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Summary record of the 307th meeting

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

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law to grant the right of passage without authorization, notification had always been the practice except in urgent cases of vessels in distress. That fact had been clearly brought out in the comment of the Yugoslav Government (A/2934, Annex, No. 18) which deserved attention.

97. Referring to Mr. Scelle's remarks, he said that in the cases mentioned the Security Council would have already reached a decision and would have requested States to carry out the enforcement measures called for under the Charter. In the absence of such a request it would be risky for a State to take a unilateral decision to refuse passage to a foreign warship. Such cases need not be provided for, since they belonged to the general category of questions connected with enforcement measures initiated by the Security Council in accordance with the provisions laid down in Chapter VII of the Charter.

The meeting rose at 1.5 p.m.

307th MEETING

Wednesday, 8 June 1955, at 12.15 p.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. 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 territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (continued)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (continued)

Article 26 [25]: Passage (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 26 of the provisional

articles adopted at the previous session (A/2693), together with the Special Rapporteur's proposed new text (A/CN.4/93).

2. Mr. FRANÇOIS (Special Rapporteur) said that, as he had explained at the previous meeting,¹ the original text of article 26 had not been entirely clear, and had given rise to misunderstandings. In response to the observations of certain governments, he had indicated in his new draft the circumstances in which coastal States could require previous authorization or notification of the passage of warships through their territorial sea.

3. The CHAIRMAN observed that the coastal State might wish, for other than military reasons, to prohibit passage through parts of its territorial sea, for example, for the purpose of safeguarding its neutrality.

4. Mr. FRANÇOIS (Special Rapporteur) explained that he had mainly had in mind the possible need to protect that part of the territorial sea surrounding a port of military importance.

5. Mr. AMADO asked for a precise definition of the words "in times of crisis".

6. Mr. FRANÇOIS (Special Rapporteur) said that he had envisaged times of political tension giving grounds for expecting an imminent outbreak of war.

7. Mr. ZOUREK observed that, in the light of the comments made at the previous meeting and of the observations of certain governments, particularly that of Sweden (A/2934, Annex, No. 13), it would be advisable for the Commission to vote on the principle which several members had upheld, namely, that passage by warships through the territorial sea should be subject to the consent of the coastal State. In the interval since the previous meeting he had had a further opportunity of consulting the authorities, most of whom confirmed that the prevailing rule of international law was that passage for warships was not a right but a concession granted by the coastal State. The Institute of International Law had left the question aside in 1914, but in 1928 had recognized the right of coastal States to regulate the passage of warships through their territorial sea.² The Harvard Draft (article 19) followed the same line.³

8. Some coastal States did not invariably require special authorization or notification, having imposed once and for all certain conditions on the passage of warships.

9. The Commission must also consider the point raised by Mr. Scelle at the previous meeting about the new situation created by the signing of the Charter of the United Nations, whereby States were prohibited from resorting to the threat or use of force against the territorial integrity or political independence of any State. Warships by their very nature constituted a potential

¹ 306th meeting, para. 85.

² Institut de droit international, *Annuaire*, 1928.

³ Harvard Law School, *Research in International Law*, III, *Territorial waters* (Cambridge, 1929), p. 245.

threat: a fact which reinforced the thesis that they could not pass through the territorial sea of another State without its consent.

10. The Special Rapporteur's new text was not acceptable, because it asserted as a principle that warships enjoyed the right of innocent passage subject to certain exceptions. Furthermore, it employed a number of ill-defined terms which were open to very broad interpretation. He accordingly proposed that the question of passage through straits used for international navigation be left aside; then, once the Commission had decided on the principle, the drafting could be left to the Drafting Committee.

11. Mr. SALAMANCA considered that there was no fundamental discrepancy between the new text suggested by the Special Rapporteur and the views put forward by certain members at the previous meeting regarding the provisions of the United Nations Charter. However, some adjustment was required to make the wording consistent with the Charter.

12. Clearly, something must be done to elucidate the precise meaning of the expression "in time of crisis". A coastal State should only be entitled to prohibit the passage of warships when that was necessary in the interests of legitimate defence. It was true that warships always constituted a potential danger. However, their right of passage should be assured, provided it was innocent.

13. Mr. KRYLOV observed that there was a considerable measure of agreement on the very important issue before the Commission. Gidel had clearly stated that there was no right of passage for warships, but only a concession on the part of coastal States. And Root had held that, whereas merchant vessels had a right of passage, warships required prior authorization because "they may threaten".

14. Referring to the Special Rapporteur's explanation of what he had had in mind when using the words "or in times of crisis", he suggested that those words be deleted, because the Commission should concern itself with times of peace.

