

Document:-
A/CN.4/SR.299

Summary record of the 299th meeting

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

Extract from the Yearbook of the International Law Commission:-
1955 vol. I

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purpose of his draft, he had not thought it necessary to emphasize subsequently that it was designed exclusively to ensure the conservation of the living resources of the sea. However, in order to make the position perfectly plain, he would point out that conservation was mentioned in each paragraph of the preamble with the exception of the first, and, indeed, constituted the special feature of his draft. There could be no doubt that conservation had been precisely the problem which the Rome Conference had been convened to study.

57. Mr. FRANÇOIS (Special Rapporteur) disagreed with Mr. Scelle's interpretation, and did not consider that the words "for the purpose of protecting fisheries against waste or extermination" allowed of any possibility of doubt. In order further to substantiate his argument, he reminded Mr. Scelle that the three articles adopted by the Commission at its fifth session had originated in that part of his second report on the high seas (A/CN.4/42)⁷ which had been devoted to the protection of the resources of the sea. From the outset, the whole issue had been considered from that angle.

58. Mr. HSU suggested that the Commission might proceed with the examination of the draft articles within the narrower framework proposed by Mr. García Amador. It could later consider whether the wider approach, of which Mr. Scelle was the exponent, was preferable.

59. Mr. SANDSTRÖM endorsed the Special Rapporteur's argument, which was further reinforced by the first sentence of paragraph 98 in the Commission's report on its fifth session.

60. Mr. SCELLE observed that, if the Commission decided that the two texts had precisely the same purpose, article 1 in Mr. García Amador's draft would have to be amplified to bring it into line with article 1 of the former.

61. Mr. SALAMANCA said that the fact that Mr. García Amador's text was an amendment to the articles adopted by the Commission was perhaps being overlooked. The sole important difference between the two was that the former took into account the special interests of the coastal State. In his opinion, it was the task of the sub-committee to combine the two texts to produce a single draft.

62. Mr. GARCÍA AMADOR pointed out that he had transposed the second sentence of article 1 in the Commission's text to make a separate article, because it enunciated a fundamental principle which was not at variance with international law. As the first sentence in the Commission's article 1 was somewhat indeterminate, and failed to define the meaning of conservation, he had, in the light of the conclusions reached by the Rome Conference, devoted the whole preamble to that definition. The remainder of his articles derived from the Commission's own draft.

⁶ 296th meeting, para. 19.

⁷ *Yearbook of the International Law Commission, 1951*, vol. II.

63. Mr. ZOUREK said that the discussion had shown that most members of the Commission, including the Special Rapporteur, agreed with the restrictive interpretation of the articles adopted in 1953; the Commission would be well advised to reach a definite decision about the scope of the text to be adopted.

64. Mr. AMADO considered the discussion to have been useful in clearing the air, and did not think that any doubts would have arisen in Mr. Scelle's mind if he had read carefully the comment on the Commission's articles. Mr. García Amador had not gone any further in formulating principles which, it must be acknowledged, were new in international law except that he had mentioned the special interests of the coastal State.

65. Mr. SCELLE observed that he had in fact given very careful study to the comment, but had interpreted the word "regulations" in paragraph 98 of the 1953 Report of the Commission (A/2456) in its widest sense. Perhaps he had been mistaken, and he would therefore ask that the Commission formally decide that issue. If his conception was incorrect, then Mr. García Amador's draft articles did indeed constitute an amendment to those already adopted by the Commission and should be dealt with first. Their approval would extricate the Commission from the embarrassment of having to submit to the General Assembly two texts which conflicted on certain points.

66. Mr. SALAMANCA observed that the Commission might, in the light of modern developments, have to modify its earlier views about the procedure for the settlement of disputes and he wondered how that important question of substance could be decided by the sub-committee if it had no guidance from the Commission itself.

It was decided by 7 votes to none, with 5 abstentions, that Mr. Scelle's interpretation of the scope of the articles adopted at the fifth session (A/2456) was incorrect.

The meeting rose at 1 p.m.

