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Summary record of the 260th meeting

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

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*Article 11 : Islands (A/CN.4/77)*⁹

48. Mr. FRANÇOIS, Special Rapporteur, said that article 11 raised the delicate issue of artificial islands. The relevant report of the 1930 Codification Conference said on that point that the definition of the term "island" did not exclude artificial islands.¹⁰ On the other hand, article 6 of the draft articles which the Commission had adopted in 1953 on the subject of the continental shelf¹¹ provided that installations necessary for the exploration and exploitation of the continental shelf did not possess the status of islands; the coastal State was merely entitled to establish safety zones around them.

49. Mr. SCELLE said that perhaps the article might specify simply that artificial islands had no territorial sea of their own.

50. Mr. CORDOVA inquired what was the difference between artificial islands and "groups of dwellings built on piles erected in the sea" which were deemed to be islands according to the last sentence of article 11.

51. Mr. FRANÇOIS, Special Rapporteur, said that the question had arisen recently in Indonesia. Real villages had been erected on piles in the high seas and the Indonesian Government wished to enforce its police regulations in those villages.

52. Mr. CORDOVA pointed out that artificial islands necessary for the exploitation of a continental shelf might also include dwellings. Under the last sentence of article 11 many States could only too easily widen their territorial sea unreasonably by building a few houses on piles.

53. Mr. SCELLE said that the last sentence of article 11 was unacceptable.

54. Mr. LAUTERPACHT said that the sentence in question was absolutely incompatible with article 6 of the draft articles relating to the continental shelf. Moreover, the Special Rapporteur's article 11 did not expressly regulate either the question of artificial islands or that of lighthouses. Both those questions were only dealt with in the comment to the corresponding article in the second report.¹²

The meeting rose at 1 p.m.

⁹ Article 11 read as follows :

"Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high-water mark. Groups of dwellings built on piles erected in the sea are deemed to be islands."

¹⁰ *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. 219. Also in A/CN.4/61, comment to article 9.

¹¹ See Report of the Commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)* pp. 12-13. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹² See A/CN.4/61, comment to article 9.

260th MEETING

Friday, 2 July 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. G. AMADO, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, 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 9 : Ports (article 7 of A/CN.4/61)
(*resumed from the 259th meeting*)²

1. Mr. LAUTERPACHT said that before taking up the discussion of article 11 relating to islands, he wished to refer to the Commission's decision on article 9 relating to ports. He had been under the impression that the article had been left open, but had since been given to understand that the Commission had adopted a substantive provision for it. If that was the case, the decision reached was in his opinion one-sided and regrettable. It was agreed that ports were incorporated in inland waters, but nothing had been said of the obligations of States from the point of view of the régime of the ports. The Geneva Convention of 1923 on the International Régime of Maritime Ports³ laid down that States should give access to their ports to foreign vessels on the same conditions as to their own vessels, or those of the most favoured State. The

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

² *Vide supra*, 259th meeting, paras. 18-32 and 46-47.

³ *League of Nations Treaty Series*, vol. 58, p. 287.

Commission was codifying and consolidating international law and should lay down in its draft the obligations of States on the basis of the principles of the 1923 Geneva Convention. He was under the impression that the Commission intended to discuss the matter, but if a decision had already been taken, he would be obliged to raise the matter when the Commission discussed freedom of passage.

2. Mr. FRANÇOIS, Special Rapporteur, said he was opposed to the discussion of the régime of ports. The subject was outside the scope of the Commission's work which dealt exclusively with the régime of the territorial sea. He had already agreed to include in article 9 a stipulation originally contained in the comment to that article. However, Mr. Lauterpacht wished the Commission to go still further and actually to determine the régime of the ports. That question had been entirely omitted from his report, and, if it was decided to introduce it, the Commission would have to take up the whole problem of inland waters, which would greatly complicate matters. He appealed to Mr. Lauterpacht not to press for a discussion on the régime of the ports.