15. Once the question of principle had been decided, the matter should be referred to the Drafting Committee, which should also give careful thought to the important point raised by Mr. Scelle at the previous meeting. He agreed with Mr. Zourek that the question of passage through straits used for international navigation should be studied separately.

16. Sir Gerald FITZMAURICE said that Mr. Salamanca had raised a pertinent point by referring to the connexion between a possible violation of the provisions of the United Nations Charter and the question whether a passage was innocent or not. He agreed that if a passage were inconsistent with those provisions it would not be innocent, but the point was surely covered by the opening words of the Special Rapporteur's new text reading: "Subject to observance of the provisions of articles 17-21", since article 17 already embodied

a definition of innocent passage. The definition, if it were included at all, should certainly be placed in article 17. The whole law relating to the right of passage was based on the assumption that such passage was innocent, because if it were not, there was no right. Accordingly, it seemed unnecessary to provide in detail for those cases when passage was forbidden, because, for the most part, they related to passage which was not innocent.

17. The introductory words of the new text should therefore allay the concern expressed by certain members. Article 20, paragraph 2, already provided for the temporary suspension of the right of innocent passage on grounds of public order and security. Hence there was no reason to reintroduce a similar provision in article 26. The Special Rapporteur's new text required pruning. If the introductory words he had quoted were retained, it was unnecessary to enumerate at the end of paragraph 1 the cases in which previous authorization and notification might be required; only if those words were deleted would the necessary safeguards have to be specified.

18. He was strongly of the opinion that in the present instance it would be most unwise for the Commission to go beyond the strict limits of the law as it stood. Admittedly, the existence of a right of innocent passage for warships had always been the subject of controversy. Oppenheim, who could not be accused of favouring the interests of a particular group of States against another, had summarized the position very fairly in the following passage:

"But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in times of peace the passage of foreign men-of-war and other public vessels through its maritime belt. It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace..."⁴

19. In practice, the right of passage of warships was recognized, provided it was inoffensive. Warships had to move about the high seas, and there was no reason why they should be forced to follow devious courses in order to avoid traversing the territorial sea of a State. The law as it stood at present was much the same as it had been in 1930, when the Conference for the Codification of International Law had adopted the following provision:

"As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification.

"The coastal State has the right to regulate the conditions of such passage.

"Submarines shall navigate on the surface."⁵

⁴ *International Law*, 7th edition, para. 188, p. 388.

20. In his opinion, if any change had occurred since 1930 it was in a direction which further emphasized the need to recognize the right of passage for warships, because of the tendency of some countries to seek greatly to extend the limits of their territorial sea. In the case of States claiming a limit of 200 miles and prohibiting the right of passage, or making it subject to previous authorization, it would be quite unrealistic to suppose that the vessels of maritime States would refrain from traversing such a belt because they had no permission to do so, and it was inconceivable that a prohibition of that kind could be enforced in what was clearly the open sea. The present trend to claim an extensive territorial sea should have as its concomitant more liberal conditions governing the right of passage.

21. The changes brought about by the adoption of the United Nations Charter, to which Mr. Scelle had referred, had little bearing on the issue. The Secretary to the Commission had pertinently raised the question of who was to decide whether a passage could be forbidden on the ground that it would involve violation of the Charter, if there had been no relevant decision by the Security Council. Some might argue in favour of conferring such an abstract right on coastal States because that would tend to prevent violations of the Charter. But views might differ on a given situation, and the granting of such a right could mean that the coastal State would have power to forbid a passage which other States might hold to be in the interests of the purposes of the Charter. It would be both dangerous and potentially controversial to leave it to the coastal State to decide such issues. There would therefore be grave disadvantages in referring in article 26 to passages contrary to the provisions of the Charter. The point was adequately covered by the requirement that passage must be innocent. The case of a passage which was manifestly not innocent was a totally different one, because then there could be no right of passage.

22. Mr. SANDSTRÖM agreed with Mr. Zourek about the need for defining more precisely the right of innocent passage of warships and suggested that the article be replaced by a provision along the following lines:

23. A first paragraph would set out the general principle recognized in the judgment delivered by the International Court of Justice in the Corfu Channel Case of 9 April 1949,⁵ namely, that in time of peace States had a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorization of the coastal State, provided that such passage was innocent; unless otherwise prescribed in an international convention, no coastal State enjoyed the right to prohibit such passage.

24. A second paragraph applicable to the territorial sea,

as distinct from straits used for international navigation, would specify the right of the coastal State to prescribe conditions for the passage of warships.

25. A formula along those lines would draw a clear distinction between straits used for international navigation between two parts of the high seas, where the right of passage had to be safeguarded very strictly, and the territorial sea in general, where the coastal State had the right to regulate conditions of passage for foreign warships. It would ensure to warships of States other than the coastal State all the rights they could legitimately claim. It would acknowledge also to the coastal State all that it could legitimately claim. It would acknowledge also to the coastal State all that it could reasonably claim in the way of control over the passage of foreign warships.

