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Summary record of the 279th meeting

Topic:
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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.

The comment to article 16 was adopted by 9 votes to 1, subject to the insertion of a new paragraph proposed by Mr. Zourek.

Comment to article 17⁴

7. Mr. PAL pointed out that the term "other" (of its interests) had been omitted in the quotation from article 17 which was given in the first paragraph of the comment to the said article.

8. Mr. LAUTERPACHT said that the comment was incomplete, particularly its first paragraph. The Commission had voted in favour of inserting, in paragraph 2 of article 17, the terms "or to such of its other interests as the territorial sea is intended to protect";⁵ without wishing to reopen the discussion on that point, he hoped that the comment would specify the exact scope of those terms, which were very vague. If broadly construed they might be taken to mean that the Commission regarded the régime of the territorial sea as identical with that of the actual territory of a coastal State; that would be completely at variance with the principles adopted by the 1930 Codification Conference. The comment should specify that the interests in question were those which the coastal State protected by means of its legislation on fiscal, public health, sanitation, immigration and customs matters. To that list might be added a reference to the very general provisions of article 21 (on the duties of foreign vessels during their passage). He could not see what other restrictions could be imposed on the right of passage without completely abolishing the freedom of the seas.

9. Mr. CORDOVA agreed that the terms "such of its other interests as the territorial sea is intended to protect" were very general. It was, however, precisely because it might apply to unforeseeable cases that the Commission had adopted it.

10. The CHAIRMAN proposed that the comment should indicate that the interests in question included, *inter alia*, those of the State in matters of taxation, public health, sanitation, immigration and customs, as well as those which the provisions of article 21 safeguarded. He would submit a written proposal on those lines and the Commission could then vote on the comment to article 17.

11. Mr. LAUTERPACHT said that, as the draft articles concerning the régime of the territorial sea were purely provisional, he would not press for a special reference to the revised language of the second paragraph.

12. With regard to the third paragraph, he proposed that, in the English text, the words "limit the duties" should be replaced by "affect the rights or obligations". The French text of the paragraph would then read: "Aucune disposition du présent chapitre n'a

pour but d'affecter les droits et obligations des Etats Membres des Nations Unies en vertu de la Charte."

The proposal was agreed to.

Comment to article 18

13. Mr. FRANÇOIS, Rapporteur, said he would redraft the English text of the first sentence of the second paragraph, which was not sufficiently clear.

Comment to article 19⁶

14. Mr. LAUTERPACHT proposed that the comment should specify that the provisions of article 19 also applied to warships even though the article appeared in section A of chapter III. The judgement of the International Court of Justice in the Corfu Channel case had actually concerned warships.

15. The CHAIRMAN said that if warships were mentioned only in one of the articles, the impression might be conveyed that none of the other articles concerned warships, which would be a wrong inference.

16. Mr. CORDOVA recalled that the Commission had admitted that, for security reasons States could, subject to certain conditions, restrict the right of free passage through their territorial sea. The decision of the International Court appeared not to recognize that right in the particularly important case of warships, and the comment to article 19 seemed to generalize that view.

17. Mr. ZOUREK regretted that the Commission had agreed to divide chapter III into two sections. It was not true to say that the rules recognized by the International Court in the particular case were a part of the law in force. According to the Charter, which was one of the principal statements of the law, warships could be used only for defensive purposes, and they therefore did not require freedom of movement in the territorial sea of other States. The decision of the Court in the Corfu Channel case dealt with the very special case of a naval demonstration which had occurred very soon after the war. The Commission had been wrong in adopting in article 19 the rules laid down by the Court and had been even less justified in extending in the comment those rules to merchant vessels.

18. Mr. FRANÇOIS, Rapporteur, recalled that he had previously proposed that article 19 should be placed in the general part of chapter III.

19. Mr. LAUTERPACHT proposed that the second phrase of the comment should be altered to read: "and which, in the Commission's view, should be applicable to all ships."

⁴ The comment read as follows:

"This article confirms the principles which were upheld by the International Court of Justice in its judgement in the Corfu Channel case and which, in the Commission's view, should be regarded as forming an integral part of international law."

⁴ *Ibid.*, paras. 19 and 20.

⁵ *Vide supra*, 262nd meeting, paras. 64-70.

20. Mr. EDMONDS proposed that the comment should be drafted as follows:

“This article confirms the principles which were upheld by the International Court of Justice in its judgement in the Corfu Channel case and which should be regarded as forming an integral part of international law.”

21. Mr. CORDOVA proposed that the second phrase of the comment (“and which, in the Commission’s view...”) should be deleted.

