. Mr. GARCÍA-AMADOR asked if it was agreed that the breadth of the territorial sea would be discussed in the course of the current session. He did not want the decision to postpone discussion thereon to be taken as a reason for deferring the question to a future session.

69. After an exchange of views, the CHAIRMAN said that the decision taken by the Commission meant simply that article 4 would be discussed after article 23; it did not impair in any way the right on the part of members of the Commission, when the time came to discuss article 4, to make whatever proposal they wished.

The meeting rose at 1 p.m.

[10] *Vide supra*, 252nd meeting, para. 54 and footnotes.

254th MEETING

Thursday, 24 June 1954, at 11.15 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, 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).

Régime of the territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77) [1] (*continued*)

CHAPTER II: LIMITS OF THE TERRITORIAL SEA (*continued*)

Article 5: Standard base line (A/CN.4/77) [2]

1. The CHAIRMAN invited debate on draft article 5.

2. Mr. FRANÇOIS, Special Rapporteur, said that article 5 should give rise to few difficulties. It was based on the regulation adopted at the Codification Conference at The Hague in 1930.[3] At the time, however, a somewhat broader text had been adopted covering cases of possible bad faith on the part of States in determining the limits of their territorial waters. The Committee of Experts which met at The Hague in 1953 had come to the conclusion that the provision referring to that possibility was unnecessary and should be deleted.[4]

3. The CHAIRMAN asked how the high-water or the low-water line could be used as a base line by countries, such as Sweden, where there were no tides.

4. Mr. FRANÇOIS, Special Rapporteur, replied that in countries with no appreciable tidal flow the base line should be the permanent line of the water.

5. In reply to a question by Mr. Córdova regarding the legal competence of the experts at The Hague, he said that the Committee had met under his chairmanship.

6. Mr. LAUTERPACHT thought that article 5 gave a good definition of the basic rule, although the introductory words "As a general rule" were too vague. If it was intended to mean that the breadth of the territorial sea was to be measured from the line of low-water mark subject to the provisions of article 6 and the provisions regarding bays and islands, the words "As a general rule" should be replaced by the words "Subject to the provisions of article 6". He made a formal proposal to that effect.

The proposal was adopted.

7. The CHAIRMAN agreed with Mr. Lauterpacht. The decision of the International Court in the Anglo-Norwegian fisheries case [5] had specified that the ruling with regard to archipelagoes did not constitute an exception but was merely the general rule as applied to a particular case.

8. Mr. FRANÇOIS, Special Rapporteur, said that he had drafted article 5 on the understanding that it should embody the general rule and article 6 the exceptions to it. He agreed that the introductory words were perhaps too vague.

9. Mr. ZOUREK inquired why the Special Rapporteur had given preference to the line of low-water mark in article 5 and proposed the straight-line method for the exceptional cases provided for under article 6.

10. Mr. FRANÇOIS, Special Rapporteur, replied that he had acted in what he believed to be the spirit of the decision of the International Court.

11. Mr. ZOUREK said that hitherto under existing international law States had been free to choose between the straight-line method and the methods based on the line of low-water mark. The Special Rapporteur had overlooked the fact that the Court had admitted the principle of the straight line not only in the case of well-defined bays but also in the cases of minor curvatures of the coast-line. In his second report [6] the Special Rapporteur had indeed interpreted the Court's decision as expressing the law in force. Accordingly, States should remain free to choose between the various methods of drawing the base line. Moreover, according to the second sentence of article 5 the high-water line was mentioned as a possible line from which to measure the territorial sea; such a provision conflicted with the international law as reflected in the practice of States.

12. Mr. FRANÇOIS, Special Rapporteur, was unable to agree with Mr. Zourek. Until the decision of the International Court the line of low-water mark had been accepted as the normal rule. No claim for freedom of choice had ever been made, and in the Anglo-Norwegian

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[1] *Vide supra*, 252nd meeting, para. 54 and footnotes.

[2] Article 5 read as follows:

"As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn which show the low-water line, the shore line (high-water line) shall be used."

[3] *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations Publication V. Legal, 1930.V.16), p. 217. The 1930 text read as follows:

"Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

"For the purposes of this convention, the line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.

"Elevations of the sea-bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base-line of the territorial sea."

