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Summary record of the 271st meeting

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271st MEETING

Monday, 19 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, 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. 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 (resumed from the 265th meeting)

CHAPTER II: LIMITS OF THE TERRITORIAL SEA
(resumed from the 263rd meeting)

Article 14: Straits (article 11 of A/CN.4/61)
(resumed from the 263rd meeting)²

1. The CHAIRMAN invited the Commission to resume debate on article 14. At the 262nd meeting of the Commission³ Mr. Zourek had proposed that article 14 should be redrafted as follows:

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

² *Vide supra*, 263rd meeting, paras. 1-22.

³ *Vide supra*, 262nd meeting, para. 72.

*“Delimitation of the territorial sea
in straits joining two parts of the high seas*

“1. In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast.

“2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 16.

“3. If the breadth of the straits exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

“4. In the case of straits with only one coastal State which are used as a recognized shipping lane between two parts of the high seas, such straits shall be treated in the same way as the straits referred to in paragraph 1, and the provisions of paragraphs 1 and 3 hereof shall be applicable thereto.”

2. Mr. FRANÇOIS, Special Rapporteur, proposed the following amendments to Mr. Zourek's text:

- (i) In paragraph 3 after the words “an area of the sea” the words “not more than two miles in breadth” should be inserted.
- (ii) The following text should replace Mr. Zourek's paragraph 4:

“Paragraphs 1 and 3 of this article shall be applicable to straits which join two parts of the high seas and which have only one coastal State if the breadth of the straits is greater than twice the breadth of that State's territorial sea. If the breadth of the straits is not greater than twice the breadth of the territorial sea these rules shall be applicable only if the straits are used as an international shipping lane.”

3. Mr. ZOUREK said that the amendments proposed by the Special Rapporteur differed from his own draft in two respects. The first difference was that the Special Rapporteur allowed enclaves of high seas of more than two miles in breadth, whereas he himself proposed that such enclaves should be treated in the same way as the waters adjacent to the coasts. Such instances were very rare indeed and there was no reason to treat the areas in question differently from internal waters.

4. The two draft paragraphs 4 dealing with straits which had only one coastal State, differed more seriously. The Special Rapporteur wished to make the régime of paragraph 1 applicable to those straits if they were used as international shipping lanes, whereas he himself only provided for that régime in the case of straits which were recognized shipping lanes.

5. His own drafting seemed a more prudent one. The Special Rapporteur himself admitted that areas of water situated between the islands of an archipelago should be considered as inland waters,⁴ although they might link two parts of the high seas. The present tendency on the part of States was to treat the enclaves in the same way as the coastal waters when both coasts of the strait came under their sovereignty. His own draft was therefore just a codification of existing international law.

6. Mr. FRANÇOIS, Special Rapporteur, in reply to Mr. Zourek's first point, said that the preparatory committee of the Codification Conference at The Hague had proposed that enclaves of high seas enclosed within a strait should be shared by the coastal States. The Conference, however, had only accepted that proposal in respect of enclaves the breadth of which did not exceed two miles; the intention had been to avoid taking away from the high seas areas of water which were perhaps of considerable extent. All he had done was to reproduce the conclusions of the 1930 Codification Conference.⁵

7. If a strait had only one coastal State and was not a recognized shipping lane between two parts of the open sea, that State could hardly be permitted not to apply paragraph 1, particularly if the straits exceeded twice the breadth of the territorial sea. Even if the interests of navigation did not suffer, those of fishing, for example, might be affected. Mr. Zourek's draft paragraph 4, from being a codification of existing international law, was actually a dangerous innovation.

8. Finally, the case of archipelagoes was completely different from that of straits and hence not strictly comparable with the latter.

9. Mr. PAL inquired from the Special Rapporteur what was the exact purport of the last sentence he proposed for paragraph 4 ("if the breadth of the straits... international shipping lane"). Article 14 only concerned the delimitation of the territorial sea in straits, and he could not see any useful purpose in the sentence concerned. He proposed that it should be deleted.