22. Mr. PAL agreed with Mr. Córdova. It was not necessary to extend the scope of the International Court’s judgement any further.

23. Mr. HSU pointed out that the interpretation of the Court’s judgement as given in the comment was not shared by all jurists; the comment reflected only one point of view and, consequently, did nothing to improve the article.

24. Mr. LAUTERPACHT said that, since the draft before the Commission was provisional, he would withdraw the amendments he had proposed.

25. Mr. CORDOVA and Mr. EDMONDS also withdrew their respective proposals.

26. Mr. ZOUREK proposed that the second phrase of the comment to article 19 (“and which, in the Commission’s view...”) should be deleted.

The proposal was adopted by 5 votes to 4, with 2 abstentions.

The comment to article 19 was adopted, as amended, by 8 votes to none, with 3 abstentions.

Comment to article 20

27. Mr. LAUTERPACHT proposed that the word “possible” in the second sentence of the comment should be replaced by the word “permissible”. The French text should accordingly be modified to read: “Dans les cas exceptionnels, une suspension temporaire du droit de passage pourrait même être permise.”

It was so agreed.

28. Mr. LAUTERPACHT proposed that in the third sentence of the comment the words “might have argued” should be replaced by the words “is arguable”. The French text would remain unchanged.

It was so agreed.

29. Mr. ZOUREK doubted if the third sentence of the comment truly represented the view of the Commission. The Commission had, in his opinion, envisaged in certain cases the permanent suspension of the right of passage. The Chairman had requested Mr. Córdova to prepare a draft providing for the safeguarding of installations used for the exploitation of the sub-soil of the territorial sea.

30. Mr. FRANÇOIS, Rapporteur, did not think the Commission had ever envisaged a permanent suspension of the right of passage.

31. Mr. CORDOVA agreed that the very special cases referred to by Mr. Zourek were covered by the right of the Stae to regulate maritime traffic within its own territorial sea.

32. Mr. ZOUREK proposed that the third sentence of the comment should be deleted, at least until the Commission had obtained the views of the Governments on article 20.

The proposal was rejected by 6 votes to 1, with 3 abstentions.

The comment to article 20, as amended in the light of Mr. Lauterpacht’s proposals, was adopted by 10 votes to 1.

Comment to article 21

33. Mr. LAUTERPACHT proposed that in the second sentence of the third paragraph of the comment, the words “in the absence of treaty provisions to the contrary” should be inserted after the words “cannot be invoked”. It was necessary to provide for the case of a State concluding treaties which included a “most favoured nation” clause.

It was so agreed.

The comment to article 21 was adopted as amended by 8 votes to 1, with 1 abstention.

Comment to article 22

34. Mr. ZOUREK said the comment gave an inadmissible interpretation of article 22. Contrary to the implication of the second paragraph, the principle of non-discrimination in the matter of charges should be recognized as a general principle.

35. Mr. LAUTERPACHT proposed that in the second paragraph the words “subject to” should be replaced by the words “on a footing of”.

It was so agreed.

The comment to article 22 was adopted as amended by 7 votes to 1, with 1 abstention.

Comment to article 23⁷

36. Mr. LAUTERPACHT proposed that the exact title and date of the 1952 convention should be given in the fourth paragraph, and the phrase “has not yet entered into force and is still under consideration by the contracting parties” should be replaced by: “has not yet been ratified by a large number of States”.

It was so agreed.

⁷ See also below, 281st meeting, para. 21.

37. Mr. LAUTERPACHT doubted whether the last (fifth) paragraph⁸ reflected exactly the true position; he suggested that it should be deleted.

38. Mr. ZOUREK supported Mr. Lauterpacht.

39. Mr. FRANÇOIS, Rapporteur, agreed to the deletion of the paragraph.

40. Mr. LIANG, Secretary to the Commission, pointed out that the words "international criminal law" in the fourth paragraph were open to misconstruction. It might be better merely to say "law", and to alter the French text to read: *la codification du droit en cette matière*.

It was so agreed.

41. Mr. LAUTERPACHT proposed that in the fourth paragraph the words "The Commission did not fail to realize how desirable it would be" should be replaced by the words "The Commission realizes that it would be desirable".

It was so agreed.

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

The comment to article 23 was adopted as amended by 8 votes to none, with 2 abstentions.

Comment to article 24⁹

43. Mr. LAUTERPACHT proposed that the word "comparable" should be replaced by the word "analogous", and that the last sentence of the comment should be deleted.¹⁰

It was so agreed.