3. Mr. LAUTERPACHT replied that the question of ports as considered by the Commission under article 9 in any case fell outside the problem of the territorial sea, as it did not to any great extent affect its delimitation. If the Commission agreed not to discuss the régime of ports he proposed that it should state in article 9 or in the comments to it, that the provisions of the article did not prejudice the question of adopting a general rule in the matter of ports on the lines of the Convention of 1923.

4. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Lauterpacht's proposal.

5. Mr. AMADO said Mr. Lauterpacht had raised a very theoretical point which should not be discussed in connexion with the territorial sea. If the Commission decided to discuss the régime of ports it would have to go into the whole question of inland waters, and then he would raise the question of the régime of river estuaries which was of considerable importance to the countries of South America.

6. Mr. ZOUREK said that the Commission had dealt with ports only in so far as they affected the delimitation of the territorial sea. It was important to distinguish the different régimes to be applied, whether the general rules of international law or the terms of the 1923 Geneva Convention, the latter being binding only on those States which had ratified the Convention or acceded to it. A discussion of the régime of ports was, in his opinion, both outside the subject being dealt with by the Commission and beyond its practical working possibilities during the current session.

7. Mr. SCALLE agreed with the Special Rapporteur and Mr. Zourek that the Commission should not discuss the régime of ports. He had no objection to Mr. Lauterpacht's proposal that the régime of ports

should be more explicitly referred to in a comment to article 9.

Article 11: Islands (A/CN.4/77)

(resumed from the 259th meeting)⁴

8. Mr. FRANÇOIS, Special Rapporteur, said that article 11 as drafted in his third report took into account six possible cases. The first case was that of a naturel island which under article 11, had its own territorial sea.

9. An island formed artificially, by accumulation, for example, of sand or rubble, would also under article 11 have its own belt of territorial sea. It was another question to know if States had the right to erect artificial islands beyond their own territorial waters, as that would allow them to appropriate large stretches of the high seas. Other States had the right to object to such action, and if the island was already erected, could refuse to recognize it and the territorial sea surrounding it. If, however, such an artificial island were erected and no State objected to its erection, it would be entitled to have its own belt of territorial sea.

10. The third case was that of a lighthouse on an area of land permanently above high-water mark. There would be no difficulty as it would *ipso facto* enjoy the status of an island and have its own territorial sea.

11. If the lighthouse was built on an area of land which was only above water at low tide, the area of land would not qualify as an island under article 11, and would not have its own territorial sea.

12. The fifth case referred to technical installations other than lighthouses. The Commission had discussed such installations at its fifth session in connexion with the exploitation of the sea bed and had agreed, and he thought rightly, that such installations should not have their own territorial sea, but only a safety zone, justified by their great vulnerability. In that connexion he mentioned a project for the building of a permanent meteorological station on the Dogger Bank to replace weather ships and assist air navigation. Such an installation would need to be protected, and the Commission might wish to keep the project in mind when discussing definite rules. On the other hand, he did not think that a safety zone was necessary for lighthouses.

13. The sixth case was that of dwellings which were built on piles erected in the sea and groups which constituted actual villages. The Commission should decide whether such villages should be treated in the same way as technical installations and denied a territorial sea of their own. The question was important for South East Asia, where such villages often were bases for drug traffickers, smugglers and pirates. If they had no territorial sea surrounding them nothing could be done to suppress such activities, and his draft article 11 accordingly provided that they should be deemed to be islands.

⁴ *Vide supra*, 259th meeting, paras. 48-54.