26. Of the various arguments put forward by Sir Gerald Fitzmaurice, he had been strongly impressed only by that which referred to the extensive claims being made by certain States regarding the breadth of their territorial sea. Such claims were however quite unacceptable, and the Commission should in no circumstances take them into consideration in its discussions; in his opinion, they should be ignored.

27. He agreed that the whole matter should be referred to the Drafting Committee.

28. The CHAIRMAN said that more than a matter of drafting was involved. The Commission had to take a decision on the question of principle, namely, the vital issue of whether the coastal State had the right to forbid passage.

29. In practice, there was usually little or no difficulty. As Sir Gerald Fitzmaurice had pointed out, it was a matter of common usage to allow—except in certain exceptional circumstances—the passage of foreign warships through the territorial sea.

30. But the Commission had to decide whether it would instruct the Drafting Committee to lay down the coastal State's privilege to interfere with the passage of foreign warships as a right, or as a mere faculty to be exercised in certain extreme cases.

31. He recalled that the 1930 Codification Conference—in the work of which he had participated—had found considerable difficulty in drafting its article 12, which corresponded to article 26 of the Commission's provisional articles. In English, the first paragraph of article 12 read: "As a general rule a coastal State will not forbid..." That wording suggested that the Conference merely made a recommendation to States not to forbid the passage of foreign warships through their territorial sea in the majority of cases. Had it intended to deny to the coastal State the right to forbid such passage, the paragraph would have read: "The coastal State has no right to forbid..."

32. In other words, as a matter of principle, the coastal State had the right to forbid the passage of foreign warships through its territorial sea, although it was recommended that that right be exercised sparingly.

⁵ *Acts of the Conference for the Codification of International Law*, League of Nations publication, *V. Legal, 1930.V.14* (document C.351.M.145.1930.V), p. 130.

⁶ *I.C.J. Reports 1949*, p. 28.

33. Mr. SCELLE said that the coastal State did not simply have the right to forbid the passage of foreign warships through its territorial sea; it might well have the duty to do so in certain circumstances.

34. The coastal State exercised sovereignty over the territorial sea, but that sovereignty was not absolute, being to some extent conditioned by higher principles of international law. Before the adoption of the United Nations Charter, aggressive action by warships of one State against another had not been forbidden by international law; in those circumstances, it might have been possible to assert the right of passage of warships through the territorial sea when they needed to do so to avoid lengthening their journey unduly, whatever the purpose of that journey might have been. But the adoption of the Charter had materially changed international law. Article 2, paragraph 4 of the Charter prescribed, as a rule of international law, the prohibition in international relations of the use of force, or the threat of force, against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of the United Nations. Some reference to that important change in international law must be embodied in the article.

35. In the new form proposed by the Special Rapporteur the article emphasized the right of the coastal State to protect itself. But in addition to that inherent right, which was recognized in Article 51 of the Charter, the coastal State had a duty under Article 2, paragraph 4 of the Charter to forbid the passage of any foreign warship suspected of being on an aggressive expedition against any State other than the coastal State itself. Should the latter fail in its duty, it would become an accomplice in the crime of aggression.

36. Sir Gerald Fitzmaurice had certainly drawn attention to the fact that the passage referred to in the article was described as "innocent passage", and aggressive activities and threats of force inconsistent with the purposes of the Charter were clearly not cases of innocent passage. But it was nonetheless essential to specify that any passage inconsistent with article 2, paragraph 4, of the Charter placed the coastal State under an obligation—and did not merely give it the right—to stop such passage.

37. Article 26 as framed by the Special Rapporteur was concerned only with the interests of navigation, and with those of the coastal State. It made no reference to the loftier interests of universal peace and respect for international law.

38. The CHAIRMAN invited the Commission to vote first on the issue of principle.

39. That issue reduced itself to a choice between two views. The first was Sir Gerald Fitzmaurice's view that, save in exceptional cases, the coastal State had no right to forbid the passage of foreign warships through its territorial sea.

40. The second was Mr. Zourek's view that the coastal

State had the right to forbid the passage of foreign warships through its territorial sea.

41. Mr. SALAMANCA thought that there was no fundamental disagreement between Sir Gerald Fitzmaurice and Mr. Scelle; the difference was rather one of emphasis. Both were agreed that the right of passage of foreign warships through the territorial sea of a State could only be denied in exceptional cases. The coastal State's inherent right of self-defence must be exercised within the framework of the United Nations Charter, and not unilaterally. If the coastal State suspected the intentions of the foreign warship it would certainly have the right to control its passage.

