

Document:-  
**A/CN.4/SR.330**

**Summary record of the 330th meeting**

Topic:  
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dissenting opinions had been included in the report as had been done on a similar occasion in the 1953 report.<sup>10</sup>

89. The bare statement in paragraph 13 that Mr. Zourek's proposal had been rejected was not sufficient. It was desirable to include a sentence to say that the Commission had preferred to retain its existing rule that detailed explanations of dissenting opinions should not be inserted in the report but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report.

90. That would be similar to what had been said on the subject in the 1953 report.

91. Sir Gerald FITZMAURICE approved of Mr. Liang's suggestion. In that manner, the report would indicate to some extent the reasons why the Commission had rejected Mr. Zourek's proposal; also that that rejection did not imply that there was no means of stating dissenting opinions in the report.

92. Mr. GARCÍA AMADOR said it was undesirable to make specific reference to the rejection of Mr. Zourek's proposal. It was not customary for the Commission to include in its report reference to the rejection of a particular proposal.

93. The CHAIRMAN said that the question of stating dissenting opinions had to be included in the report because it had been one of the items on the Commission's agenda.

94. He agreed with Mr. García Amador's remarks, and suggested that the words "This proposal was rejected" be deleted from paragraph 13. That paragraph would thus consist only of the statement suggested by the Secretary to the Commission.

95. Mr. SALAMANCA said that the whole of Mr. Zourek's proposal (A/CN.4/L.61) should be reproduced, and not merely the operative part.

96. Mr. ZOUREK agreed.

*Paragraph 12 was adopted subject to the inclusion therein of the full text of Mr. Zourek's proposal.*<sup>11</sup>

97. Mr. LIANG (Secretary to the Commission) suggested the following text for paragraph 13:

"13. However, the Commission reaffirmed the existing rule adopted at the third session, that detailed

<sup>10</sup> "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 163, in *Yearbook of the International Law Commission, 1953*, vol. II.

<sup>11</sup> Original text of paras. 12-13 read as follows:

"12. The Commission considered a draft resolution submitted by Mr. Jaroslav Zourek (A/CN.4/L.61) on the question of stating dissenting opinions. The operative part of this draft reads as follows:

"Any member of the International Law Commission shall have the right to add a short statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if the said decision does not in whole or in part express the unanimous opinion of the members of the Commission."

"13. This proposal was rejected."

explanations of dissenting opinions should not be inserted in the report, but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report."

98. Mr. GARCÍA AMADOR formally proposed adoption of the text suggested by the Secretary.

*Paragraph 13 was adopted in that form.*

#### VIII. Representation at the General Assembly (paragraph 14 [39])

99. The CHAIRMAN said that it had not been considered appropriate to make any reference to the matters in respect of which the Commission desired its Chairman to represent it at the General Assembly.

110. Mr. SALAMANCA proposed that in the English text the words "for purposes of consultation" be substituted for the words "in a consultative capacity".

101. Mr. LIANG (Secretary to the Commission) said Mr. Salamanca's proposal corresponded to the English text adopted in previous reports. The words "in a consultative capacity" were due to a mistranslation.

102. Mr. FRANÇOIS (Rapporteur) also expressed agreement to the change.

*Paragraph 14 was adopted as amended by Mr. Salamanca in the English text.*

*Chapter IV of the report was adopted as a whole.*

*Further consideration of the Commission's report was adjourned.*

The meeting rose at 1.10 p.m.

### 330th MEETING

Friday, 8 July 1955, at 10 a.m.

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*Chairman:* Mr. S. B. KRYLOV, First Vice-Chairman of the Commission

*Rapporteur:* Mr. J. P. A. FRANÇOIS

*Present:*

*Members:* 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.

**Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1-3) (continued)**

CHAPTER II: RÉGIME OF THE HIGH SEAS (A/CN.4/L.59/Add.1) (resumed from the 329th meeting)

DRAFT ARTICLES CONCERNING THE HIGH SEAS (resumed from the 329th meeting)

Article 14 (resumed from the 326th meeting)

1. Mr. FRANÇOIS (Rapporteur) submitted the following amended text for the second paragraph of the comment to article 14:

“With regard to point 3, the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with civil war or with acts committed by warships in the service of governments not universally recognized are too complex to make it seem necessary for the safeguarding of public order on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement endorsed a new right in the process of development.”

