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Summary record of the 273rd meeting

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of the coastal State. The right of passage shall not, in the absence of special authorization, imply the right to stop or to anchor in territorial waters.”

48. He further proposed that paragraph 4 of the same article should be replaced by the following :

“In time of peace, innocent passage shall not be obstructed, so far as warships are concerned, in international straits which form an indispensable shipping lane between two parts of the high seas.”

49. Mr. LAUTERPACHT said that all the authorities quoted by Mr. Zourek referred to the passage of warships through the territorial sea in general, as distinct from straits used as international shipping lanes between two parts of the high seas. Such straits were open to the passage of warships, as was generally accepted by eminent writers and as had been confirmed by the International Court of Justice. With regard to passage through the territorial sea, the views of writers were divided. Those selected by Mr. Zourek supported his case ; but there were others who affirmed the right of innocent passage. Generally speaking, whether by usage or custom, that was also the tendency of international practice.

50. So far as passage through territorial waters generally was concerned, the language of paragraph 1 (“as a general rule, a coastal State will not forbid the passage . . .”) should satisfy Mr. Córdova.

51. Mr. FRANÇOIS, Special Rapporteur, said that the Preparatory Committee of the 1930 Conference had received replies from governments¹⁷ which expressed the unanimous view that the right of passage of warships through territorial waters was generally recognized.

52. Unless Mr. Zourek was able to show in what manner international law could have changed so materially between 1930 and 1954, it was patent that the right of passage for warships was and had always been part of positive international law.

The meeting rose at 1 p.m.

¹⁷ *Op. cit.* (*supra*, footnote 6), pp. 65-75.

273rd MEETING

Wednesday, 21 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 (*continued*)

CHAPTER III : RIGHT OF PASSAGE (*continued*)

Article 26 : Passage [of warships]
(article 22 of A/CN.4/61) (*continued*)²

1. Mr. LAUTERPACHT said he wished to make his position clear concerning Mr. Zourek's proposed amendment to paragraph 1 of the article.³ In Mr. Zourek's view, the international law in force did not acknowledge the right of passage of warships in the territorial sea of a foreign State ; that view was not accurate. It was true that the right of passage was not granted in the same unqualified terms for warships as it was for merchant ships. But international custom and usage in fact tended to acknowledge that right. That was the view expressed in a passage in which the controversial character of that right, as far as writers were concerned, was fully acknowledged in Oppenheim's *International Law*, vol. I, 7th edition, paragraph 188. It was also stated in the same textbook that Governments, in their replies to the questionnaire circulated in connexion with the Codification

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

² *Vide supra*, 272nd meeting, paras. 42-52.

³ *Ibid.*, para. 47.

⁴ *Conference for the Codification of International Law, Bases of Discussion, vol. II: Territorial Waters* (League of Nations publication, V. Legal, 1929.V.2), pp. 65-75.

Conference at The Hague in 1930, had not made any marked distinction between the treatment of warships and that of merchant ships in the matter of passage through the territorial waters.

2. The words "As a general rule", which were the introductory words of paragraph 1, gave the coastal State sufficient latitude. The Commission might perhaps redraft the provision along the following lines:

(a) Warships were entitled to right of passage as authorized by international usage.

(b) Warships enjoyed unrestricted right of passage in those parts of the territorial sea which constituted international shipping lanes.

(c) Warships enjoyed unrestricted right of passage in straits forming part of international shipping lanes.

3. Mr. CORDOVA pointed out that the main purpose of the régime of the territorial sea was to safeguard the security of the coastal State. In article 20⁵ the Commission had stated that in certain case the coastal State had the right to forbid the passage of merchant ships through the territorial sea. It would not be logical to refuse them the same rights in respect of warships.

4. Mr. SCELLE said the negative phraseology of paragraph 1 was unfortunate. Moreover, the words "As a general rule" appeared too vague. He therefore proposed the adoption of the following draft: "Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification".

5. Freedom of navigation in the high seas was only possible if ships were able to call at ports.

6. Mr. LIANG, Secretary to the Commission, pointed out that when Oppenheim wrote, the world was enjoying an era of genuine peace; the whole question of warships visiting foreign ports came within the scope of international comity. The situation had unfortunately changed and it was understandable that States should wish to take greater precautions. The words "As a general rule" therefore seemed to him fully justified.