42. The CHAIRMAN pointed out that the two views between which he had asked the Commission to choose were those of Sir Gerald Fitzmaurice and Mr. Zourek.

43. Sir Gerald FITZMAURICE said that the question to be put to the Commission should be that of whether the coastal State had the right to prevent innocent passage of foreign warships through its territorial sea. All members of the Commission were agreed that where passage was not innocent the coastal State was entitled to prevent it.

44. Mr. KRYLOV said that it was impossible to put the issue to the Commission in the form suggested by Sir Gerald Fitzmaurice: where passage was permissible, it must be innocent; where the coastal State could forbid it, it could not be. Sir Gerald's proposal was begging the question.

45. The question was whether, as a matter of principle, the coastal State had the right to forbid the passage of foreign warships through its territorial sea.

46. The CHAIRMAN said that, as he saw it, the Commission was being asked to decide whether the coastal State could in principle forbid the passage—even innocent—of foreign warships through its territorial sea. It might well happen that a coastal State would have security reasons for such interference, without being directly threatened by the warships concerned; the threat to the coastal State might come from some other quarter, yet constitute a valid security reason for interfering with the movements of foreign ships, however innocent.

47. Mr. AMADO said that there could be no doubt that, in the exercise of its full sovereign rights, the coastal State was free to do anything it pleased in its territorial sea.

48. Mr. SCELLE denied that the coastal State's sovereign rights over the territorial sea were absolute. It could forbid passage, or restrict it, only in cases sanctioned by international law.

49. There was another important point, namely, the fact that should the coastal State err in the exercise of its rights and duties with regard to the passage of foreign warships through its territorial sea, it would be liable for damages. The coastal State certainly had the right to forbid the passage of foreign ships in certain

circumstances, but should it do so in a case where passage would have been innocent, financial responsibility would ensue.

50. So far as he could see, the only difference between Sir Gerald Fitzmaurice and himself was that in his (Mr. Scelle's) opinion any violation of the United Nations Charter would deprive passage of any claim to innocence.

51. Sir Gerald FITZMAURICE said that it would serve no useful purpose to put the question of principle to the Commission in the form suggested by the Chairman. No member of the Commission doubted that there were some exceptional cases in which the right to forbid passage through the territorial sea existed; the problem was that of defining those cases.

52. Mr. ZOUREK drew attention to the fact that the view attributed to him by the Chairman had not been exclusively his own: it was shared by several other members of the Commission, including Mr. Sandström. The question before the Commission was whether the principle of the article should be the general right of a coastal State to forbid passage, subject to innocent passage being respected, or whether the principle of innocent passage should be asserted as the general rule, the cases where interference was allowed constituting exceptions thereto.

53. At the invitation of the CHAIRMAN, Mr. ZOUREK suggested the following wording for the question on which the Commission should be asked to vote: Does the coastal State enjoy, in virtue of its sovereignty over the territorial sea, the general right to forbid the passage of foreign warships through its territorial sea — in other words, the right to make such passage subject to previous authorization or notification?

54. The CHAIRMAN invited the Commission to decide whether the coastal State could, in law and as a matter of principle, forbid the passage of foreign warships through its territorial sea. If the Commission accepted that principle, it would do so on the clear understanding that the right in question must be construed in the light of international usage and standing practice concerning its exercise. Once the principle had been adopted, the Drafting Committee would have to elucidate in its text the international usage concerned.

The principle was approved by 6 votes to 3, with 4 abstentions.

55. Mr. EDMONDS explained that he had abstained because he could not see how the Commission could take a vote on the question as worded by the Chairman. All members agreed that in certain cases the coastal State had the right to interfere with the passage of foreign warships through its territorial sea. The problem was how to formulate the cases in which such right of interference existed.

56. Sir Gerald FITZMAURICE said that he had voted against the principle because—perhaps unintentionally—it held the implication that, in any and in all cir-

cumstances, the coastal State had the right to prevent even the innocent passage of foreign warships through its territorial sea. Had the question put to the Commission been that of determining whether there were some circumstances in which interference with the right of passage was permissible, an affirmative answer would have been acceptable.

57. Mr. AMADO said that he had voted in favour of the principle because any refusal to acknowledge the coastal State's right in the matter would have been tantamount to a denial of the whole concept of the territorial sea.

58. Mr. KRYLOV said he had voted in favour of the coastal State's right in principle to interfere with passage in general, not with innocent passage. The issue on which the Commission had just taken the vote involved nothing less than the right of a coastal State to exercise its sovereignty over its territorial sea.

The meeting rose at 1.15 p.m.

308th MEETING

Thursday, 9 June 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. Jean SPIROPOULOS

Rapporteur : Mr. J. P. A. FRANÇOIS

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