[4] See the Report of the Committee of Experts, annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953*, vol. II.

[5] *I.C.J. Reports 1951*, p. 116.

[6] A/CN.4/61, comment to article 5, in *Yearbook of the International Law Commission, 1953*, vol. II.

fisheries case the claim had been formally advanced for the first time. The Court confirmed the traditional low-water line as the normal rule, adding that in exceptional cases the straight-line method could be used. He believed that his draft articles 5 and 6 correctly interpreted the Court's decision.

13. Mr. LAUTERPACHT hoped that the Special Rapporteur would not modify articles 5 and 6 as submitted to the Commission. Mr. Zourek, who proposed that States should retain their freedom of choice, should remember that the object of the Commission was precisely to establish binding rules so that those matters would no longer be left to the discretion of States. There was little object in codification which on main controversial points confined itself to giving States freedom of action.

14. The principle of following the coast-line was important in that it provided a safeguard for the freedom of the high seas. Article 5 was, from that point of view, well drafted and if article 6 contained exceptions to it, he was glad to see that the draft proposed by the Special Rapporteur had made the decision of the International Court considerably clearer. While the Court's judgement on the subject had developed international law, it had done so by reference to somewhat general principles which, unless defined, might become a source of uncertainty. That defect the present article 6 intended to eliminate. He hoped that the articles would not be modified in substance.

15. Mr. CÓRDOVA pointed out that it might be necessary to insert a provision relating to countries which had no tides. He asked if one and the same country could apply both the low-water line method and the straight-line method; and also what body would be competent to settle possible disputes.

16. Mr. FRANÇOIS, Special Rapporteur, said that a country would be able to apply both methods as required by the configuration of the coast. Possible disputes would probably be settled by arbitration.

17. Mr. ZOUREK pointed out that the method proposed in the second sentence of article 5 did not correspond to the view taken by The Hague Codification Conference in 1930 which had favoured the line of mean low-water spring tides. Article 5, as drafted, referred to the low-water line in cases where charts were available and to the high-water line in cases where there were none. The rule recommended in 1930 was more precise and more convenient in cases of doubt or dispute, and he inquired why the Special Rapporteur had found it necessary to depart to such an extent from the solutions adopted at The Hague.

18. Mr. FRANÇOIS, Special Rapporteur, said that the conclusions reached at The Hague in 1930 had been studied by the Committee of Experts which had in its turn proposed the new criteria. The official charts of most countries showed the low-water line, but where no such indication was given, ships at sea could only rely on the high-water line which, being identifiable with the shoreline, was always visible. The possibility of no charts being available had not been taken into consideration by the International Court at the time of its decision. It had proposed the mean low-water line as a criterion from which official charts should not stray.

19. Mr. SPIROPOULOS pointed out that if the line drawn on an official chart differed to any great extent from the tide-line a protest could be made and the chart corrected. He agreed that in practice the only possible solution from the point of view of ships at sea where no charts were available, was that advocated by the Special Rapporteur.

20. Mr. ZOUREK was unable to accept Mr. Lauterpacht's views. The Commission should prepare the work of codification, but should leave States complete freedom in solving such technical problems as the one under consideration.

21. Mr. FRANÇOIS, Special Rapporteur, pointed out, in reply to a question by Mr. Córdova, that the exact position of the low and high water lines was important for vessels at sea as it enabled them to identify the limits of the territorial and high seas. It was also important to know their exact positions for they affected the limits of the stretches of water lying between the coast and the base line where the right of passage might be subject to restrictions by the coastal State.

22. The CHAIRMAN put to the vote article 5 as amended by Mr. Lauterpacht.

Article 5 as amended was adopted by 12 votes to 1.

23. Mr. ZOUREK explained that he had voted against article 5 because he considered that, under international law, States were free to choose between the two systems: that of measuring the breadth of the territorial sea from the low-water line, and that of measuring it from straight base lines.

Article 6: Straight base line (A/CN.4/77)[7]

24. Mr. FRANÇOIS, Special Rapporteur, said that in drafting article 6 for his second report (A/CN.4/61) he

[7] Article 6 read as follows:

"1. As an exception, where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In this special case, the methods of base lines joining appropriate points on the coast may be employed. The drawing of base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"2. As a general rule the maximum permissible length for a 'straight base line' shall be ten miles. Such base lines may be drawn, where justified, between headlands on the coastline or between any such headland and an island, or between two islands provided that every such line remains within five miles from the coast and provided further that such headlands and/or islands are not more than ten miles apart. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea.