10. Mr. FRANÇOIS, Special Rapporteur, said that the provision in question concerned narrow straits which were usually avoided by maritime traffic. For example, it was permissible to incorporate into the territorial sea of the United Kingdom the area of water situated between the Isle of Wight and the English coast.

11. Mr. ZOUREK agreed with Mr. Pal. Article 14 concerned the delimitation of the territorial sea and not the right of passage. His own draft paragraph 4 simply acknowledged the right of the coastal State of

both shores of a strait to carry out that delimitation itself.

12. Replying to a question by the Special Rapporteur, he said that there were always two belts of territorial sea, even where there was only one coastal State.

13. The CHAIRMAN put the various proposals to the vote with the following results:

Article 14, paragraph 1, as proposed by Mr. Zourek, was adopted by 11 votes to none, with 2 abstentions.

Article 14, paragraph 2, as proposed by Mr. Zourek, was adopted by 11 votes to none, with 2 abstentions.

Mr. François' amendment to Mr. Zourek's article 14, paragraph 3, was adopted by 4 votes to 2, with 7 abstentions.

Article 14, paragraph 3, as amended, was adopted by 4 votes to none, with 9 abstentions.

Mr. Pal's proposal for the deletion of the last sentence of the Special Rapporteur's draft for article 14, paragraph 4, was adopted by 5 votes to 3, with 4 abstentions.

Article 14, paragraph 4, as proposed by the Special Rapporteur but reduced to its first sentence following the foregoing vote, was adopted by 4 votes to 1, with 8 abstentions.

14. The CHAIRMAN said that the foregoing vote made it unnecessary to put Mr. Zourek's draft paragraph 4 to the vote.

Article 14 as a whole, as amended, was adopted by 4 votes to none, with 9 abstentions.

ORDER OF BUSINESS

15. Mr. LAUTERPACHT proposed that the discussion on the territorial sea should be suspended.

The proposal was adopted by 7 votes to 4, with 2 abstentions.

16. Mr. LAUTERPACHT hoped that that vote would not prevent the Commission from submitting to the General Assembly those articles relating to the territorial sea which it had so far adopted.

17. Mr. FRANÇOIS, Special Rapporteur, said that it would be impossible to submit the draft in such an incomplete state. He proposed that a questionnaire should be sent to Governments on the question of the breadth of the territorial sea.

The proposal was adopted by 6 votes to 1, with 6 abstentions.

18. Mr. LAUTERPACHT proposed that the draft articles relating to the territorial sea adopted during the current session should be included in the report on the current session.

The proposal was adopted by 6 votes to 4, with 3 abstentions.

⁴ Article 12 of A/CN.4/77 in *Yearbook of the International Law Commission*, 1954, vol. II.

⁵ *Vide supra*, 261st meeting, para. 26.

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85)⁶ (resumed from the 270th meeting)

Articles 1, 2 and 4

19. Mr. LAUTERPACHT regretted that he had been unable to attend some of the meetings at which the Commission had discussed the draft Code. He was grateful to the Chairman for allowing him to express his views on the subject at the present stage of the discussion.

20. He hoped the draft Code would be adopted during the present session but wished to make the following comments:

Article 1 read: "Offences against the peace and security of mankind, as defined in this Code are crimes under international law for which the responsible individuals shall be punished." The draft did not refer to the criminal liability of States as such. He did not, however, think it necessary to modify article 1; it would be sufficient to give explanations in the relevant comments.

Article 2, paragraph 5, read: ["The following acts are offences against the peace and security of mankind]... (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State." The words "civil strife" were ambiguous and too reminiscent of Mr. Hsu's proposal which the Commission had rejected at its 269th meeting.⁷ The words "civil war" would be preferable. In that case, also, the necessary explanation could be given in the comment.

Article 2, paragraph 8 read: "Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime." It should be specified that only annexations by force should be considered as international crimes.