299th MEETING

Thursday, 26 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. S. B. KRYLOV (First Vice-Chairman)
later: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda)
(A/2693, A/CN.4/90 and Add.1 to 4, A/CN.4/93, A/CN.4/L.54) (resumed from the 295th meeting)

Mr. Krylov, First Vice-Chairman, took the Chair.

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)

Chapter III: Rights of passage

1. The CHAIRMAN, after announcing that the sub-committee set up at the previous meeting¹ had not yet completed its work on the draft articles on fisheries, invited the Commission to consider chapter III of the provisional articles concerning the régime of the territorial sea.

2. Mr. FRANÇOIS (Special Rapporteur) stated that the United Kingdom Government had raised certain objections to the order of the articles in chapter III, on the grounds that some of the articles were general in scope and should be applicable to warships as well as to merchant vessels. He admitted that the grouping adopted by the Commission at its sixth session was not particularly felicitous, but did not find the proposed remedy fully satisfactory. It might, indeed, give rise to just as much confusion as the original text. In particular, he could not agree to the inclusion in a general article of the kind proposed by the United Kingdom Government² of the provision contained in sub-paragraph (7), which related solely to warships. Furthermore, if the United Kingdom Government's proposals were adopted it would no longer be clear that articles 22 and 23 applied to merchant vessels only.

¹ 298th meeting, para. 49.

² A/2934, annex, No. 16.

3. A simple solution would be to group together articles 18, 19, 20 and 21, which were of a general character, and to transpose the heading "Section A: Vessels other than warships" from its present position before article 18 to a similar position before article 22. Some further modifications would also be necessary, particularly in the case of articles 26 and 27. As the matter was one of presentation and not of substance, he believed it could be referred direct to the Drafting Committee.

4. The CHAIRMAN entirely agreed that the question could be dealt with by the Drafting Committee.

5. Sir Gerald FITZMAURICE observed that there was a great deal of justice in the Special Rapporteur's criticism of the form proposed by the United Kingdom Government. The original was clearly capable of improvement, but the United Kingdom amendment was not entirely successful.

It was agreed to refer the matter to the Drafting Committee.

6. Mr. SALAMANCA considered that, as articles 20 and 21 stated the exceptions to the right of innocent passage, the Drafting Committee should give all the attention it deserved to the United Kingdom Government's proposed sub-paragraph (6). That text was a positive affirmation of the right and was drafted in much more precise and lucid language than that used by the Commission.

7. Mr. FRANÇOIS (Special Rapporteur) pointed out that the right of innocent passage was recognized in a positive manner in article 18.

8. Mr. ZOUREK considered it appropriate to refer the question of the order of articles to the Drafting Committee, but could not agree with the Special Rapporteur that the transposition of the heading of section A was a mere drafting matter. That action would have grave legal consequences, owing to the fact that all the articles in chapter III were based on the drawing of a distinction between warships and other vessels. The right of innocent passage by warships had been discussed at great length at the previous session, when he had been in the minority. He still could not agree that article 18 was applicable to warships, since that would be contrary to existing rules of international law. If the Commission wished to propose such a change *de lege ferenda*, it must say so clearly.

9. In considering the order of the articles it should be borne in mind that they flowed from State sovereignty. The rights and duties of the coastal State were in the present instance subject to the right of innocent passage in the interests of freedom of navigation. The relative importance of the principles involved must be reflected in the structure of the draft.

10. Mr. FRANÇOIS (Special Rapporteur) explained that he had not proposed that the distinction between warships and other vessels should be abandoned; it would be preserved if section A were to begin at

article 22 and if certain provisions were transposed to form part of the general provisions.

11. Mr. Zourek's other observations would, of course, be taken into account by the Drafting Committee, which he hoped would not feel impelled to make any great change in the order adopted at the previous session.

12. The CHAIRMAN then invited the Commission to discuss chapter III article by article.

Article 17 [16]: Meaning of the right of passage

13. Mr. FRANÇOIS (Special Rapporteur) said that some governments considered that it should be made clear that the provisions of chapter III applied in time of peace. Though it was perhaps superfluous to make an explicit reference of that kind, he had in his amendments proposed that the heading of the chapter be changed to read "Right of innocent passage in time of peace", so as to avoid all possibility of misunderstanding.

