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Summary record of the 261st meeting

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

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

CONTENTS

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.

measured from the coast, could be used for an extension of the territorial sea. The device of using drying rocks for the purpose of extending territorial waters could, under the proposed amendment, be used only once. A limit had to be set to the somewhat artificial encroachments upon the area of the high seas.

5. Mr. FRANÇOIS, Special Rapporteur, did not oppose the amendment.

6. Mr. PAL said that, with reference to islands, article 6 laid down that only islands which were five miles or less from the coast could be used for the purpose of determining the territorial sea. Perhaps the Commission might wish to make a similar reservation in the case of drying rocks.

7. Mr. LAUTERPACHT pointed out that the rule of the five-mile maximum distance only applied if a State proposed to draw straight base lines more than ten miles in length.

8. The CHAIRMAN said it was not clear to him in what way Mr. Lauterpacht's amendment differed in substance from the Special Rapporteur's draft.

9. Mr. FRANÇOIS, Special Rapporteur, said that he had interpreted his own draft as meaning much the same as Mr. Lauterpacht's amendment, but the latter had the merit of removing any possible doubts.

10. Mr. CÓRDOVA said that any rock the occupation of which by an enemy State might endanger the security of the coastal State should be used for the purpose of determining the extent of the latter's territorial sea.

11. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks were not sufficiently important to warrant a substantial extension of the territorial sea.

12. Mr. SPIROPOULOS said that drying rocks and shoals, in view of their very nature, were unlikely to be a source of serious danger to the security of the coastal State.

13. Mr. SCELLE agreed with Mr. Córdova. A landing was possible on certain rocks and shoals of the type referred to. If the danger to which Mr. Spiropoulos had referred were to be take into consideration in respect of the rocks situated nearest to the coast, there seemed to be no valid reason for treating other rocks differently.

14. Mr. LAUTERPACHT quoted a passage from Lindley's *The Acquisition and Government of Backward Territory in International Law* (1926). Lindley took the view that mere occupation of a rock did not warrant an extension of sovereignty. Accordingly, article 13 in fact represented a concession in favour of the coastal State. He had no objection to such a concession, but he would insist on its being kept within reasonable bounds.

15. Mr. PAL said that article 13 was not a concession granted to the coastal State. That article was based on considerations of security; if those considerations were valid for one rock, they were valid for all rocks.

16. Mr. ZOUREK said the Commission had admitted, in accordance with general practice, that the territorial sea was measured from the line of land uncovered at low tide. Hence it was logically bound to consider as a point of departure for the measuring of the territorial sea any formation which emerged at low tide and particularly the drying rocks and shoals mentioned in article 13. In any case, he did not believe there was any case of a series of rocks so situated that they might lead to an excessive extension of territorial waters.

17. Mr. SPIROPOULOS said that it was right to refer to the security of the coastal State when dealing with the breadth of the territorial sea although the protection afforded by the latter was more illusory than real. He was, however, surprised that the security of the coastal State should be taken as a possible criterion for determining the point of departure for measuring the territorial sea.

18. Mr. SCELLE, replying to Mr. Spiropoulos, said that the very existence of the territorial sea was, of course, an exception to the general principle of the unity of the sea. Mr. Spiropoulos' argument, however, if taken to its logical conclusion, would result in the elimination of the territorial sea, which would be absurd. If States insisted on retaining and enlarging their territorial sea, they did so in order to safeguard their legitimate interests, particularly in the matter of fisheries.

19. Mr. AMADO supported Mr. Lauterpacht's amendment which would prevent abuses.

20. The CHAIRMAN said that in Sweden the territorial sea was measured from islands submerged during part of the year. Article 13 as drafted did not appear to cover that possibility; he would, however, be prepared to agree to article 13 as it stood.

Mr. Lauterpacht's amendment was not adopted, 4 votes being cast in favour, 4 against, with 4 abstentions.

21. Mr. CÓRDOVA thought that by rejecting Mr. Lauterpacht's amendment the Commission had shown that it interpreted the Special Rapporteur's draft in a sense contrary to that of Mr. Lauterpacht's text. The Drafting Committee should be asked to redraft article 13 in such a way as to avoid any misunderstanding.

22. Mr. FRANÇOIS, Special Rapporteur, thought that it would be sufficient to add some explanatory remarks in the comment to the article.