14. Mr. LAUTERPACHT said that article 11 was of considerable importance because, however small the island or the area of land purporting to be an island might be, it inevitably involved the subsidiary questions of the territorial sea of that island, the zones contiguous to it and even the continental shelf. The importance of finding a satisfactory solution to the problem was emphasized by a case quoted in *Hackworth's Digest*: in answer to a request by a group of United States citizens for permission to erect an island forty miles off the coast, the Government of the United States had replied that there was nothing in international law to prevent the erection of the island provided that it did not violate the interests of any State. It had added, that if it was erected, it (the Government of the United States) might consider subjecting it to some measure of control.⁵

15. It was important to know to what extent the erecting of artificial structures with their own territorial sea would extend the area not subject to the principle of the freedom of the seas. He agreed to a very great extent with the views of the Special Rapporteur, which would be strengthened if the Commission agreed to make the following minor amendments to article 11.

16. Firstly, that the word "natural" should be inserted before the words "area of land". That would exclude artificial islands if such was the Commission's intention; it would also rule out technical installations, lighthouses and even, possibly, the villages built on piles. In his view no lighthouse or artificial structure should have a territorial sea of its own.

17. Secondly, the words "in normal circumstances" should be inserted before the words "permanently above high-water mark"; that would cover exceptional cases.

18. Thirdly, the words "and capable of effective occupation and control" should be added after the words "above high-water mark".

19. He thought that States should be able to grant at least some measure of protection to lighthouses even if safety zones were not admitted. With regard to the groups of dwellings built on piles, no special provision should be included in article 11.

20. Mr. SCELLE thought that the Commission had embarked on a task which it had no hope of completing. If all the cases enumerated by the Special Rapporteur were taken into account, the draft regulation would have to contain many more articles than was contemplated. He had said before that the régime of ports should not be dealt with by the Commission, and he held the same view with regard to islands, with the exception only of those situated within the territorial sea of a State. The territorial sea of an island situated in the high seas should be dealt with when the Commission studied the régime of the high seas.

21. He had been surprised to hear that lighthouses should have no safety zone, whereas petroleum companies extracting oil from the sea bed should be entitled to protection.

22. Mr. SPIROPOULOS agreed with the draft submitted by the Special Rapporteur with the exception of the last sentence relating to the groups of dwellings built on piles. That case was exceptional and should not be taken into account in the Commission's draft.

23. Referring to Mr. Lauterpacht's proposal for the insertion of the word "natural" before the words "area of land", he thought that certain man-made areas of land could be considered as natural, and that it would be clearer to say areas of land "formed by nature".

24. He agreed that the erection of an artificial island on the high seas was contrary to international law. However, if other States recognized such an island, he saw no reason why it should not have its own territorial sea, particularly if in due course it became, as was probable, indistinguishable from a natural island.

25. He did not object to Mr. Lauterpacht's proposal for the addition of the words "in normal circumstances" although he saw no need for them.

26. Mr. ZOUREK did not think States had the right to build artificial islands in the high seas. Recognition of such a right would be tantamount to recognizing the occupation of portions of the high seas which would be an evident violation of the principle of the freedom of the seas and would invite the most varied claims. Unlike the Special Rapporteur, he considered that the mere absence of any protest by States at the time of the construction of artificial islands was not a reason for recognizing such structures as islands.

27. Groups of dwellings on piles should be treated in the same way as artificial islands; a State could erect them within its own territorial waters as long as they did not obstruct the regular shipping lanes necessary to international traffic. They could, if situated inside territorial waters, constitute points of departure for measuring the breadth of the territorial; if situated in the high seas they should not be given the status of islands, and should not have their own territorial sea.

28. Mr. PAL said that article 11 contained two provisions: firstly, the provision that every island had its own territorial sea; secondly, it defined the term "island" so as to include certain artificial structures. Ordinarily, the term "island" was applied only to natural formations; with regard to islands in that limited sense, he believed, it was generally accepted that they had their own territorial sea, whether they were in the high seas or in the territorial sea of a State. The matter of artificial structures, however, was not without its difficulties. He would therefore propose that the two sets of provisions should be kept distinct. The first sentence of the article was probably acceptable. The question whether the term "island"

⁵ G. H. Hackworth, *Digest of International Law*, vol. II, p. 680.

were to be extended to artificial structures was a completely different one and could best be dealt with in a separate article. If the Commission decided that an artificial island should be treated in the same manner as a real island, then it would have to define the characteristics of such an island for the present purposes so as to make clear what its decision in that respect implied.