14. Mr. AMADO considered the original title to be perfectly adequate, and was disturbed by the restrictive implications of the Special Rapporteur's amendment. Moreover, he could not admit that there could be any right of passage which was not innocent.

15. Mr. FRANÇOIS (Special Rapporteur) pointed out that in time of war the right of passage for merchant ships through the territorial sea of another State was subject to rules other than those obtaining in time of peace.

16. The CHAIRMAN, speaking as a member of the Commission, favoured the Special Rapporteur's amendment, which made clear the scope of chapter III.

17. Sir Gerald FITZMAURICE, though he did not wish to make an issue of the point, asked whether the Special Rapporteur's amendment might not be construed as meaning that certain other parts of the draft were of general application both in time of peace and in time of war. If, in fact, the Commission was legislating for peace time, it would be wrong to make specific mention of that fact in one chapter alone.

18. Mr. FRANÇOIS (Special Rapporteur) did not share Sir Gerald's concern, because he considered that other articles in the draft had a general application not limited to time of peace. The distinction only arose in the case of the right of innocent passage. The matter could, however, be elucidated in the comment.

19. Mr. AMADO said he had not been convinced by the Special Rapporteur's arguments, and would insist on a vote if the amendment were maintained.

20. Sir Gerald FITZMAURICE could not entirely agree with the Special Rapporteur. For instance, even with regard to the limits of the territorial sea the claims made by States were not necessarily the same during a war as in time of peace, as was illustrated by the case of the Scandinavian States. The Commission might also

find it necessary to provide for the eventuality of the articles on fisheries not necessarily being equally applicable in times of war. That being so, there was a case of indicating, perhaps in the comment, that the régime of the territorial sea would apply only in time of peace.

21. Mr. HSU thought that, in view of the difficulty of definition, a change of the kind proposed by the Special Rapporteur was inadvisable, as it might require the inclusion of a further article to explain what was meant by "time of peace".

22. Mr. SCELLE also felt that the Special Rapporteur's amendment might be positively harmful. Most rules of international law applied only in time of peace, and it would be a great mistake for the Commission to make any reference of the kind proposed by the Special Rapporteur.

23. Mr. FRANÇOIS (Special Rapporteur) withdrawing his amendment, emphasized that it was extremely dangerous to argue that the limit of the territorial sea was only applicable in peacetime.

24. Mr. AMADO observed that in the modern world it was difficult to determine when a state of war existed.

25. Mr. FRANÇOIS (Special Rapporteur), turning to paragraph 2 of article 17, recalled that the concluding words "any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect" had been adopted at the sixth session at the suggestion of Mr. Scelle and after prolonged discussion. They had been strongly opposed by Mr. Lauterpacht, who had entered an express reservation stating that he could not accept such wording. The United Kingdom Government had noted that such wording, which favoured the coastal State, might be open to abuse, and the Netherlands Government, moved by the same preoccupation, had proposed that the paragraph be amended to read: "Passage is innocent so long as the vessel uses the territorial sea without committing any act contrary to the laws and provisions enacted by the coastal State in conformity with these regulations and with other rules of international law." He submitted that text for the Commission's consideration.

26. Mr. SANDSTRÖM preferred the Netherlands amendment (A/2934, annex, No. 10), which defined the right of passage in more positive terms than did the original text. However, the question at issue was really one of form.

27. Sir Gerald FITZMAURICE said that he would be satisfied by the Netherlands amendment.

28. Mr. ZOUREK expressed a strong preference for the original text, which could be slightly recast to meet Mr. Sandström's wishes. The Netherlands amendment had reversed the proper order of things by indirectly defining innocent passage as passage which did not violate the laws of the coastal State, whereas it was the latter which must be the judge of whether its security,

fiscal, sanitary, migration and other interests were being respected. By the terms of the Netherlands amendment, if the coastal State had made no specific laws and regulations for the protection of its interests, the passage of a foreign vessel through its territorial waters must always be held to be innocent whatever its actions. Such wording would accordingly vitiate the fundamental principle stated in article 1.