7. The CHAIRMAN said he preferred the Special Rapporteur's draft both to Mr. Lauterpacht's proposal and also to Mr. Scelle's. The Special Rapporteur's draft was much more in keeping with the principle, recognized both by custom and by jurisprudence, that the passage of foreign warships through the territorial sea was a concession rather than a right in the strict sense of the word.

8. Mr. LAUTERPACHT pointed out that none of the States which had replied to the 1930 questionnaire had denied the right of foreign warships to pass through their territorial sea.

9. Mr. ZOUREK replied that many of those States had pointed out that they considered themselves fully

authorized to regulate the conditions of such passage, a statement which implied the possibility of passage being forbidden in certain cases. Moreover, only some twenty States out of the approximate total of sixty maritime Powers had replied to the questionnaire.⁶

10. Mr. PAL agreed with Mr. Córdova that it would be sufficient to state that the rights of warships in that respect were not to exceed those of merchant ships.

11. Mr. FRANÇOIS, Special Rapporteur, considered the second sentence of Mr. Zourek's amendment to paragraph 1 superfluous, in view of the fact that article 18, paragraph 3,⁷ applied to all the articles of chapter III, including article 26.

12. The first sentence of Mr. Zourek's amendment proposed a rule which was absolutely contrary to international law.

13. Mr. ZOUREK said that his draft provision would not in any way prevent a coastal State giving its consent in advance by means of a regulation regarding territorial waters which would allow foreign warships to enter those waters without asking for a specific prior authorization. Moreover, article 18, paragraph 3, which the Special Rapporteur had mentioned, contained a reservation concerning cases in which stopping and anchoring were incidental to ordinary navigation. Such provisions were justifiable for merchant ships but they were unnecessary in the case of warships.

14. Mr. AMADO considered that the Commission should adhere to existing customary law, under which warships were required to request the authorization of the coastal State before they could enter its territorial waters.

15. Faris Bey el-KHOURI proposed that paragraph 1 of article 26 should be deleted. It was by no means certain that the provision it embodied was a generally accepted rule of international law. It would also be preferable to redraft the other provisions of the article, so as to empower the coastal State to forbid the entry of foreign warships into its territorial waters except when those waters were part of an international shipping lane.

16. Mr. LAUTERPACHT said that if the second sentence of Mr. Zourek's amendments to paragraph 1 also applied to the incidents of navigation dealt with in article 18, paragraph 3, it was absolutely unacceptable.

17. Mr. FRANÇOIS, Special Rapporteur, accepted Mr. Scelle's draft of paragraph 1.

18. The CHAIRMAN proposed, in his own name, the draft of article 26, paragraph 1, which the Special Rapporteur had just withdrawn.

19. The CHAIRMAN thereafter put the various proposals to the vote.

⁶ *Vide supra*, para. 1.

⁷ *Vide supra*, 262nd meeting, footnote 8 and para. 71.

⁵ *Vide supra*, 265th meeting, para. 14.

Faris Bey El-Khourî's proposal that paragraph 1 be deleted was rejected by 6 votes to 3, with 3 abstentions.

The first sentence of Mr. Zourek's amendment to paragraph 1 was rejected by 6 votes to 3, with 4 abstentions.

The second sentence of Mr. Zourek's amendment to paragraph 1 was rejected by 6 votes to 4, with 2 abstentions.

Mr. Scelle's draft paragraph 1, accepted by the Special Rapporteur, was adopted by 5 votes to 4, with 4 abstentions.

20. The CHAIRMAN said that in view of the foregoing vote it was no longer necessary to put to the vote the Special Rapporteur's original draft of paragraph 1 which he had put forward in his own name.

21. Mr. CORDOVA proposed that the following phrase be inserted at the end of article 26, paragraph 2, after the word "passage": "Subject to the exercise by the coastal State of the right to close its territorial sea on the grounds mentioned in article 20."

22. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Córdova's draft was couched in more restrictive terms than his own, but he was prepared to accept it as a compromise solution.

23. The CHAIRMAN put paragraph 2, as amended by Mr. Córdova, in agreement with the Special Rapporteur, to the vote.

Article 26, paragraph 2 as amended was adopted by 10 votes to none, with 3 abstentions.

24. The CHAIRMAN put paragraph 3 of article 26 to the vote.

Article 26, paragraph 3 was adopted by 10 votes to none, with 3 abstentions.

25. Mr. CORDOVA proposed that paragraph 2 should be placed at the end of article 26. The rule laid down in that paragraph would thus apply to the whole article. He pointed out in that connexion that a State occupying both shores of a strait having a width of less than twice the breadth of the territorial sea had always the right to close that strait.