29. He did not agree with Mr. Scelle that the Commission was only dealing with islands situated in the territorial sea. All islands, including those in the high seas, had a territorial sea of their own.

30. Mr. HSU said that the most debatable provision in article 11 was that of the final sentence concerning dwellings built on piles erected in the sea. That was really a very special case, and it was not desirable that the Commission should sacrifice the general principle it had adopted and treat such groups of dwellings as islands. The problem of criminals living in such dwellings built on piles could probably be adequately dealt with under existing rules of criminal jurisdiction.

31. Finally, he agreed with the amendments proposed by Mr. Lauterpacht, which made the wording clearer.

32. Mr. SPIROPOULOS said the Commission was in general agreement that every island had its own territorial sea. It also agreed on the definition of an island. The addition of the words "in normal circumstances" before "permanently above high-water mark", as proposed by Mr. Lauterpacht, did not seem essential, as the concept of normal circumstances was implied in the original draft. There was, however, nothing objectionable in it.

33. A vote would have to be taken, however, on the question of artificial islands. He agreed with Mr. Pal that a separate paragraph might be drafted to deal with them. As international law now stood, a State had no right to erect artificial islands in the high seas. Should a State, however, obtain the consent of other States to do so and thus erect an artificial island in conformity with international law, it would still be necessary to determine whether such an island had a territorial sea of its own.

34. Finally, the Commission would probably agree that the reference to groups of dwellings built on piles should be deleted.

35. Mr. AMADO said that the members of the Commission were nearing an agreement on article 11. He disapproved, however, of the provision concerning dwellings built on piles. That matter had already been discussed at The Hague Codification Conference of 1930, and the conclusion to be drawn from these discussions was that such dwellings should not be treated as islands.⁶

36. He drew special attention to Mr. Lauterpacht's amendment under which an island had to be "capable

of effective occupation and control". The Commission should go into that matter carefully before taking a vote upon it. It raised the extremely important issue of whether the possibility of occupation was indeed the test of what was an island in international law.

37. He was prepared to vote for the Special Rapporteur's draft article 11 except for the final sentence concerning dwellings on piles.

38. The CHAIRMAN said that the basic provision of article 11 was that which gave an island its own territorial sea. It followed that an island off the coast enabled a State to extend its territorial sea further to seaward. The question of artificial islands should be left open. Incidentally, nature was still creating islands much faster than man could hope to do: in the north of Sweden the land was rising by one metre every century. The Baltic Sea, being shallow, big stretches of land were emerging and islands were formed.

39. An artificial island erected within the territorial sea might have a territorial sea of its own, but an artificial island erected in the high seas should not be recognized as having a territorial sea.

40. Mr. LAUTERPACHT said the Commission could not construe its task as confined to codifying only those points concerning which there was general agreement, while leaving open all controversial issues. Such a procedure would not produce profitable results. Artificial structures of all kinds—and in particular lighthouses—gave rise to serious practical problems and it was the Commission's duty to give rulings thereon. There was also the problem of solid ice, which, in the region around Spitzbergen and in the areas claimed by States in the Antarctic continent, was of particular importance.

41. If an island were to arise naturally in the territorial sea, it would be under the sovereignty of the coastal State. If, however, it emerged in the high seas, it would be a *res nullius* and would belong to whoever first occupied it.

42. There appeared to be general agreement within the Commission that dwellings built on piles should not be considered as islands.

43. Finally, he hoped that the Special Rapporteur would agree to Mr. Pal's suggestion that separate provisions should deal with artificial islands and natural formations.

44. Mr. FRANÇOIS, Special Rapporteur, withdrew the last sentence of draft article 11: "Groups of dwellings built on piles erected in the sea are deemed to be islands." That sentence had been introduced in order to deal with a problem which was of interest to the Government of Indonesia. That Government would no doubt find the records of the Commission's discussions helpful. Besides, when the draft articles were submitted to Governments, the Indonesian Government would probably comment on the question.