29. Mr. FRANÇOIS (Special Rapporteur) considered that Mr. Zourek's objections were to a great extent well-founded. Perhaps the Drafting Committee might be requested to prepare a compromise text.

30. Mr. SCELLE did not consider that the difference between the two texts was very significant. Paragraph 2, however, did call for some further thought by the Drafting Committee, particularly with the object of improving the somewhat clumsy expression "or to such other of its interests as the territorial sea is intended to protect".

31. Sir Gerald FITZMAURICE had no objection to paragraph 2 being referred to the Drafting Committee, though he considered that a serious point of substance, which had already been discussed at length at the previous session, was involved. The virtue of the Netherlands amendment was that it contained no reference to "public policy", on which point previous discussion had largely turned. He himself shared Mr. Lauterpacht's view that those words went very far towards qualifying the right of innocent passage, and would allow the coastal State, on some plausible pretext, to declare that a passage was not innocent. In his opinion, therefore, if the provision was to be effective, the reference to public policy must be deleted from both article 17 and article 20.

32. Mr. SANDSTRÖM pointed out that, unlike the original text, the Netherlands amendment did not take intention into account.

33. The CHAIRMAN suggested that paragraph 2 be referred to the Drafting Committee on the understanding that it would probably require further discussion in plenary meeting.

It was so agreed.

*Article 18: Rights of innocent passage
through the territorial sea*

34. Mr. FRANÇOIS (Special Rapporteur) said that the Netherlands and United Kingdom comments (A/2934, annex, Nos. 10 and 16) on article 18 could be discussed as soon as the Drafting Committee had submitted a new text for article 17.

35. Sir Gerald FITZMAURICE, taking up Mr. Salamanca's point raised during the general discussion, when he had expressed support³ for the United Kingdom's proposed sub-paragraph (6), because there was no clear and positive affirmation of the right of inno-

cent passage in the Commission's text, said that the Special Rapporteur had not disposed of that point by referring to article 18, since that article qualified the right by making it subject to the "provisions of these regulations".

36. The CHAIRMAN observed that if the Special Rapporteur's proposal to transpose the heading of section A were adopted, the provisions of article 18 would apply to warships also.

37. Mr. SALAMANCA considered that a substantive issue was at stake, and was uncertain whether the Drafting Committee would be capable of reaching a decision as to whether the right of passage should be stated in positive or in negative terms.

38. At the previous session he had been in agreement with Mr. Lauterpacht about the danger of allowing the coastal State to be the sole judge of whether or not an act was prejudicial to its public policy, since such a provision was open to the widest possible interpretation. In face of the marked tendency to extend the rights of coastal States every effort must be made to ensure that the right of innocent passage was not endangered. That was why she favoured the unequivocal wording proposed by the United Kingdom Government in its sub-paragraph (6).

39. Mr. FRANÇOIS (Special Rapporteur) repeated that all those considerations could be discussed once the Drafting Committee had prepared a new text for article 17: in doing so it would, of course, take full account of the United Kingdom's comments.

It was so agreed.

Article 19 [17]: Duties of the coastal State

40. Mr. FRANÇOIS (Special Rapporteur) said that the Netherlands comment (A/2934, annex, No. 10) had not convinced him that article 19 required modification, since it was self-evident that the coastal State must itself respect the principle of freedom of passage. The need to exclude any interpretation implying that coastal States had a specific responsibility for the presence of obstacles not of their own making in their territorial waters was already adequately met.

41. Sir Gerald FITZMAURICE suggested that the Netherlands Government had been prompted by the view that a threat to freedom of communication in the territorial sea could normally emanate only from the coastal State. The form of article 19, therefore, was somewhat odd; it should have been more direct. He disagreed with the Special Rapporteur that the Netherlands Government's point, which had also been taken up by the United Kingdom Government, had been met, for there was no clear affirmation in the present text that it was the duty of the coastal State to allow innocent passage. There was altogether something a little evasive about articles 18, 19 and 20, for they created exceptions to a rule which had nowhere been expressly laid down.