26. Mr. SCELLE said that such a reversal of the order of the paragraphs would be tantamount to transforming an exception into the general rule. In fact, the right of passage constituted the rule, and the coastal State's right to regulate the conditions of passage constituted an exception.

27. Mr. LAUTERPACHT pointed out that straits joining two parts of the high seas should always remain free.

28. Mr. FRANÇOIS, Special Rapporteur, said that the rule mentioned by Mr. Lauterpacht had been explicitly recognized by the International Court of Justice in its

decision in the Corfu Channel case.⁸ Indeed that rule has always been acknowledged by international usage. Mr. Córdova's proposal amounted to a retrograde step in international law and should not be adopted.

29. Mr. ZOUREK thought the sequence of the paragraphs proposed by Mr. Córdova a very logical one which the Commission should adopt.

30. Mr. LIANG, Secretary to the Commission, recalled that article 21 already imposed certain obligations on all foreign vessels exercising the right of passage.⁹ Article 26, paragraph 2, was therefore to some extent a corollary of article 21 and it would be enough to refer to that article. It could be maintained that the coastal State exercised more extensive rights in the case of the passage of warships; nevertheless he thought article 26 should emphasize the right of passage of those ships rather than the restrictions of that right by the coastal State.

31. The CHAIRMAN said that before determining the order of the paragraphs the Commission would study paragraph 4 as drafted by the Special Rapporteur.

32. Mr. CORDOVA proposed that the words "Under no pretext" in paragraph 4 should be deleted.

33. Mr. ZOUREK said that paragraph 4 claimed to lay down rules for the passage of warships which were not in conformity with international law. The draft was based only on the decision of the International Court in the Corfu Channel case; it was wrong to base a general rule on a decision in a particular and very controversial case, and especially to apply the rule formulated by the Court to all straits, even those with a single coastal State.

34. Accordingly he proposed that paragraph 4 should be replaced by the following draft:

"In time of peace, innocent passage shall not be obstructed so far as warships are concerned, in international straits, which form an indispensable shipping lane between two parts of the high seas."

35. Mr. LAUTERPACHT pointed out that the International Court of Justice had carefully weighed the terms of its judgement in the Corfu Channel case and that that judgement, which had been drafted in very broad terms, had stated that the coastal State was not allowed to close straits even though passage through them was not indispensable to international navigation; it was enough if those straits were useful to international navigation.

36. Mr. ZOUREK recalled that the most important straits, such as the Magellan Strait, the Bosphorus and the Dardanelles, had special régimes.

37. The CHAIRMAN put the various proposals to the vote.

⁸ *I.C.J. Reports 1949*, p. 4.

⁹ *Vide supra*, 265th meeting, paras. 15-69.

Mr. Zourek's amendment was rejected by 8 votes to 3, with 2 abstentions.

Mr. Córdova's proposal that the words "Under no pretext" in paragraph 4 should be deleted was adopted by 9 votes to none, with 4 abstentions.

Article 26, paragraph 4, as amended, was adopted by 8 votes to 3, with 2 abstentions.

Mr. Cordova's proposal that the order of paragraphs 2 and 4 should be changed was rejected by 7 votes to 2, with 4 abstentions.

Article 26 as a whole was adopted by 7 votes to 3, with 3 abstentions, in the following form:

- "1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.
- "2. The coastal State has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances described in article 20.
- "3. Submarines shall navigate on the surface.
- "4. There may be no interference with the passage of warships through straits used for international navigation between two parts of the high seas."

38. Mr. ZOUREK said he had voted against article 26 because, contrary to state practice and existing international law, it applied the same rules to warships and merchant vessels, and appeared to regulate the passage of warships through straits in a way not in conformity with international law.

*Article 27: Non-observance of the regulations (article 23 of A/CN.4/61)*¹⁰

39. Mr. ZOUREK proposed that the following sentence should be inserted before the Special Rapporteur's draft text:

"Warships shall be bound when passing through the territorial sea to respect the laws and regulations of the coastal State."

40. Indeed, he found it logical, since article 27 related to violations and possible penalties, to specify the rules to be obeyed by foreign warships.