44. Mr. LAUTERPACHT said the comment should refer to the Brussels convention of 10 May 1952, relating to the arrest of sea-going ships, and state that the Commission proposed to continue the study of that topic in the light of that convention.

45. The CHAIRMAN said the Rapporteur would make the relevant additions to the comment on the lines suggested by Mr. Lauterpacht, and the Commission would vote on the comment to article 24 when the redrafted text was submitted to it.

Comment to article 25

46. The CHAIRMAN pointed out that the third sentence of the comment should be deleted so as to take

⁸ The paragraph read:

"Though it realizes that some authorities hold that the coastal State has a broader power to arrest, the Commission, nevertheless, considers the article as drafted as the expression of the international law in force."

⁹ See also below, 281st meeting, para. 22.

¹⁰ The sentence read:

"In the Commission's opinion, the article states the international law in force."

into account the amendments made by the Commission to the text of article 25.

It was so agreed.

47. Mr. LAUTERPACHT thought it somewhat excessive to say that the rules laid down by the Brussels Convention of 1926 could be regarded as already forming part of general international law; the principles underlying those rules were being increasingly recognized, but it should not be forgotten that the Brussels Convention had as yet only been ratified by a small number of States. It might therefore be preferable to replace the second sentence by the following text: "It considers that these rules follow the preponderant practice of States, and has consequently formulated this article accordingly."

It was so agreed.

48. The CHAIRMAN submitted the comment, as amended, to the vote.

The comment to article 25 was adopted as amended by 10 votes to 1.

Comment to article 26¹¹

49. Mr. CORDOVA proposed the deletion of the final phrase of the last paragraph: "which it considers to be in conformity with the international law in force".

It was so agreed.

50. Mr. ZOUREK pointed out that the first sentence of the comment did not represent the unanimous opinion of the Commission. It would be preferable to indicate that some members of the Commission considered that the passage of warships through the territorial sea was subject to the prior consent of the coastal State.

51. Mr. FRANÇOIS, Rapporteur, pointed out that nowhere else in the report was a minority opinion recorded.

52. Mr. ZOUREK said he would draft a suitable comment. He proposed that the vote on the comment to article 26 should be deferred.

It was so agreed.

Comment to article 27

53. Mr. LIANG, Secretary to the Commission, pointed out that the term "exterritoriality" raised a number of theoretical difficulties; it was perhaps preferable to say "immunity from jurisdiction".

54. Mr. LAUTERPACHT agreed.

55. Mr. CORDOVA said that the terms proposed by the Secretary and Mr. Lauterpacht did not convey a very precise meaning.

¹¹ See also below, 281st meeting, paras. 23-28.

56. Mr. LAUTERPACHT said there was a body of law relating to immunity from jurisdiction. To avoid any confusion, the passage might state, for example, that the provisions of paragraph 1 were without prejudice to the generally recognized principle of immunity from jurisdiction enjoyed by warships in the territorial sea.

57. Mr. FRANÇOIS, Rapporteur, pointed out that, in the French text, the words *immunité de juridiction* might prove confusing, and they could be construed as meaning merely that the courts of the coastal State had no jurisdiction over foreign warships, whereas what the Commission wanted to stress was that the law of the coastal State did not apply on board a warship. For that reason, he preferred to retain the term "exterritoriality".

58. The CHAIRMAN put the comment to the vote.

The comment to article 27 was adopted by 10 votes to 1, with 1 abstention.

**Election of a special rapporteur for the topic
"Diplomatic intercourse and immunities"**

59. The CHAIRMAN recalled that at its 270th meeting¹² the Commission had asked Mr. Zourek whether he would be prepared to act as special rapporteur on the topic. Owing to lack of time, Mr. Zourek was unable to act and the Commission had to appoint another rapporteur.

60. Mr. LAUTERPACHT proposed that Mr. Sandström should be appointed special rapporteur on the topic "diplomatic intercourse and immunities".

61. Mr. PAL seconded Mr. Lauterpacht's proposal.

Mr. Lauterpacht's proposal was adopted unanimously.

62. Mr. LAUTERPACHT pointed out that Mr. Hsu had proposed that the Commission should request the Special Rapporteur on the law of treaties and the Special Rapporteur on the régime of the high seas to continue their work on those topics.¹³

63. Mr. LIANG, Secretary to the Commission, pointed out that it was not customary for the Commission to adopt a formal resolution in such cases. It went without saying that special rapporteurs appointed by the Commission continued their work until they submitted their reports.