³ See *supra*, para. 6.

42. Mr. AMADO said that the Drafting Committee should consider whether the expression "the means at its disposal" was appropriate, since the main object in view was that the coastal State should take effective means to ensure respect for the principle of the freedom of communication.

43. Mr. SANDSTRÖM considered that the Netherlands Government's comment could be taken into account by the Drafting Committee.

44. Mr. ZOUREK believed that the Netherlands comment deserved attention. Paragraph 1, which went far beyond existing rules of international law concerning the obligations of the coastal State, required re-drafting.

45. Mr. FRANÇOIS (Special Rapporteur) explained that paragraph 1 contained a provision which had been recognized as a rule of international law in the judgement given by the International Court of Justice in the Corfu Channel case.⁴ He considered that the article could now be referred to the Drafting Committee.

It was so agreed.

Article 20 [18]: Right of protection of the coastal State

46. Mr. FRANÇOIS (Special Rapporteur) stated that the Netherlands Government had proposed the substitution of the words "such other of its interests as it is authorized to protect under these regulations and other rules of international law" for the words "such other of its interests as the territorial sea is intended to protect" in paragraph 1. It had also proposed the addition of the following paragraph: "There must be no interference with the passage of foreign vessels through straits used for international navigation between two parts of the high seas."

47. Mr. SALAMANCA said that, as at present worded, the Spanish and English texts seemed to hold somewhat obscure implications as to the nature of the territorial sea.

48. Mr. LIANG (Secretary to the Commission) reverting to Sir Gerald Fitzmaurice's observations concerning "public policy", observed that the views on that term expressed by Mr. Lauterpacht at the previous session had not been shared by some members of the Commission, or by himself. He noted that the United Kingdom Government, in its observations on that article, had not made a specific issue of the point, but had confined itself to putting forward an amended text which omitted the term.

49. In their present context, the words "public policy" were used in the technical meaning ascribed to them in private international law, and did not bear the wider connotation of the word "policy" as such. He did not therefore consider that there were grounds for weighty objection to them.

50. Mr. SCELLE said that the divergence of view between him and Mr. Lauterpacht at the previous

session had perhaps been caused by a linguistic difficulty. The words *ordre public* in French law could not possibly be interpreted as meaning the general policy of a government.

51. Turning to another question, he said that the articles under discussion were drafted in such a way as to tend to increase the rights of coastal States, a tendency which he deplored and strongly opposed. Though he recognized that the territorial sea was subject to a special régime, it was nevertheless an inseparable part of the sea. He considered, therefore, that the draft, which at present gave pride of place to the coastal State, should be reviewed in the light of the consideration that there could be no freedom of the high seas without the right of innocent passage, subject of course to the requirements of "public order" in his sense of the term.

52. Mr. AMADO feared that the use of the expression *ordre public* would always create confusion and difficulties, and hoped that the articles under discussion, which were already somewhat wordy, might be pruned.

Mr. Spiropoulos resumed the Chair.

53. Mr. SALAMANCA said that the reference in paragraph 1 to "the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect" was vague, and accordingly unsatisfactory. The "other interests" might, perhaps, be those specified in article 21, or the reference might be to such interests as customs and sanitary control. He suggested that that imprecise term be replaced by a clear definition of the interests which could justify interference with the right of innocent passage; to that end, paragraph 1 could be amended along the lines of the Netherlands Government's observations on article 17, paragraph 2 (A/2934, annex, No. 10)

54. Sir Gerald FITZMAURICE said that when Mr. Lauterpacht had objected at the sixth session to the use of the term "public policy", it was certain that he had not been under the impression that it implied that political grounds constituted sufficient justification for interference with the right of passage. It was, however, unfortunately true that the words "public policy" in English were wide enough to warrant possibly quite unjustified limitations of the right of passage. To quote a not impossible instance, a State might conceivably refuse passage to oil-burning ships on the grounds that the prevention of oil pollution was an important element of its public policy.

