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Summary record of the 278th meeting

Topic:
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Paragraph 6 (61)

56. The CHAIRMAN submitted paragraph 6.

Paragraph 6 was adopted.

Paragraph 7 (62)

57. The CHAIRMAN submitted paragraph 7.

Paragraph 7 was adopted.

Paragraph 8 (63)

58. Mr. ZOUREK requested that the words "mentioned in paragraph 5" should be inserted after the words "The committee of experts".

59. Mr. LIANG, Secretary to the Commission, said that "group of experts" was probably a better description than "committee of experts".

60. Mr. HSU thought the best solution would be to give the names of the experts who had met at The Hague.

It was so agreed.

Paragraph 8 was adopted subject to that modification.

Paragraph 9 (64)

61. The CHAIRMAN submitted paragraph 9.

Paragraph 9 was adopted.

Paragraph 10 (65)

62. The CHAIRMAN submitted paragraph 10.

Paragraph 10 was adopted.

Paragraph 11 (66)

63. Mr. ZOUREK requested that the words "which follows broadly the 1952 draft" after "draft regulation" should be deleted.

It was so agreed.

Paragraph 11 was adopted as amended.

Paragraph 12 (67)

64. Mr. LAUTERPACHT requested that in the last line of the paragraph the words "article 16 (h)" should be replaced by "the provisions".

It was so agreed.

Paragraph 12 was adopted as amended.

Paragraph 13 (68)

65. Mr. FRANÇOIS, Rapporteur, said that, in accordance with the decision of the Commission, he had in that paragraph summarized the various proposals made by the members of the Commission with respect to the breadth of the territorial sea. The proposals had not

all been submitted at the sixth session as the Commission had only dealt with that problem indirectly; most of them had been submitted during the third session. In addition he had received a proposal from Mr. Hsu which would be added to the list in paragraph 13.

66. Mr. HSU pointed out that the opinions expressed by the members of the Commission during debate were not necessarily all formal proposals. Accordingly, several of the sub-paragraphs of paragraph 13 might well be deleted.

67. Mr. LIANG, Secretary to the Commission, said it was not clear that the proposals enumerated in paragraph 13 had been submitted by members of the Commission. Furthermore, the sequence in which those proposals were enumerated was not very logical.

68. Mr. LAUTERPACHT said that the enumeration was merely intended to give Governments an indication of the great variety of possible solutions and to induce them to give their views. There was, therefore, no point in giving the name of the author of the proposal in each case or in enumerating them in the most logical order.

69. Mr. FRANÇOIS, Rapporteur, said that all the points of view expressed in paragraph 13 had actually been formulated by members of the Commission, at any rate, as constituting possible bases for discussion.

70. Mr. ZOUREK requested the Special Rapporteur to insert in paragraph 13 a passage drafted on the following lines: "That it should be admitted that the breadth of the territorial sea depends on different factors which vary from State to State and that it should be agreed that each coastal State is entitled to fix the breadth of its territorial sea in the light of these factors."⁷

The meeting rose at 1.10 p.m.

⁷ *Vide infra*, 281st meeting, paras. 1-3.

278th MEETING

Monday, 26 July 1954, at 4 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. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (continued)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA
(A/CN.4/L.48/Add.4) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter IV of the draft report on its current session.

*Paragraph 14 (69) **

2. Mr. LAUTERPACHT proposed that the word "inevitably" before "meet" should be deleted and the word "objection" replaced by the word "opposition".

It was so agreed.

3. Mr. FRANÇOIS, Rapporteur, explained that the last sentence had been inserted so as to enlist the co-operation of States which had hitherto, in the majority of cases, merely noted that their legislation did not conform to the proposals of the Commission.

4. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 14 was adopted as amended.

Paragraph 15 (70)

5. Mr. LAUTERPACHT proposed that the phrase: "the Commission would be grateful to Governments ..." should be replaced by: "the Commission would be greatly assisted in its task if governments would state..." The words "very debatable" before "question" should also be deleted.

It was so agreed.

6. Mr. LIANG, Secretary to the Commission, proposed that the word "help" in the last line of the paragraph should be replaced by the word "enable".

It was so agreed.