23. Mr. LAUTERPACHT pointed out in reply to Mr. Córdova that, as his own draft had only been rejected because it had been put to the vote first, he was satisfied with the Special Rapporteur's assurance that he interpreted the article in the sense of the amendment.

Subject to redrafting by the Drafting Committee, article 13 was adopted by 9 votes to none, with 4 abstentions.

Article 14: Straits (Article 11 of A/CN.4/61)[3]

24. The CHAIRMAN invited debate on article 14, the text of which was contained in article 11 of the second report on the régime of the territorial sea.

25. Mr. FRANÇOIS, Special Rapporteur, pointed out that the article did not deal with the right of passage for that was the subject of chapter III.[4] Article 14 was concerned only with the legal position of the waters situated between two parts of the high seas. There was no difficulty in cases where, throughout their entire length, straits were more than twice as wide as the territorial sea; the waters of the straits would be divided between two territorial seas separated by an expanse of the high seas. There would also be no difficulty in cases where for their entire length the width of the straits was equal to or less than double the breadth of the territorial sea of the two coastal States, for in that case the waters of the straits would be divided between two territorial seas separated by a median line.

26. The real problem was that of straits of unequal width, for example straits which at both ends were narrower, but in the middle were wider, than twice the territorial sea. If the limit of the territorial sea was drawn in accordance with the general rule there would be an enclave of the high seas in the middle of the territorial sea. The preparatory committee of the 1930 Codification Conference had agreed that such an enclave of the high seas was unimportant and that it was preferable to divide it between the territorial seas of the two coastal States.[5] However, the conference itself had not entirely adopted the views of its preparatory committee and had restricted the scope of that rule to cases where the enclave was not more than two miles across.[6] He had himself adopted the same solution, but pointed out that the case was not governed by positive law; he was merely making a proposal.

27. Mr. PAL inquired what the situation would be if two coastal States applied different rules with regard to the breadth of their respective territorial sea.

28. Mr. FRANÇOIS, Special Rapporteur, was of the opinion that the Commission should adopt the attitude that its efforts to standardize the national legislation of States in that respect would be successful.

29. The CHAIRMAN pointed out that the situation described by the Special Rapporteur was similar to that provided for in his article 16[7] relating to the delimitation of the territorial sea of two States the coasts of which were opposite each other.

30. Mr. Zourek noted that in the comment to the article in the Rapporteur's second report[8] it was stated that the article did not touch the regulation of straits giving access to inland waters and that such straits remained subject to the rules governing bays and, where necessary, islands. He considered that comment unjustified. The rules concerning bays and islands could not apply to straits connecting inland waters with territorial waters, nor even to straits connecting inland waters with a sea not legally forming part of the high seas (closed sea). In any case, the régime of bays was not laid down by international law and the Commission had not yet discussed it.

31. Secondly, the waters of straits should not necessarily form part of the territorial waters if both shores of the straits belonged to a single State and were not used for international shipping. In the latter case the waters of the straits might be regarded as part of the inland waters of the sovereign State. Such cases did in fact exist. He therefore proposed the deletion of the words "even if the same State is the coastal State of both shores" at the end of paragraph 1 and the insertion after the words "two parts of the high sea" of the words "and separating two or more States".

32. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Zourek that the question of the régime of straits giving access only to inland waters should be held over until the Commission had settled the régime governing bays. In that connexion he added that the authorship of the comment referred to by Mr. Zourek should not be attributed to himself but to the 1930 Codification Conference whose observations he had merely reproduced.

33. He was, however, unable to accept Mr. Zourek's second suggestion. The article related to straits "which form a passage between two parts of the high sea"; in that connexion he referred to the International Court's judgement of April 1949 in the Corfu Channel case.[9] It was clear from that judgement that the right of passage should be recognized in cases where the straits provided a useful route for international maritime

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[3] Article 14 read as follows:

"1. In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores.

"2. When the width of the straits exceeds the breadth of the two belts of territorial sea, the waters between those two belts form part of the high sea. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to territorial sea."

[4] *Vide infra*, 262nd meeting.

[5] *Conference for the Codification of International Law, Bases of Discussion drawn up for the Conference by the Preparatory Committee*, vol. II: Territorial Waters (League of Nations Publication, V. Legal, 1929.V.2), p. 59.

[6] *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. 220.

[7] *Vide infra*, para. 55.

[8] See comment to article 11 in A/CN.4/61, *Yearbook of the International Law Commission, 1953*, vol. II.