64. Mr. LAUTERPACHT recalled that the Commission had made similar decisions at its fifth session.¹⁴

65. Mr. HSU said he was satisfied with the explanations given by the Secretary to the Commission and therefore withdrew his proposal.

Control and limitation of documentation

66. Mr. LIANG, Secretary to the Commission, drew attention to General Assembly resolution 789 (VIII) concerning the control and limitation of documentation.

67. The CHAIRMAN proposed that the Commission should indicate in its report that it had duly noted that resolution.

It was so agreed.

Draft resolution proposed by Mr. García-Amador regarding closer co-operation with Inter-American institutions

68. Mr. GARCÍA-AMADOR proposed the following draft resolution:

"The International Law Commission,

"*Considering* that according to article 26 of its statute, adopted by resolution 147 (II) of the General Assembly,

"The advisability of consultation by the International Law Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized,

"*Considering* that the Inter-American Council of Jurists and the Tenth Inter-American Conference have taken steps towards the implementation of the foregoing provision,

"*Resolves* to ask the Secretary-General to take such steps as he may deem appropriate in order to establish a closer co-operation between the International Law Commission and the Inter-American bodies whose task is the development and codification of international law."

69. He pointed out that the Inter-American Council of Jurists at its session in Rio de Janeiro in 1950 had adopted a resolution providing for a certain degree of co-operation between the Secretariat of the Council and the Secretariat of the International Law Commission, particularly so far as the exchange of documentation was concerned. The Tenth Inter-American Conference had, moreover, adopted, in connexion with the subject of the responsibility of States, a resolution along the same lines.

70. It would be desirable for the Commission to be kept informed of the work done by American inter-governmental institutions on problems studied by the Commission. It would be sufficient for that purpose, at the present stage, for the Secretariat of the Commission and that of the Inter-American Council of Jurists to communicate to one another all the documents relating

¹² *Vide supra*, 270th meeting, para. 12.

¹³ *Vide ibid.*, para. 7.

¹⁴ See the Commission's report on its fifth session, in *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, p. 30, paras. 164 and 165. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

to the questions studied by both bodies, and further, to take all appropriate measures with a view to closer co-operation between them. Such action would not involve any additional expenditure as enough copies of the documents of the Commission were reproduced in any case.

71. Mr. LIANG, Secretary to the Commission, pointed out that there was already in practice a certain degree of co-operation between the Secretariat of the United Nations and that of the Pan American Union. It was no doubt desirable that the co-operation should become closer, provided that it had no major financial implications.

72. Mr. HSU supported Mr. García-Amador's proposal. Inter-American bodies were doing splendid work, at the regional level, in the matter of the codification of international law, and the Commission's co-operation with them should be closer.

13. The CHAIRMAN put the draft resolution to the vote.

Mr. García-Amador's draft resolution was adopted unanimously.

Representation of the Commission at the ninth session of the General Assembly of the United Nations

74. Mr. HSU submitted the following proposal: "The Commission decides that it shall be represented at the ninth session of the General Assembly by its Chairman, Mr. A. E. F. Sandström, for purposes of consultation."

Mr. Hsu's proposal was adopted unanimously.

The meeting rose at 1 p.m.

280th MEETING

Tuesday, 27 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. 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 vote on the provisional articles concerning the régime of the territorial sea, as a whole.

2. He explained that he would vote in favour of the articles, subject to a reservation with regard to article 5 for it laid down a system for determining the breadth of the territorial sea which was more rigid than that recognized by existing law as interpreted by the International Court of Justice, and which did not sufficiently take into consideration the geographical characteristic of certain archipelagoes such as those in the Scandinavian countries (the *skjaergaard*).

3. Mr. LAUTERPACHT proposed that the vote on the provisional articles should be postponed until after the Commission had considered the comments to the articles.

4. Mr. HSU thought that the vote could be taken at the following meeting. Since, however, he would be unable to attend, he wished the Commission to note that he had intended to abstain from such a vote.

5. The provisional articles on the régime of the territorial sea had been drawn up before the pivotal question of the breadth of the territorial sea had been decided upon. The procedure was illogical and could not but have had consequences. The first was the need to assume, for the sake of drafting, the out-of-date three-mile rule. That, in turn, would produce the second; namely, a prejudicial effect on the minds of the Governments in their consideration of the problem of the breadth of the territorial sea, now referred to them for their opinions. Those two consequences would make the revision of the articles at the following session necessarily more drastic and time-consuming.

6. The CHAIRMAN said that the vote on the provisional articles concerning the régime of the territorial sea would be postponed until the next meeting.