7. Faris Bey el-KHOURI said that no useful purpose would be served by requesting the opinion of Governments. The Commission should define its attitude with regard to the problems before it and present its opinion to the Governments.

8. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 15 was adopted as amended by 6 votes to none, with 4 abstentions.

Paragraph 16 (71)

9. Mr. LIANG, Secretary to the Commission, proposed that the words "for those seem to be connected" should be replaced by the words "for these questions are connected".

It was so agreed.

10. Mr. LAUTERPACHT requested that "governments' replies" should be altered to read "the replies of the Governments".

It was so agreed.

11. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 16 was adopted as amended.

Paragraph 17 (72)

12. Mr. ZOUREK proposed that the words "draft rules relating to the régime" should be replaced by the words "the provisional articles concerning the régime...".

It was so agreed.

Paragraph 17 was adopted as amended.

13. The CHAIRMAN proposed that the heading of the articles should be altered from "Draft regulations relating to..." to "Provisional articles concerning..." and invited the Commission to take up the comments to the provisional articles one by one.

It was so agreed.

Comment to article 1¹¹

14. Mr. LAUTERPACHT pointed out that the Special Rapporteur appeared to have based the substance of the comment on what he considered to have been the attitude of The Hague Codification Conference of 1930. In fact, however, it was somewhat inexact to speak of an attitude since no decisions had been taken and no convention drafted. It was only possible to refer to the replies of Governments and to the Sub-Committee's report to the Conference. In his opinion, the principle of the sovereignty of the coastal State over the territorial sea was no longer seriously disputed and it was therefore unnecessary to elaborate on the subject. He also queried the need to refer to dissenting views.

15. Mr. FRANÇOIS, Rapporteur, said he would not oppose the deletion in the third sentence of the words "which adopted the same attitude" after the words "the Codification Conference of 1930"; nor would he object to the deletion of the last sentence beginning

* The number within parentheses refers to the paragraph number in the Commission's final report on its sixth session. *Vide supra*, 277th meeting, footnote 1.

¹ See also below, 281st meeting, paras. 4-6.

with the words "The opinions of the few dissentients..." He would, however, point out that the principle of the sovereignty of the coastal State over the territorial waters was still disputed, for example, by La Pradelle.

16. The CHAIRMAN proposed that further consideration of the first paragraph of the comment should be deferred until the Special Rapporteur and Mr. Lauterpacht had devised an agreed draft.

It was so agreed.

17. Mr. ZOUREK recalled that he had preferred the term "territorial waters" to the term "territorial sea" and added that he was unable to agree with the reasons for the change given in the second paragraph of the comment.

18. Mr. LAUTERPACHT said that the difference was not sufficiently clear between "internal waters" and "inland waters".

19. The CHAIRMAN agreed that the English translation of the term *eaux intérieures* was deficient and proposed that further consideration of the paragraph should be deferred until Mr. Lauterpacht had been able to suggest a more suitable term.

It was so agreed.

20. Mr. ZOUREK said that since the article dealt only with the territorial sea, it was illogical to mention the air space over or the sea bed and sub-soil of the territorial sea. He proposed that in the third paragraph the phrase "the air space above it and the bed and sub-soil of the territorial sea", which followed upon the words "sovereignty over the territorial sea" should be deleted.

It was so agreed.

21. Mr. ZOUREK further proposed that the entire sentence beginning with the words "The reason why this is expressly mentioned..." should be deleted.

22. The CHAIRMAN put Mr. Zourek's proposal to the vote.

The proposal was rejected by 7 votes to 2, with 1 abstention.

23. Mr. LAUTERPACHT proposed that the word "general" before the word "sovereignty" at the end of the third paragraph should be deleted and that the words "of the State over other parts of its territory" should be added at the end of the paragraph.

It was so agreed.

24. The CHAIRMAN put the third paragraph, as amended, to the vote.

Paragraph 3 was adopted as amended.

25. Mr. LAUTERPACHT said the words "This draft regulation" at the beginning of the fourth paragraph should be modified to read "These provisional articles", and that the word "immediate" should be

replaced by "specific". Furthermore, it would be better to say that international law limited "the rights of the sovereign State" instead of "the sovereign power of the State".