55. With regard to the words "such other of its interests as the territorial sea is intended to protect", he agreed with Mr. Salamanca that they were dangerously vague and introduced a subjective element which would serve neither a useful nor a desirable purpose. States held widely different views about the interests to be protected by the régime of the territorial sea. It was therefore necessary to replace the phrase in question by a more precise indication of the interests it was intended to cover.

56. He agreed with Mr. Scelle that the right of innocent passage must be construed not as a mere derogation of

⁴ *I.C.J. Reports 1949*, p. 4.

the sovereign rights of the coastal State in the territorial sea, but rather as an independent right, which must be given such status, and not an inferior or subordinate position, in the process of codification.

57. Right of passage through the territorial sea was a necessary logical concomitant of the freedom of navigation on the high seas. The object of a voyage was to go from one port to another, usually in some other country. If the right of passage through the territorial sea were not free, voyages would become liable to frustration.

58. It was necessary to strike a balance between two legal principles of equal importance: the right of innocent passage and the prerogatives of the coastal State in the territorial sea.

59. Mr. SANDSTRÖM said that the Drafting Committee might draw inspiration from the terms of article 21, when trying to clarify the vague terminology of article 20.

60. Mr. ZOUREK said that article 20 was not absolutely indispensable. The right of protection of the coastal State, as defined in that article, was a necessary corollary of the sovereignty of the coastal State over the territorial sea enunciated in article 1. The basic principle of the Commission's work on the régime of the territorial sea was that that sea formed part of the territory of the coastal State, with the consequence that the latter exercised therein its fullest sovereign prerogatives, with the proviso—or exception—that the right of innocent passage of foreign ships be respected.

61. The various rights and prerogatives of the coastal State were not dependent on the Commission's draft articles. They would exist by virtue of State sovereignty, even were the Commission not to adopt such an article as article 20.

62. He recalled that he had been in favour—as indeed he still was—of the rule that the coastal State was entitled to stop innocent passage in certain areas in the interests of the maintenance of public order and security, provided recognized sea lanes essential to international navigation were left clear. In paragraph 2 of article 20, the Commission had only provided for the temporary suspension of the exercise of the right of innocent passage on such grounds.

63. The Norwegian Government had pointed out in its comments (A/2934, annex, No. 11) that article 6, paragraph 5, of the draft articles on the continental shelf adopted by the Commission at its fifth session laid down that safety zones around installations on the continental shelf could not be established in narrow channels or on recognized sea lanes essential to international navigation.

64. The position under those draft articles was that installations—such as an oil derrick—on the continental shelf, which rose above the surface of the high seas could have a safety zone around them at a reasonable distance provided the safety zone did not interfere with

international navigation. If that applied on the high seas—the superjacent waters of the continental shelf—there could be no doubt that it applied equally in the case of the territorial sea, over which the coastal State exercised full sovereign rights. If an oil derrick were erected on the continental shelf covered by the territorial sea, it would be absurd to deny to it the safety zone that was permissible in the case of a derrick erected on the continental shelf covered by the high seas.

65. Mr. AMADO doubted whether article 20 should be retained at all.

66. Mr. FRANÇOIS (Special Rapporteur) suggested that article 20 be amended by replacing the words “such other of its interests as the territorial sea is intended to protect” by the more precise formula suggested by the Netherlands Government.

67. He further proposed that the words “public policy” be deleted. As thus re-drafted, the last part of paragraph 1 of article 20 would read “... any act prejudicial to the security of that State or contrary to the laws and provisions enacted by the coastal State in conformity with these regulations and with other rules of international law”. Such a formula would cover all legitimate grounds for interfering with innocent passage.

68. Mr. KRYLOV said that article 20 should not be dropped, as tentatively suggested by Mr. Amado. He agreed, however, that the controversial term “public policy” should be deleted.

69. Mr. SCALLE said that the Drafting Committee should be authorized to re-draft articles 17, 19, 20 and 21, which ought to form a harmonious whole. In carrying out that task, the Committee should bear in mind the necessity for maintaining an equitable balance between the right of innocent passage and the prerogatives of the coastal State, so as to prevent the latter from treating international navigation with too heavy a hand.