41. Mr. FRANÇOIS, Special Rapporteur, thought the amendment perfectly acceptable. The sentence proposed by Mr. Zourek could be inserted as paragraph 1 of article 27 and the sentence in the original draft of that article would become paragraph 2. Nevertheless, perhaps a better formulation would be "the

laws and regulations of the coastal State relating to navigation in the territorial sea".

42. Mr. ZOUREK thought the formulation did not go far enough; the ships had also to comply with the regulations relating to health and other questions which were not exclusively concerned with the territorial sea.

43. Mr. FRANÇOIS, Special Rapporteur, said it would have to be stated in the comment that the provisions of article 27 in no way deprived warships of the benefit of extra-territoriality.

44. The CHAIRMAN put to the vote paragraph 1 of article 27 which consisted of the new sentence proposed by Mr. Zourek.

The paragraph was adopted by 10 votes to none, with 1 abstention.

45. The CHAIRMAN put to the vote article 27 as a whole, in the form of the two paragraphs which had been adopted.

Article 27, as amended, was adopted by 10 votes to none, with 1 abstention.

Procedure to be adopted with regard to the draft articles relating to the territorial sea

46. The CHAIRMAN noted that with the sole exception of the articles relating to the breadth of the territorial sea and the questions connected with those articles, the Commission had completed its study of the draft regulation on the territorial sea earlier than expected. The Commission might therefore reconsider what action should be taken with respect to the draft articles it had adopted.

47. Mr. FRANÇOIS, Special Rapporteur, proposed that the draft articles should be circulated to Governments for their consideration, with the request that in view of the differences of opinion which had arisen in the Commission concerning the breadth of the territorial sea, the Commission would be glad to know the views of the governments on that subject.

48. Mr. LAUTERPACHT proposed that the various proposals made concerning that question during debate should also be communicated to governments.

49. Mr. FRANÇOIS, Special Rapporteur, agreed to Mr. Lauterpacht's proposal.

50. Mr. HSU said he would communicate to the Special Rapporteur the text of a new draft proposal that article 4 on the breadth of the territorial sea as submitted by the Special Rapporteur should be adopted subject to the deletion of paragraph 2(b).

51. The CHAIRMAN put to the vote the proposal made by Mr. Lauterpacht and agreed to by the Special Rapporteur to the effect that the articles relating to the territorial sea which had been adopted by the Commission should be submitted to Governments together with the various possible solutions of the question of the

¹⁰ Article 27 read as follows:

"If a foreign warship passing through the territorial sea does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea."

breadth of the territorial sea proposed by members of the Commission, and that Governments should be asked to comment.

The proposal was adopted by 11 votes to none, with 2 abstentions.

Nationality, including statelessness (item 5 of the agenda)
(A/2456) (resumed from the 271st meeting)

REDRAFT BY DRAFTING COMMITTEE OF THE DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS¹¹

52. The CHAIRMAN invited the Commission to consider the draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future Statelessness, as redrafted by the Drafting Committee.

Preamble

53. Mr. CORDOVA, Special Rapporteur, pointed out that the Drafting Committee had adopted for both drafts the same preambles as those adopted by the Commission in 1953 (A/2456).

Article 1

54. Mr. CORDOVA, Special Rapporteur, said that in the first article of the draft Convention on the Elimination of Future Statelessness, which was identical with article 1, paragraph 1, of the Convention on the Reduction of Future Statelessness, the Drafting Committee had replaced the word "child" by the word "person".¹²

55. The CHAIRMAN put this amendment to the vote.

The amendment was approved by the Commission.

The meeting rose at 1.10 p.m.

¹¹ See paragraph 162 of the Commission's report on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456). Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹² *Vide infra*, 274th meeting, para. 8.

274th MEETING

Friday, 23 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. CORDOVA, 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. J. ZOUREK.

Secretariat : Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Time and place of the seventh session

1. Mr. LIANG, Secretary of the Commission, informed the Commission that a reply had been received from the United Nations Headquarters in New York concerning the Commission's preliminary decision to hold its seventh session in Geneva.¹ The Secretary-General, for budgetary and other reasons, favoured the Commission's seventh session being held in New York for a period of eight, and not ten, weeks, as suggested by the Commission. If, however, the Commission confirmed its preliminary decision in favour of Geneva it was suggested that the seventh session open on 2 May 1955, and last eight weeks so as to avoid overlapping with the Economic and Social Council and its functional commissions.

2. The CHAIRMAN thought the Commission should maintain its decision to meet in Geneva, but in view

¹ *Vide supra*, 256th meeting, para. 2.