26. Mr. LIANG, Secretary to the Commission, said he preferred the English text of the comment in question to the French text. The latter was somewhat pretentious and too mandatory. He had doubts concerning such words in the French text as "impose" and "doivent être recherchées". The English text of the first sentence of the paragraph reflected more exactly the views of the Commission.

27. Mr. CORDOVA agreed that the word "specific" should be used in the English text rather than "immediate". The words "the sovereign power" in the comment should be replaced by the words "the exercise of the sovereign rights".

28. Mr. ZOUREK said the entire comment should be reconsidered.

29. Mr. FRANÇOIS, Rapporteur, pointed out that it was impossible to cover all the provisions of public and private international law relating to the territorial and high seas. That is why he had in the French text included the words "en premier lieu".

30. Mr. LIANG, Secretary to the Commission, proposed that the words "doivent être recherchées" should be replaced in the French text by "sont énoncées". He also proposed that in the third sentence the words "be described in this draft codification as applying to" should be replaced by: "be codified in this draft as applying to".

31. Mr. ZOUREK thought that many of the limitations imposed by the draft articles on the exercise of sovereignty were not a part of existing law, and therefore called for a vote.

32. The CHAIRMAN put to the vote the passage in question, as amended in the course of the discussion:

"These provisional articles set forth the specific limitations imposed by international law on the exercise of sovereignty in the territorial sea. These provisions should not, however, be regarded as exhaustive. Events which occur in the territorial sea and which have a legal import are also governed by the general rules of international law which cannot be codified in this draft as applying to the territorial sea in particular. For this reason, the 'other rules of international law' are mentioned in addition to the provisions of this draft."

The above text was adopted by 6 votes to 1, with 5 abstentions.

33. Mr. SALAMANCA proposed that in the fifth paragraph a comma should be inserted between the words "special" and "geographical" so as to cover any existing conventions.

34. Mr. CORDOVA agreed that conventional relationships were even more important than geographical

relationships between two States and should therefore be mentioned.

35. Mr. LIANG, Secretary to the Commission, thought it was inappropriate to place conventions and geographical relationships on the same level.

36. Mr. FRANÇOIS, Rapporteur, proposed that the words "by convention or otherwise" should be added at the end of the paragraph.

37. The CHAIRMAN put the Rapporteur's proposal to the vote.

The proposal was adopted by 7 votes to 1, with 1 abstention.

38. Mr. CORDOVA thought that reference should not be restricted to rights of passage since there were a number of other rights, such as, for example, fishing rights and those pertaining to the use of ports.

39. Mr. ZOUREK thought that reference to the rights of passage should be made not in the present comment but in the comment to the article referring specifically to those rights.

40. The CHAIRMAN said the last sentence of the paragraph might be modified to read: "It is, for instance, not the Commission's intention to limit, in any way, the rights of States which, on account of a convention or otherwise, enjoy more extensive rights of passage through the territorial sea."

41. Mr. LIANG, Secretary to the Commission, thought that if the paragraph did not refer exclusively to rights of passage, any reference to such rights should be omitted.

42. Mr. SALAMANCA agreed with the modification proposed by the Chairman.

43. Mr. LAUTERPACHT proposed that the last sentence of the paragraph should be redrafted to read:

"It is not the intention of the Commission to limit any more extensive rights of passage or other rights enjoyed by States by virtue of custom or treaty."

44. The CHAIRMAN said the words "by virtue of custom or treaty" in Mr. Lauterpacht's draft were in conformity with the Commission's prior vote to insert some such phrase as "by convention or otherwise".

The draft of the last sentence of the paragraph as submitted by Mr. Lauterpacht was adopted.

Comment to article 2

45. Mr. LAUTERPACHT proposed that the terms "the manner in which sovereignty over the air space, sea bed and sub-soil in question is exercised" should be replaced by "the question of the exercise of sovereignty".

46. Mr. FRANÇOIS, Rapporteur, said the French text was satisfactory.² He proposed that the Commission should adopt the French text on the understanding that the English version would be brought into line with it.

It was so agreed.

Comment to article 4³

47. Mr. LAUTERPACHT proposed the deletion of the last sentence of paragraph 1 reading: "This is the Commission's interpretation..."