Article 2, paragraph 11 read: "Acts in violation of the laws or customs of war." He recalled that the laws and customs of war incorporated a very large number of rules, some of which were only of minor importance. The Geneva conventions of 1949⁸ referred to "major violations" of the laws and customs of war. The passage should therefore read: "Acts which constitute a major violation..."

⁶ *Vide supra*, 266th meeting, para. 1 and footnotes.

⁷ *Vide supra*, 269th meeting, paras. 1-16.

⁸ *International Committee of the Red Cross, The Geneva Conventions of August 12, 1949* (Geneva, 1950).

Article 4 read: "The fact that a person charged with an offence defined in this Code acted pursuant to an order of his government or of a superior, does not relieve him from responsibility in international law if in the circumstances at the time, it was possible for him not to comply with such order." The second half of the sentence constituted a dangerously retrograde step. The defence was admissible in time of war, but not in time of peace. The draft code was, in fact, concerned primarily with peacetime conditions. Under the formulation as adopted the accused might escape punishment for the reason that "it was not possible for him" not to comply with the order for fear of losing his post, or forfeiting a chance of promotion, or displeasing his superiors, or incurring the odium of disobeying a decision of his party, and the like.

Finally, his main objection referred to *the new paragraph (intervention)* inserted in *article 2* of the draft Code on Mr. García-Amador's proposal: "The intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures of an economic or political character in order to force its will and obtain from it advantages of any kind."

He was no less opposed than the other member of the Commission to the intervention of one State in the affairs of another; but the text adopted by the Commission was far too broad for it meant that perfectly legitimate and normal manifestations of international life were to be regarded as offences. International political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will. International law should merely impose certain restrictions on these measures, or, in other words, prohibit the use of force.

If the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning. Intervention—assuming that the meaning of the term was clear—was an unlawful act. It was an excess of zeal to render it criminal. In the Corfu Channel case⁹ the International Court of Justice had declared that the United Kingdom had committed, in some respects, an act of intervention by ordering a destroyer to enter the Channel for the purpose of mine-sweeping. The Court had found that the declaration constituted a sufficient sanction. Under the Code, as proposed, the officers who had ordered the action would be guilty of a criminal act. He agreed that it was necessary to devise a formula forbidding brutal and unjustified acts of intervention, but thought it impossible to retain the text of the paragraph as it stood.

21. The CHAIRMAN drew Mr. Lauterpacht's attention to paragraph 58(c) of the Commission's report covering the work of its third session.¹⁰ By stating that it would deal only with the criminal liability of indi-

⁹ *I.C.J. Reports 1949*, p. 4.

¹⁰ *Vide supra*, 266th meeting, footnote 1.

viduals the Commission had implied that there could also be cases involving the criminal liability of States.

22. Mr. LAUTERPACHT replied that if that was so it would be sufficient to make a suitable remark in the comment.

23. The CHAIRMAN pointed out, with regard to Mr. Lauterpacht's second remark, that in the French text the words "civil strife" had been translated as "*guerre civile*"; clearly, therefore, only a drafting question was involved.

24. Mr. CORDOVA thought, on the contrary, that a question of substance was involved. He had voted against Mr. Hsu's amendment¹¹ because it had been pointed out to him that the amendment was intended to cover precisely "civil strife", which were the words used in article 2, paragraph 5. If that expression was replaced by the words "civil war", he would ask that Mr. Hsu's amendment should be put to the vote again.

25. Mr. SCELLE said he had assumed that it was generally admitted that a body corporate could not be held criminally liable. That principle had been confirmed by the Nürnberg Tribunal. In same cases such a body would conceivably be held civilly liable, though the fictitious personality to such bodies was purely a practical expedient; it would clearly be absurd to speak of the criminal liability of a fictitious person. He thought the Commission should retain article 1 as it stood and perhaps note in the comment that in certain cases a State if it was in a position to do so could be required to make good the damage caused.

26. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the new paragraph relating to intervention should be reconsidered.