"3. Where 'straight base lines' are justified, it shall be the responsibility of the coastal State to give adequate publicity thereto."

had treated the judgement of the International Court in the Fisheries case,[8] a decision which had been given by a majority of ten judges to two, as a statement of the international law in force. The Commission had accepted in principle his draft article 6 as appearing in that second report. Since then, the committee of experts which had met at The Hague in 1953[9] had pointed out, *inter alia*, that the rule embodied in the Fisheries case judgement required to be clarified. It was essential not to depart appreciably from the general outline of the coast, and for that purpose, a maximum permissible length had to be laid down for the "straight base lines". That maximum length had been laid down at ten miles in the new draft article 6 in his third report (A/CN.4/77). Clearly, by laying down that the maximum permissible length for a "straight base line" would be ten miles, more of the sea was included than if the maximum permissible length had been, say, two miles.

25. Article 6, paragraph 2, provided that, where justified, such base lines could be drawn not only between headlands but also between a headland and an island, or between two islands, so long as all points on such lines were within five miles from the coast and so long as such headlands and islands were not more than ten miles apart in each case. The purpose of paragraph 2 was to provide for the special case of certain coasts which were deeply indented or which had islands in their immediate vicinity.

26. He recalled that the Commission had reserved its decision on article 4 which dealt with the breadth of the territorial sea. He thought that the Commission should nevertheless take a decision covering article 6, because he agreed with the committee of experts and with the ruling of the International Court that there was no relation between the length of "straight base lines" and the breadth of the territorial sea. Even if the territorial sea were to be 200 miles wide, it would still have to be measured from the same base line.

27. The CHAIRMAN said that in the Scandinavian countries, some of the provisions of draft article 6 had not met with approval. Firstly, the special régime for a deeply indented coast or one having islands in its immediate vicinity was not regarded in Scandinavia as an exceptional rule; that objection could, however, be met by not using the term "as an exception". Secondly, it was felt that a ten-mile maximum for the "straight base line" would be inconsistent with the International Court's judgement in the Fisheries case. That decision had stated that the ten-mile maximum had been adopted by some States in their municipal law and in conventions signed by them, and had also been recognized in arbitral awards; but the International Court had added that it was not a general rule of international law. The ten-mile maximum was not therefore approved of in the Scandinavian countries. There was no obvious reason for preferring a ten-mile maximum to, say, a twenty-mile or a thirty-mile maximum, for the straight base line.

28. Mr. FRANÇOIS, Special Rapporteur, was disappointed to hear that the new draft article 6, based on the conclusions of the committee of experts, had not met with approval in the Scandinavian countries; one of the experts had been Professor L. E. G. Asplund of the Geographic Survey Department of Stockholm, who had been in full agreement with the other experts.

29. In the Fisheries case, the International Court had necessarily to give a decision based on *lex lata*; it had therefore stated that there was no accepted rule of international law laying down a ten-mile maximum for straight base lines. Members of the Commission fully agreed that they were not merely codifying the existing international law relating to the territorial sea. They were trying to settle the rules for the future. It was therefore quite natural that they should be discussing a rule concerning straight base lines that was more definite and precise than the Court's decision on that point. The choice of a ten-mile maximum was indeed somewhat arbitrary. He would point out, however, that seafaring men had a preference for a distance of five miles, which was the range of vision in either direction in clear weather. A line ten miles long would join all points from which one at least of two headlands or islands could always be seen.

30. Mr. HSU suggested that the discussion of article 6 should be postponed, in view of the fact that article 4, which laid down the breadth of the territorial sea, had already been postponed. It was obvious that if the territorial sea were to extend 200 miles from the coast, it became a purely academic question whether it was measured from straight base lines of a maximum length of ten miles or not. He wished to stress that only one-third of the States of the world still adhered to the three-mile limit for the territorial sea; it was therefore not improbable that the Commission would finally adopt a different limit. In fact, even if the territorial sea were to extend to twelve miles, the significance of article 6 was materially reduced.