48. Mr. FRANÇOIS, Rapporteur, said that it had been suggested by Mr. Zourek in the course of the discussion that the ruling of the International Court of Justice was to the effect that States were completely free to choose between the low-water line and straight base-lines. The majority of the Commission, however, had agreed with him (Mr. François) in interpreting the judgement as stating that straight base-lines concerned the very special case of a deeply indented coastline.

49. Mr. CORDOVA said that perhaps all reference to the judgement in the Fisheries case could be omitted.

50. The CHAIRMAN said he personally shared the Rapporteur's view but that a vote should perhaps be taken.

51. Mr. ZOUREK said the matter was not one that could be decided by a vote. An adverse vote would not change what he regarded as the correct interpretation of the judgement in question. He would therefore not ask for a vote on the matter.

52. Mr. LAUTERPACHT withdrew his proposal for the deletion of the last sentence.

53. The CHAIRMAN suggested that a more precise reference to the Fisheries case (date, etc.) should be inserted.

It was so agreed.

54. The CHAIRMAN put the comment to the vote.

The comment to article 4 was adopted by 10 votes to 1, subject to the insertion of a fuller reference to the judgement of the International Court of Justice in the Fisheries case.

Comment to article 5⁴

55. Mr. LAUTERPACHT said that the comment in question suggested that the right of States to draw

² The French text read:

"Cet article a été emprunté, sauf modifications de pure forme, au règlement de 1930. Il peut être considéré comme faisant partie du droit positif. Eu égard au fait que le présent projet s'occupe exclusivement de la mer territoriale, la Commission n'a pas étudié les conditions dans lesquelles la souveraineté sur l'espace aérien, le sol et le sous-sol, est exercée."

³ See also below, 281st meeting, para. 7.

⁴ *Ibid.*, paras. 8-17.

straight base-lines was part of existing law both before and after the judgement in the Fisheries case. The comment went on to say that the two limitations concerning the maximum distance of five miles from the coast and the maximum length of ten miles for the straight base-lines were *lex ferenda* rules which would only become valid after the States had approved of them. The judgement in the Fisheries case, in his opinion, expressed an acceptable rule of future international law provided that limits were laid down both for the maximum length of the straight base-lines and for their maximum distance from the coast.

56. Mr. FRANÇOIS, Rapporteur, said that the five-mile maximum for the distance between the straight base-lines and the coast, and the ten-mile maximum length of those lines, as suggested by the experts, could not possibly be regarded as part of existing international law. Having been proposed by experts, those limits deserved careful consideration, but the only rule of positive international law was that acknowledged by the International Court of Justice—namely, that States with a deeply indented coast were entitled to draw straight base-lines.

57. Mr. LAUTERPACHT said he had gathered that Mr. François as Special Rapporteur had agreed with his view that the law laid down limitations to the right of drawing straight base-lines. Such limitation was implied in the judgement of the Court. All that the Commission had done, on the advice of experts, was to express those limitations in concrete terms. The proposed paragraph, however, implied that any limitation as such of that right was a *lex ferenda* rule. That was putting the ruling of the Court much too high. He proposed that the last sentence of the comments should be deleted altogether.

58. Mr. ZOUREK said that the International Court of Justice had accepted straight base-lines 38 and 45 miles long in places.

59. Mr. FRANÇOIS, Rapporteur, said that the sentence in question was necessary because the Commission had often been accused of not specifying clearly enough which of its conclusions were *de lege ferenda* and which *de lege lata*.

60. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the last sentence of the comment to article 5 should be deleted.

The proposal was rejected by 2 votes to 1, with 8 abstentions.

61. The Chairman put the comment to article 5 to the vote.

The comment to article 5 was adopted by 5 votes to 2, with 5 abstentions.

62. Mr. LAUTERPACHT said that, as a result of the adoption of the comment to article 5, he would be unable to vote for the whole of the draft relating to the territorial sea.

63. Mr. ZOUREK said that he had voted against the comment because article 5 itself did not reflect existing international law.

Comment to article 6

64. Mr. ZOUREK proposed that the expression "committee of experts" in the first paragraph should be amended to "group of experts" as had been done in certain other references to that unofficial body.

It was so agreed.