45. Referring to Mr. Scelle's suggestion that article 11 should only deal with islands in the territorial sea and

⁶ *Vide supra*, 259th meeting, para. 48 and footnote 10.

not with those in the high seas, he said the latter also had a territorial sea. The rule that islands had a territorial sea of their own therefore applied to all islands, and not only to those in the territorial sea. He accepted Mr. Lauterpacht's proposal that the words "in normal circumstances" should be added, although those words might be considered as implied in the original draft. He did not, however, agree with Mr. Lauterpacht's proposal for adding the words "capable of effective occupation and control". Any rock could be used as a radio station or a weather observation post. In that sense, all rocks were capable of occupation and control. The provision seemed either unnecessary or confusing.

46. He did not agree either with Mr. Lauterpacht's suggestion that an island should necessarily be a natural formation. Shallow sandbanks or drying rocks could be used as the foundation for artificial islands, as had been done in a number of States. Clearly, the territorial sea should be measured from the new man-made land built on a pre-existing natural formation. The provisions of article 11 would become much too restrictive if the qualification "natural" were to be adopted. His remarks referred to artificial islands in territorial waters. If an artificial island were erected by a State in the high seas, the situation was quite different, because it might well not be recognized by other States.

47. Mr. LAUTERPACHT withdrew his proposal for the inclusion of the words "capable of effective occupation and control". His reason for doing so was not that he had any doubts concerning the reasonableness of the proposal, but that he wished to avoid a lengthy discussion of the meaning of "effective" and "control".

48. He maintained, however, the other two alterations he had proposed. With particular reference to the requirement that an island should be a natural area of land, he would point out that if artificial islands erected within the territorial sea were to have a territorial sea of their own, then a State could erect a series of small artificial islands just within its territorial sea and a few miles apart. It might in that way double the extent of its territorial sea. If its seas were shallow enough, there was no reason why the process should not be repeated and the extent of the territorial sea trebled. A State was free to erect artificial islands in its territorial sea but those islands should not be taken into consideration for the purpose of defining the outer limit of the territorial sea. Finally, if the articles were to deal with artificial structures, there was no reason why it should be silent on the important problem of lighthouses.

49. Faris Bey el-KHOURI said that artificial islands would no doubt be useful for various purposes and Governments should not be discouraged from undertaking their construction. He agreed with Mr. Pal that artificial islands should be dealt with in a separate article.

50. The CHAIRMAN put to the vote the first sentence of article 11: "Every island has its own territorial sea."

The first sentence of article 11 was adopted unanimously.

51. The CHAIRMAN then put to the vote Mr. Lauterpacht's amendment for the insertion of the word "natural" in the second sentence of article 11.

The amendment was rejected by 5 votes to 4, with 2 abstentions.

52. The Chairman then put to the vote Mr. Lauterpacht's second amendment, that the words "in normal circumstances" should be added before "permanently".

The amendment was adopted by 9 votes to none, with 2 abstentions.

53. The CHAIRMAN put to the vote article 11 as a whole, which as amended and after the withdrawal of the last sentence by the Special Rapporteur, read:

"Every island has its own territorial sea. An island is an area of land surrounded by water which is under normal circumstances permanently above high-water mark."

He added that the vote would be without prejudice to possible drafting changes by the Drafting Committee.

Article 11 as a whole was adopted by 8 votes to 2, with 1 abstention.

54. Mr. SCALLE said he had voted against the word "natural" because in his opinion the term "island" should apply to all formations surrounded by water. To restrict the benefit of a territorial sea to natural formations would only be appropriate if the Commission were dealing solely with islands in the high seas. But the Commission was dealing with islands in the territorial sea; and all islands in the territorial sea would enable a State to extend its territorial waters.