[9] *I.C.J. Reports 1949*, p. 4.

traffic. Such a route did not have to be necessary for international maritime traffic as Mr. Zourek proposed.

34. Mr. CÓRDOVA thought the term "straits" should first be defined in legal language.

35. Mr. LAUTERPACHT could see no substantial difference between the right of passage through straits and the right of passage through the territorial sea in general. The rule laid down by the International Court in the Corfu Channel case would apply equally, in the case of warships, in any territorial sea. He asked which clause of the draft regulation governed the right of passage through straits.

36. Mr. FRANÇOIS, Special Rapporteur, agreed that in most cases the rules normally applied to the territorial sea applied equally well to straits. Nevertheless, he drew Mr. Lauterpacht's attention to article 26, paragraph 4, of the draft.[10]

37. Mr. LAUTERPACHT agreed that under that paragraph passage through the straits could not be interfered with under any pretext whatsoever. The International Court had, however, recognized that the coastal State was also entitled, to some extent, to regulate the passage of foreign ships through the straits, although it was not entitled to make the right of passage dependent on previous authorization. There was thus no difference in practice between the legal régime of straits and that of the territorial sea.

38. Mr. SPIROPOULOS said that the Commission should not prejudge its decision on the right of passage; it should only settle the problem of a portion of the high seas enclosed in the territorial sea.

39. Mr. ZOUREK pointed out that the expression "straits which form a passage between two parts of the high sea" was ambiguous. The International Court's judgement in the Corfu Channel case could not be invoked in respect of straits both shores of which belonged to a single State. States should be free to treat such straits, including enclaves, as part of their inland waters. Accordingly, he proposed that the last sentence of paragraph 1 should be amended.

40. Faris Bey el-KHOURI agreed that straits of uneven width which were at some points more than double the breadth of the territorial sea presented a very delicate problem. He could see no better solution than that proposed by the Special Rapporteur.

41. Mr. FRANÇOIS, Special Rapporteur, proposed that the words "In straits which form a passage between two parts of the high sea" should be replaced by "In straits which constitute a useful route for international maritime traffic". Those were the very terms used by the International Court in the Corfu Channel case. The use of those terms would meet Mr. Zourek's objection.

42. Mr. LAUTERPACHT feared that the introduction of such a provision into the article might be tantamount to granting the coastal State the right to decide whether passage through the straits was useful or not. Actually, except for coast-wise slipping, the coastal State was not qualified to give that decision.

43. Mr. SPIROPOULOS said the Commission was not at that stage concerned with the usefulness or even the possibility of passage through a strait; he therefore proposed that the first phrase of paragraph 1 should be altered to read "In straits joining two parts of the high sea, etc."

44. Mr. FRANÇOIS, Special Rapporteur, agreed to Mr. Spiropoulos' proposal.

45. The CHAIRMAN put Mr. Spiropoulos' proposal to the vote.

The proposal was adopted by 11 votes to 1, with 1 abstention.

46. The CHAIRMAN put to the vote Mr. Zourek's proposal that the final phrase of paragraph 1 "even if the same State is the coastal State of both shores" should be deleted, and that the words "and separating two or more States" should be inserted after the words "two parts of the high sea".

The proposal was adopted by 6 votes to 4, with 4 abstentions.

47. Mr. FRANÇOIS, Special Rapporteur, in reply to a question by Mr. Córdova, said that the amendment just adopted was not a mere drafting change. A special paragraph would have to be added to draft article 14 to provide for the case in which two shores of a strait belonged to the same State.

48. Mr. ZOUREK agreed that article 14 would have to be supplemented. In any case, paragraph 1 as drafted by the Special Rapporteur would not cover all possible cases, since the use of the term "territorial sea" prejudged the régime applicable to straits.

49. Mr. LAUTERPACHT said that paragraph 1 as it stood might produce consequences that could hardly be admitted; it would be surprising, for instance, if the Straits of Messina were to be considered as part of the inland waters of Italy.

50. Mr. ZOUREK agreed that there were exceptional cases such as those of the Straits of Messina and the Straits of Gibraltar which constituted an important recognized international maritime highway.

51. Mr. FRANÇOIS, Special Rapporteur, said the amendment just adopted entailed another consequence, which he considered unacceptable. It would authorize a State to incorporate in its inland waters any straits both shores of which belonged to it, even if the width of the straits exceeded twice the breadth of the territorial sea.