65. The CHAIRMAN put the comment, as amended, to the vote.

The comment to article 6 was adopted as amended by 7 votes to 1 with 2 abstentions.

Comment to article 8

66. The CHAIRMAN said that in the last sentence the words "are assimilated to" should be substituted for "are deemed to be", to bring the text into line with the French version.

The comment to article 8 was adopted as amended.

Comment to article 9

67. Mr. ZOUREK proposed that the last sentence should be deleted. He did not consider that the article reflected the international law in force. Even in 1930, the opinion had been expressed that roadsteads should be regarded as internal waters.

68. Mr. FRANÇOIS, Rapporteur, said that the view to which Mr. Zourek had referred had received only a minority of votes in 1930. In the discussions during the current session of the Commission, it had received no support whatever. The sentence in question was therefore not at all unjustified.

69. The CHAIRMAN put Mr. Zourek's proposal to the vote.

Mr. Zourek's proposal for the deletion of the last sentence was not adopted, 2 votes being cast in favour, 2 against, with 6 abstentions.

The comment to article 9 was adopted by 10 votes to 1, with 1 abstention.

Comment to article 10

70. Mr. LAUTERPACHT said that the terms "the Commission challenges this right" (the right to create artificial islands in the high seas) were not adequate. In the same comment, it was stated that, in the Commission's view, existing artificial islands had a territorial sea of their own. He did not recall the Commission discussing that question in any detail.

71. Mr. ZOUREK said that artificial islands which might be erected should not have any territorial waters. They should be treated in the same manner as light-

houses, for which no State had ever claimed a special territorial sea.

72. The CHAIRMAN proposed that the entire passage dealing with artificial islands should be deleted.

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

The comment to article 10 as a whole was adopted as amended by 10 votes to 1, with 1 abstention.

The meeting rose at 6.10 p.m.

279th MEETING

Tuesday, 27 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. 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).

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA (A/CN.4/L.48/Add.4) (*continued*)

1. The CHAIRMAN invited the Commission to continue the discussion of the comments to the provisional articles concerning the régime of the territorial sea included in chapter IV of the Commission's report (A/CN.4/L.48/Add.4).¹

¹ *Vide supra*, 277th meeting, para. 1 and footnote.

Comment to article 12

2. Mr. LAUTERPACHT recalled that at the 261st meeting² he had made a proposal intended to prevent a State from extending its territorial sea unduly by using a succession of drying rocks off its coast. By a vote of 4 against 4 that proposal had not been adopted. The third paragraph of the comment to article 12 showed that the Rapporteur interpreted that vote as indicating that the majority of the Commission intended to grant a territorial sea of their own to drying rocks and shoals situated within the bulges in the outer limit of the territorial sea caused by the existence of another drying rock. He feared that such an interpretation went beyond the intentions of the Commission; he therefore proposed that the third paragraph of the comment to article 12 should be deleted.

The proposal was adopted by 4 votes to 1, with 4 abstentions.

The comment to article 12 was adopted as amended.

Comment to article 13

3. The CHAIRMAN proposed that the word "open" in the second line of the second paragraph of the English text should be replaced by "high".

It was so agreed.

The comment to article 13 was adopted as amended by 8 votes to 1, with 1 abstention.

Comment to article 15

4. Mr. LAUTERPACHT proposed that the words "that an arbitration" in the first line of the fifth paragraph of the English text of the comment should be replaced by "that some provision for arbitration".

It was so agreed.

The comment to article 15 was adopted as amended by 9 votes to 1.

*Comment to article 16*³

5. Mr. ZOUREK recalled that, among the various possible solutions to the problem dealt with in article 16, he had indicated the system of following the line of a parallel of latitude drawn through the intersection of the land frontier and the coastline. That was the solution adopted by Bulgaria, for example.

6. Mr. FRANÇOIS, Rapporteur, pointed out that the method mentioned by Mr. Zourek was only possible in the case of a coast following a north to south direction. It would be necessary to specify that it did not apply to all cases. Subject to that reservation, he saw no objection to indicating that solution after the three others referred to in the comment.

It was so agreed.

² *Vide supra*, 261st meeting, paras. 3-23.

³ See also below, 281st meeting, para. 18.