The result of the vote was 7 in favour, 5 against, with 1 abstention.

The proposal was not adopted, having failed to obtain the required two-thirds majority.

27. Mr. HSU said he had voted in favour of Mr. Lauterpacht's proposal because he thought the scope of the new paragraph as adopted by the Commission was too broad.

28. Mr. LAUTERPACHT withdrew his proposal for reconsidering article 4.

**Nationality, including statelessness (item 5 of the agenda)
(A/2456, A/CN.4/82 and Add. 1 to 8) (resumed
from the 252nd meeting)**

**DRAFT CONVENTION ON THE ELIMINATION OF FUTURE
STATELESSNESS¹² (resumed from the 251st meeting)**

Final clauses (resumed from the 251st meeting)

29. The CHAIRMAN announced that the Sub-Committee appointed by the Commission¹³ to redraft the

text of the final clauses of the draft conventions concerning the elimination and the reduction of future statelessness, submitted the following draft for the final clauses of the first of those draft conventions:

Article 11

SIGNATURE, RATIFICATION AND ACCESSION

1. The present Convention, having been approved by the General Assembly, shall until (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign is addressed by the General Assembly.

2. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. After (the above date) the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

TERRITORIAL APPLICATION CLAUSE

1. Any Party may at any time, by written notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the international relations of which that Party is responsible.

2. Any such extension shall take effect on the ninetieth day after the date of receipt of the aforesaid notification by the Secretary-General or on the date of entry into force of the Convention for the State concerned, whichever is the later.

Article 13

RESERVATIONS

1. At the time of signature, ratification or accession any State may make a reservation permitting it to postpone, for a period not exceeding two years, the application of the Convention pending the enactment of necessary legislation.

2. No other reservations to the present Convention shall be admissible.

Article 14

ENTRY INTO FORCE

1. The present Convention shall enter into force on the ninetieth day following the date of the deposit of the (e.g., third or sixth) instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention subsequently to the latter date, the Convention shall enter into force on the ninetieth day following the deposit of the instrument of ratification or accession by that State.

¹¹ *Vide supra*, 269th meeting, paras. 1-16.

¹² *Vide supra*, 242nd meeting, para. 1 and footnotes.

¹³ *Vide supra*, 251st meeting, para. 62.

Article 15

DENUNCIATION

1. Any Party to the present Convention may denounce it at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the said Party one year after the date of its receipt by the Secretary-General.
2. Any Party which has made a notification under article 12 may at any time thereafter by a written notification to the Secretary-General of the United Nations declare that the Convention shall cease to be applicable to such territory one year after the date of receipt of the latter notification by the Secretary-General.

Article 16

NOTIFICATION BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States referred to in article 11 of the following particulars:

- (a) Signatures, ratifications and accessions under article 11;
- (b) Notifications received under article 12;
- (c) Reservations under article 13;
- (d) The date upon which the present Convention enters into force in pursuance of article 14;
- (e) Denunciations under article 15.

Article 17

DEPOSIT OF THE CONVENTION AND CIRCULATION OF COPIES

1. The present Convention shall be deposited in the archives of the United Nations.
2. A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States referred to in article 11.

Article 18

REGISTRATION

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

Article 11

30. The CHAIRMAN put article 11 to the vote.

Article 11 was adopted unanimously.

Article 12

31. Mr. ZOUREK proposed that article 12 should be deleted. In practice, its effect would be to remove colonial territories from the application of the convention, for very few States extended the application of conventions they accepted to the Non-Self-Governing Territories which they administered, and the Commission should not encourage them in that attitude. States

which administered Non-Self-Governing Territories could always, before accepting a convention, take the necessary measures to make it applicable to such Territories.

32. Mr. GARCÍA-AMADOR pointed out that the "colonial clause" embodied in article 12 had always raised difficulties of a political character at the General Assembly. The Commission should not deal with the question; it was better to delete article 12.