52. Mr. PAL saw nothing in the amendment in question which authorized States to proceed in that manner. All that was necessary was that the Commis-

[10] *Vide infra*, 272nd meeting, footnote 14.

sion should specify what régime would be applicable to the case mentioned by the Special Rapporteur.

53. Mr. SPIROPOULOS said that the amendment in question in effect made it possible to transform the waters of straits into internal seas, as was contemplated in the case of bays. There was nothing illogical in such a situation because in both cases the two areas of inland waters situated on either side of the enclave of open sea were joined together. Whereas other States might claim the right of passage through straits, no question of passage arose in the case of bays. He stressed that no such principle had ever been accepted in international law.

54. Mr. ZOUREK formally moved that the discussion of article 14 should be deferred so that he could submit amendments thereto.[11]

Mr. Zourek's motion was agreed to without opposition.

Article 16: Delimitation of the territorial sea of two States the coasts of which are opposite each other (A/CN.4/77) [12]

55. Mr. FRANÇOIS, Special Rapporteur, said he had reverted in article 16 to the median line method which had been adopted by the Commission in 1953 for determining the boundary of the continental shelf appertaining to two States whose coasts were opposite to each other.[13] The same method had been adopted by the Committee of Experts.[14] They had, however, added certain particulars which were much more important in the case of a territorial sea than in that of the continental shelf. It was indeed normal, when drawing the median line of demarcation of the territorial sea, to take into account islands situated between the two States, unless there was an agreement between those States, when, for example, the island in question was farther away from the State to which it belonged than from the other State. That exception extended to the case of dry rocks situated in the territorial sea of a State, which the Commission had deemed to be islands for the purpose of measuring the territorial sea. Drying rocks situated between two States the coasts of which were less than T miles apart would not, however, be taken into account, as both States would have equally valid claims thereto.

56. Mr. SPIROPOULOS agreed that it was impossible to use, in the case covered by article 16, a different method for the delimitation of the territorial sea from that which had been adopted for determining the boundary of the continental shelf. It would be inconceivable that the continental shelf of a State should be under the territorial sea of another State. That being so, he doubted whether there was any justification for the exceptions to the median line rule which had been laid down in the case of islands and drying rocks; as pointed out by the Special Rapporteur, there were no such exceptions provided for in article 7 relating to the continental shelf.

57. Mr. CÓRDOVA shared Mr. Spiropoulos' misgivings concerning the exceptions referred to. He took the example of two States the coasts of which were eight miles apart. If the breadth of the territorial sea had been fixed at four miles, the median line would constitute a perfectly good boundary both for the territorial sea and for the continental shelf of each State. But if there was an island between the two States, the territorial sea of the State to which it belonged would be greater than the territorial sea of the other and the boundary of the territorial sea would no longer coincide with that of the continental shelf.

58. The CHAIRMAN stressed that article 7 of the draft articles on the continental shelf did not contemplate any exceptions to the median rule in the case of islands or drying rocks, but did contain the proviso "unless another boundary line is justified by special circumstances".

59. Mr. PAL said he feared that the analogy used by the Special Rapporteur had led to a certain amount of confusion. The case contemplated by Mr. Córdova could not arise in practice, for the continental shelf, by definition, commenced where the territorial sea ended, whereas the case under discussion was that in which the distance between two coasts was less than two T miles.

60. Mr. ZOUREK pointed out that the outer limit of the territorial sea formed the frontier of a State; that was not the case with the boundary of the continental shelf. Experience had shown how very difficult the determination of boundaries could be, whether it was on land, in rivers, or at sea. Such boundaries could not be determined merely by the automatic application

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[11] *Vide infra*, 262nd meeting, para. 72.

[12] Article 16 read as follows:

"1. An international boundary between countries the coasts of which are opposite each other at a distance of less than two T miles (T being the breadth of the territorial sea) is as a general rule the median line, every point of which is equidistant from the base lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands shall be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State shall be taken into account, but similar elevations that are within T miles of both States, shall be disregarded in laying down the median line.

"2. Exceptional considerations of navigation and fishing rights may justify a different delimitation of the boundary, in such manner as the parties concerned may agree.

"3. The line shall be marked on the largest-scale charts available which are officially recognized."

[13] See article 7 of the draft articles on the continental shelf in the report of the Commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), p. 13. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

[14] 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.