55. Mr. ZOUREK said he had abstained from voting on the article as a whole because its provisions did not really solve the problem of islands in the territorial sea.

Article 13: Drying rocks (A/CN.4/77)⁷

56. The CHAIRMAN said that article 12 (groups of islands) had been held over and would be dealt with when the Commission discussed the breadth of the territorial sea.

57. Mr. FRANÇOIS, Special Rapporteur, said that his draft article 13 laid down that drying rocks and shoals which were situated wholly or partly within the territorial sea could be taken as individual points of departure for measuring the territorial sea. For that purpose, drying rocks thus situated were treated exactly

⁷ Article 13 read as follows:

"Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."

like islands. But drying rocks situated in the high seas were not treated like islands and had no territorial sea of their own. Unless that distinction were made, a country like Holland might extend its territorial sea very considerably by advancing from one shoal to another, claiming that a shoal situated within the territorial sea of another shoal had itself a territorial sea. The gist of draft article 13 was that a drying rock within T miles of coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. A drying rock situated more than T miles from the shore, however, should be ignored for the purposes of defining the outer limit of the territorial sea.

58. It might prove necessary later to compare article 13 when adopted with the final sentence in article 6, paragraph 2: "base lines shall not be drawn to and from drying rocks and shoals." Some amendments might be required to ensure concordance of the two articles.

59. The CHAIRMAN pointed out that while the English term "drying rocks and shoals" was used both in article 6 and in article 13, in the French text article 6 used the term *fonds affleurants à basse-mer*, whereas article 13 referred to *rochers ou fonds couvrants et découvrants*.

60. Mr. FRANÇOIS, Special Rapporteur, said that there appeared to be a regrettable divergence in terms between articles 6 and 13. "Drying rocks and shoals" (in French, *sèches* or *rochers ou fonds couvrants et découvrants*) referred to rocks, sandbanks, etc. which were exposed at low-water but covered by the sea at high-water. As to *fonds affleurants à basse-mer* or *affleurants au niveau qu'on a choisi pour la carte*, the English original of the committee of experts' report⁸ described them as "rocks (and similar elevations) awash at the datum of the chart". The expression "drying rocks and shoals" used in the English text of article 6 was correct; the French version should read: *fonds couvrants et découvrants*.

61. Mr. ZOUREK said it was essential that the exact scientific meaning of the term "drying rocks and shoals" should be made clear because, if the articles were adopted, they would be translated into all languages. A precise definition of the term was required; indeed the definition would vitally influence the application of the articles.

62. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks and shoals (*sèches* being the French term used by the International Court of Justice) were rocks, sandbanks, etc., which only emerged from the sea at certain times. The term "rocks awash" implied a rock formation which was just awash at low tide and, at all other times completely under water.

63. The CHAIRMAN said that there appeared to be some discrepancy between article 6, which did not permit straight base lines to be drawn to and from drying rocks and shoals, and article 13, which laid down that such drying rocks and shoals could be taken as individual points of departure for measuring the territorial sea.

64. Mr. FRANÇOIS, Special Rapporteur, said that there was in fact no contradiction between the two articles. Article 13 embodied a general principle, whereas article 6 referred to a special case.

65. Article 13 laid down the general rule for measuring the territorial sea from the normal base line—namely, the low-water line. For that purpose, rocks emerging at low-water were to be taken into account provided, of course, that they were less than 5 miles from the shore.

66. Article 6 was concerned with the exceptional cases in which a State, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight base lines as an artificial substitute for the normal base line (the low-water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. It forbade the drawing of straight base lines to and from banks and rocks emerging only at low tide. The system of straight base lines had been evolved for the benefit of countries like Norway which had a rugged and rocky coast. If the drawing of straight base lines from all shoals were to be permitted, other countries, such as the Netherlands, might benefit unduly from the facility offered. Those countries, unlike Norway, had never claimed the right to draw straight base lines over the shoals.