33. The CHAIRMAN pointed out that the article merely acknowledged the fact that there were certain territories which were not self-governing and that in certain cases a convention which was applicable to the mother country might not be applicable in a dependent territory.

34. The CHAIRMAN put to the vote Mr. Zourek's proposal for the deletion of article 12.

At the request of Mr. García-Amador, a vote was taken by roll call.

In favour: Mr. Amado, Mr. Córdova, Mr. Edmonds, Mr. García-Amador, Mr. Hsu, Faris Bey el-Khoury, Mr. Zourek.

Against: Mr. François, Mr. Lauterpacht, Mr. Pal, Mr. Salamanca, Mr. Sandström.

Present and not voting: Mr. Scelle.

The proposal was adopted by 7 votes to 5.

35. Faris Bey el-KHOURI said he had voted for the deletion of the article because he considered that it was always possible for States parties to a convention to extend its application to the territories they administered.

Article 13

36. Mr. ZOUREK said he did not wish to raise the general question of reservations to conventions which the Commission would consider in connexion with Mr. Lauterpacht's report on the law of treaties.¹⁴ Nevertheless, he wished to point out that article 13 did not agree with the generally accepted solution of the problem of reservations to conventions, a problem closely connected with the question of the sovereignty of States.

37. The CHAIRMAN pointed out that the Subcommittee had been guided merely by considerations of logical arrangement. If reservations other than that permissible under article 13, paragraph 1, were to be permitted, the purpose of the convention, which was the elimination of future statelessness, would be stultified. He put article 13 to the vote.

Article 13 was adopted by 12 votes to none, with 1 abstention.

¹⁴ A/CN.4/63, in *Yearbook of the International Law Commission, 1953, vol. II.*

Article 14

38. The CHAIRMAN put article 14 to the vote.

Article 14 was adopted unanimously.

Article 15

39. The CHAIRMAN said paragraph 2 had been dropped as the result of the elimination of article 12. He put to the vote article 15, which accordingly consisted of former paragraph 1 only.

Article 15 as amended was adopted unanimously.

Article 16

40. The CHAIRMAN pointed out that following the elimination of article 12, point (b) of article 16 should be deleted. He put article 16, as amended, to the vote.

Article 16 as modified was adopted unanimously.

Article 17

41. Mr. LIANG, Secretary to the Commission, said that draft paragraph 1 would be improved if altered to read:

“The present Convention shall be deposited with the Secretariat of the United Nations.”

42. Mr. LAUTERPACHT made a proposal to that effect.

That amendment to paragraph 1 and the paragraph, as amended, were adopted unanimously.

Paragraph 2 was adopted unanimously.

43. The CHAIRMAN said by those votes article 17 as a whole, as amended, had been adopted unanimously.

Article 18

44. The CHAIRMAN put article 18 to the vote.

Article 18 was adopted unanimously.

45. The CHAIRMAN said it was the intention of the Sub-Committee to submit draft final clauses to the draft Convention on the Reduction of Future Statelessness similar to those of the Convention on the Elimination of Future Statelessness. The Sub-Committee had, however, decided that the question of reservations to the second convention was outside its competence and could only be settled by the Commission itself.

46. Mr. LAUTERPACHT suggested that, having very rapidly disposed of the final clauses to the draft Convention on the Elimination of Future Statelessness, the Commission, notwithstanding its previous decision, might continue the study of the draft articles on the régime of the territorial sea.

47. The CHAIRMAN said there was no opposition to that proposal and ruled that the Commission would

spend two days in considering the articles relating to the régime of the territorial sea.

The meeting rose at 1.10 p.m.

272nd MEETING

Tuesday, 20 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, 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. 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 (resumed from the 271st meeting)

CHAPTER III: RIGHT OF PASSAGE
(resumed from the 265th meeting)

Article 22: Charges to be levied upon foreign vessels (article 18 of A/CN.4/61)²

1. Mr. FRANÇOIS, Special Rapporteur, said the article was identical with article 7 of the report of the Second

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

² Article 22 read as follows:

“1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.