70. Mr. GARCÍA AMADOR said that the question of the territorial sea was very different from that of the high seas. The régime of the high seas was dominated by the principle of the freedom of the seas; any interference with that freedom, such as the right of pursuit, was a limitation of that general principle, and could only be construed restrictively.

71. The régime of the territorial sea, on the other hand, was dominated by the principle of the sovereignty of the coastal State. In that context the right of innocent passage was a limitation of the basic principle. It followed from the contrasting legal status of the two sea areas concerned that freedom of navigation in the territorial sea was not identical with the freedom of navigation on the high seas. Article 20, by recognizing the right of protection of the coastal State in the territorial sea, laid due emphasis on the coastal State's sovereign rights. Such recognition entailed no serious danger, because articles 23 *et seq.* contained detailed

provisions qualifying and limiting the exercise of the right of protection.

72. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would endeavour to recast article 20 in a form acceptable to all members. The fact that there were divergencies of opinion about the basic principles underlying the article had not prevented the drafting of an agreed text in the past, and he hoped that would hold true for the present discussion.

73. Finally, he proposed that a third paragraph be added to article 20, reading:

“3. There must be no interference with the innocent passage of foreign vessels through straits used for international navigation between two parts of the high seas.”

74. That proposal was based on the suggestion made by the Netherlands Government in its comment on article 20, which had been prompted by the consideration that the Commission had laid down in article 26, paragraph 4, that there should be no interference with the passage of warships through straits used for international navigation between two parts of the high seas. It had seemed strange to the Netherlands Government that no corresponding provision should have been made in the case of merchant ships.

75. The reason for that omission was that article 26, paragraph 4, was based on the judgement of the International Court of Justice in the Corfu Channel case which concerned warships.⁵ It was clear, however, that a similar right must be acknowledged in the provisions relating to merchant vessels.

76. Mr. SALAMANCA said that article 20 had not been thoroughly thought out, and its defects had provoked a great many comments by governments.

77. The right of innocent passage in the territorial sea had an independent, and not a subordinate status. The Commission had to correlate it with the rights of the coastal State. As adopted at the sixth session, paragraph 1 referred to some ill-defined interests or rights of the coastal State, which appeared to constitute a set of exceptions to the right of passage. Paragraph 2, on the other hand, laid down a general right to suspend the exercise of right of passage—a general right which upset the balance which ought to exist between the concepts of the right of innocent passage and of the sovereignty of the coastal State.

78. He repeated his proposal that the passage “such other of its interests... intended to protect” be replaced by the more satisfactory wording suggested by the Netherlands Government.

79. If the Commission adopted his proposal, which was identical with that of the Special Rapporteur, paragraph 2 would become redundant and could be deleted.

80. Mr. AMADO said that the right of innocent passage of merchant ships through straits used for inter-

national navigation between two parts of the high seas had always been universally recognized. If the Commission were to lay down a rule to that effect, that would be tantamount to casting doubts on the validity of the principle. The Commission had felt it proper to refer in article 26, paragraph 4, to such right of passage in the case of warships, in order to dispel any doubts on the matter; but no such doubts could exist in the case of merchant ships.

81. Mr. FRANÇOIS (Special Rapporteur) considered that it was none the less necessary to make explicit reference to innocent passage of merchant vessels in the specific case in point.

82. Mr. SALAMANCA said that the United Kingdom Government's (A/2934, annex, No. 16) proposed subparagraph (6) constituted—as did also the Netherlands Government's (A/2934, annex, No. 10) suggested text for article 17—a great improvement on the Commission's draft of article 20. He urged the Commission to take advantage of the constructive suggestions made by those two governments.

83. Mr. SCALLE said that, from the point of view of drafting, it might be preferable, instead of adding the proposed new paragraph 3 to article 20, to introduce the words “and particularly in straits” at the point where the right of innocent passage was stated.