67. He agreed with the committee of experts that drying rocks and shoals could be taken as individual points of departure for measuring the breadth of the territorial sea.

68. Mr. LAUTERPACHT said that the adjective "drying" which was used to qualify "rocks and shoals" did not seem very clear.

69. Mr. FRANÇOIS, Special Rapporteur, said that the term "drying" implied that the rocks and shoals in question sometimes were under water and at other times emerged and dried. The meaning was perhaps better reflected by the French term *rochers ou fonds couvrants et découvrants*.

70. Faris Bey el-KHOURI said that article 13, when referring to "measuring the territorial sea" presumably meant the measuring of the width of the territorial sea and hence the determination of the outer limit thereof.

71. The CHAIRMAN said that article 11 defined an island as being "permanently above high-water mark", whereas article 13 treated in the same way as islands certain rock formations which only emerged at low water. It was difficult to reconcile the two provisions.

⁸ Annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953, vol. II.*

72. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks and shoals in the high seas which only emerged at low water were not to be used as points of departure for measuring the territorial sea. It was only drying rocks and shoals within T miles from a coast that were virtually treated like islands under the provisions of article 13.

73. Mr. PAL inquired if the purpose of article 13 was to make provision for drying rocks with a territorial sea of their own, or else simply to enable such drying rocks to be used as individual points of departure for measuring the territorial sea. In the latter case, the logical place for the provision was either in, or immediately after, article 6. Article 6, however, specifically laid down that drying rocks could not be used as such points of departure. It was therefore necessary to remove any possible inconsistency between the two articles.

74. If drying rocks were to be acknowledged as having a territorial sea of their own, the Commission had to proceed with caution, as it would thus perhaps be extending existing prerogatives.

75. The CHAIRMAN said that was a question for the Drafting Committee.

76. Mr. FRANÇOIS, Special Rapporteur, said that much more than a question of mere drafting was involved. Article 6 and article 13 dealt respectively with two questions which were different in substance. The adoption of article 6, which forbade the drawing of straight base lines from rocks awash (*fonds affleurant à basse-mer*), had nothing to do with the question whether drying rocks could be used as part of the normal base line. The normal base line being the line of low-water mark, and drying rocks being rocks which emerged at low-water, it followed, as stated in article 13, that such rocks could be used in measuring the territorial sea. That provision of article 13 would apply whether there were any straight base lines under article 6 or not.

77. Mr. PAL quoted from the International Court's decision in the Fisheries case. The Court had referred to the contentions of the United Kingdom Government which had claimed that, in order to be taken into account, a drying rock should be situated within four miles of permanently dry land. The Court had not had to consider that in fact none of the drying rocks used by Norway as base points was more than four miles from the coast.⁹ For the Commission, however, the question of a maximum permissible distance of the drying rocks from the coast would be a relevant and pertinent one. If drying rocks, irrespective of their distance from the coast, were going to be given a territorial sea of their own, that would be tantamount to raising them to the status of islands; he could see no justification for such a course.

The meeting rose at 1 p.m.

⁹ *I.C.J. Reports 1951*, p. 128.

261st MEETING

Monday, 5 July 1954, at 3 p.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, Mr. D. L. EDMONDS, 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*)

1. The CHAIRMAN welcomed Judge Douglas L. Edmonds, who had been elected a member of the Commission and who had just arrived from the United States to take part in its work.
2. Mr. EDMONDS thanked the Chairman for his words of welcome.

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

Article 13: Drying rocks (A/CN.4/77) (*continued*)²

3. Mr. LAUTERPACHT proposed that the words "situated wholly or partly within the territorial sea" should be replaced by "if within the territorial sea as measured from the mainland or from an island".
4. The purpose of his amendment was to prevent a State from using a succession of drying rocks off its coast for the purpose of extending its territorial sea. Under his proposed amendment, only drying rocks near the coast, namely, within the territorial waters as

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

² *Vide supra*, 260th meeting, paras. 56-77.