31. Mr. CÓRDOVA said that the question was a highly technical one. It seemed to him that the purpose of the ten-mile maximum length permissible for straight base lines aimed at keeping the base line as close as possible to the general outline of the coast.

32. Mr. LAUTERPACHT said that article 6 seemed to him generally acceptable. He would, however, suggest some alterations. Two of them concerned the wording of the article. Firstly, he would suggest substituting the words "where exceptional circumstances permit" for the opening words used in the draft of article 6, paragraph 1. Secondly, the second sentence of article 6, paragraph 1, should read (in the plural) "in these special cases" instead of the singular, as it referred to several cases and not one.

33. He would suggest moreover a further amendment of substance. He did not agree with the closing words of

[8] *I.C.J. Reports 1951*, p. 116.

[9] *Vide supra*, footnote 4.

article 6, paragraph 1, reading "the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters". The words "subject to the régime of internal waters" lent themselves almost irresistibly to the interpretation that the areas of the sea enclosed by the straight base lines were fully assimilated to the régime of internal waters and that the coastal State could therefore interfere at its discretion with freedom of navigation in those waters. Any such result could not be admitted.

34. It was essential, for reasons of substance, to clarify the term "internal waters". The term did not carry a very precise meaning. There seemed to him to be three types of waters that might be relevant to the discussion: (1) the territorial sea; (2) the waters behind the straight base lines, which could perhaps be described as internal waters; and (3) inland waters properly so-called—namely, rivers, etc.

35. When the Commission came to discuss right of passage, he would propose the extension of that right to internal waters. In the Fisheries case judgement, large stretches of what had hitherto been high seas had been transformed into internal waters. Although the Court had only been really concerned with fisheries, its ruling lent itself to the interpretation that the waters in question were no longer subject to the rule of the freedom of the seas in any respect whatsoever. That was a result going beyond the subject of the dispute as originally submitted to the Court—namely, whether the Norwegian decree delimiting Norwegian waters for the purpose of fisheries was in accordance with international law.

36. For those reasons, he would propose that the last phrase should be deleted and replaced by the words "the sea areas lying within these lines must have a sufficiently close connexion with the land domain." No reference would be made to the régime of internal waters.

37. Mr. HSU formally proposed that the Commission postpone all discussion of article 6 until it had discussed article 4.

38. Mr. SPIROPOULOS said he agreed that, should the Commission decide on a twelve-mile limit for the breadth of the territorial sea, that would make a considerable difference to the relevance of the subject matter of article 6.

39. Mr. GARCÍA-AMADOR supported Mr. Hsu's proposal.

40. Mr. FRANÇOIS, Special Rapporteur, said that a 200-mile limit for the territorial sea was imaginary. Practically, the only real choice lay between the three-mile limit and the system of allowing States to fix their own limits, provided always that they did not exceed twelve miles. The system of straight base lines would lead in some cases to advancing the outer limit of the territorial sea by as much as five miles in places. It therefore followed that the relative importance of article 6 was not materially diminished even if it were assumed that the Commission would go to the extreme limit of allowing States to define their territorial seas as extending up to twelve miles in breadth.

41. Mr. Lauterpacht had raised an important question. The waters behind the straight base lines would become internal waters and would as such be subject to a special régime. It was therefore extremely important to define the limit of those waters accurately, though that was an entirely different question from the breadth of the territorial sea.

42. The CHAIRMAN put to the vote Mr. Hsu's proposal that the discussion of article 6 should be postponed until the Commission had dealt with article 4.

The proposal was rejected by 5 votes to 3, with 4 abstentions.

The meeting rose at 1 p.m.

255th MEETING

Friday, 25 June 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. A. AMADO, Mr. R. CÓRDOVA, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. G. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, 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).

Régime of the territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77) [1] (*continued*)

CHAPTER II: LIMITS OF THE TERRITORIAL SEA (*continued*)

Article 6: Straight base line (A/CN.4/77) [2] (continued)

1. The CHAIRMAN called upon Mr. Lauterpacht to proceed with his remarks.

[1] *Vide supra*, 252nd meeting, para. 54 and footnotes.

[2] For the English text of the article, *vide supra*, 254th meeting, footnote 7.