Article 20 was approved in principle and referred to the Drafting Committee.

Article 21 [19]: Duties of foreign vessels during their passage

84. Mr. FRANÇOIS (Special Rapporteur) proposed that a new subparagraph be added to article 21, reading:

“(e) Any hydrographical survey”.

That proposal followed a suggestion made by the Netherlands Government, the purpose of which was to reserve to the ships of a coastal State the right to carry out hydrographic surveys in its territorial waters.

The Special Rapporteur's amendment was adopted.

Article 21 was adopted as amended.

Additional article on freedom of innocent passage

85. Sir Gerald FITZMAURICE recalled that at the sixth session Mr. Lauterpacht had introduced a proposal concerning the right of passage in internal waters; a proposal which he had subsequently withdrawn while reserving the right to re-introduce it. He (Sir Gerald Fitzmaurice) now wished to propose the insertion of a similar article, which could well find its place after article 21, and which would read as follows:

“The principle of the freedom of innocent passage governing the territorial sea shall also apply to areas enclosed between the coastline and the straight base lines drawn in accordance with article 5.”

86. The judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries

⁵ *I.C.J. Reports 1949*, p. 28.

Case between the United Kingdom and Norway had recognized the right of a country such as Norway, the coast of which was deeply indented or cut into, to measure the breadth of its territorial sea from straight base lines drawn from headland to headland, or from headland to island under certain conditions.⁶

87. That judgement had been concerned only with the method of measuring the breadth of the territorial sea and its effect on the extent thereof. It had, however, had a secondary effect which the International Court had not contemplated, and, indeed, had been under no compulsion to consider, in delivering its judgement on the fisheries issues. That effect was that the waters between the straight base lines and the coast acquired a new legal status: instead of territorial waters, they were now internal waters. Until that time, internal waters—where no right of passage existed—had covered only rivers, lakes, estuaries and certain deep bays, that was, waters almost exclusively behind the coastline. The new internal waters were on the seaward side of the coast, and were now to be excluded from the régime of the territorial sea. Hence his proposal concerning the recognition of the right of innocent passage in those waters which, upon straight base lines being drawn in front of them, had ceased to be part of the territorial sea and had technically become internal waters.

88. The waters which were thus now technically known as internal waters were geographically part of the sea and necessary to navigation. The right of innocent passage therein must therefore be protected, at least in cases where the waters concerned had always been used by international shipping.

89. When the subject had been discussed at the sixth session, the Special Rapporteur had pointed out that most of the waters enclosed within the Norwegian base lines were in any event too dangerous to be navigated, so that the question of the right of passage therein would not arise in practice. That was not always the case: the Norwegian base lines enclosed, and had thus transformed into internal waters, the important traditional shipping lane between the islands and the Norwegian coast known as the Indreleia. Moreover, the concept of base lines resulting from the International Court of Justice's judgement in the Norwegian Fisheries Case could well be applied by States other than Norway. It was true that so far only Iceland, and Denmark with regard to Greenland, appeared to have done so, but it was always open to any State with a rugged coastline to invoke the principle in question. It was therefore extremely important that the Commission should lay it down as a general principle that where territorial waters were thus abruptly transformed into internal waters, following the drawing of straight base lines, the right of innocent passage in such waters should persist, to allow international shipping to continue to use them without let or hindrance.

90. Mr. FRANÇOIS (Special Rapporteur) said that Sir Gerald Fitzmaurice's proposal could best be

examined when the Commission came to discuss article 5, which dealt with straight base lines.

It was so agreed.

The meeting rose at 1 p.m.

300th MEETING

Friday, 27 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman : Mr. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat : Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda)
(A/CN.4/79, A/CONF.10/6) (resumed from the 298th meeting)

NEW DRAFT ARTICLES ON FISHERIES (resumed from the 298th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that the sub-committee¹ had unanimously agreed on the following text for the articles on fisheries :

“Article 1

“A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing acti-

⁶ *I.C.J. Reports 1951*, pp. 129-130.

¹ Set up at the 298th meeting. See *supra*, 298th meeting, para. 49.