2. He had prepared that text in order to meet a point raised by Mr. Hsu.<sup>1</sup> He understood, however, that Mr. Hsu was satisfied only with the first part of the proposed text and wished the remainder deleted.

3. For his part, he (Mr. François) could not agree to Mr. Hsu's proposal and submitted the whole text to the Commission.

4. Mr. HSU proposed the following text for the relevant paragraph:

“With regard to point 3, the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with civil war or with acts committed by warships in the service of governments not universally recognized are too complex to make it seem necessary for the Commission to enter into them.”

5. The question whether parties to a civil war constituted belligerents or not, as well as that of governments which were not universally recognized, were problems far too complex to be mentioned in the paragraph in question. They were problems which had not been discussed by the Commission, and there was no necessity to include a reference to them.

6. The Nyon Agreement did not specifically deal with either problem. Its purpose was to condemn unrestricted submarine warfare against merchantmen, as had been done by the Washington Treaty of 1922 and the London Treaty of 1930.

7. Piracy could only be committed by a warship if the crew mutinied and took over control of the ship.

8. Mr. SANDSTRÖM agreed with the text proposed by the Rapporteur. The Nyon Agreement specifically concerned the case of a civil war; there was, therefore, nothing confusing in the reference to civil war in the paragraph under discussion.

9. Sir Gerald FITZMAURICE said that Mr. Hsu's objection could be partly met if the first two sentences were separated from the rest of the text by dividing it into two paragraphs.

10. Mr. FRANÇOIS (Rapporteur) accepted Sir Gerald Fitzmaurice's suggestion.

11. The CHAIRMAN put the text proposed by Mr. Hsu to the vote.

*The text proposed by Mr. Hsu was rejected by 8 votes to 2 with 1 abstention.*

12. Mr. LIANG (Secretary to the Commission) suggested that the third sentence of the paragraph proposed by the Rapporteur be amended to read:

“The questions arising in connexion with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safeguarding of public order...”

That change would make the meaning of the text clearer. There was really only one problem, and not two separate problems, that of civil war and that of governments not universally recognized.

13. Mr. FRANÇOIS (Rapporteur) accepted that suggestion.

<sup>1</sup> 326th meeting, paras. 84-85.

14. Mr. ZOUREK proposed deletion of the penultimate sentence ("Hence the Commission feels..."), which appeared to have far too wide a scope; he recalled that in article 15 provision had been made for acts of piracy committed by a warships.

*Mr. Zourek's proposal was rejected, 5 votes being cast in favour and 5 against, with 1 abstention.*

*The text proposed by the Rapporteur for insertion in place of the second paragraph of the comment to article 14 was adopted as amended.*

15. The CHAIRMAN invited members to place their reservations on record before the report as a whole was adopted by the Commission.

16. Mr. EDMONDS requested inclusion of the following reservations in the report:

*Chapter II (Régime of the high seas):* A footnote to be inserted to the effect that he (Mr. Edmonds) considered articles 24-33 on fisheries a useful basis for future discussion as to proposed articles on the subject of the conservation of fisheries, but that, for the reasons stated by him in the course of the discussions, they were inadequate in several respects.

*Chapter III (Régime of the territorial sea):* The following footnotes to be inserted under the appropriate articles:

*Article 3.* "Mr. Edmonds entered a reservation to article 3 on the ground that, for the reasons explained by him at the Commission's 308th meeting (A/CN.4/SR.308), he asserts that under the traditional rule of international law, the breadth of the territorial sea is three miles."

*Article 5.* "Mr. Edmonds dissented from article 5 for the reasons explained by him at the Commission's 317th meeting (A/CN.4/SR.317)."

*Article 7.* "Mr. Edmonds dissented from article 7 for the reasons explained by him at the Commission's 318th meeting (A/CN.4/SR.318)."

*Article 25.* "Mr. Edmonds dissented from article 25 for the reasons explained by him at the Commission's 325th meeting (A/CN.4/SR.325)."

17. Mr. GARCÍA AMADOR pointed out that, in view of the Commission's rejection of Mr. Zourek's proposal (A/CN.4/61),<sup>2</sup> the previous rule was still in force whereby detailed explanations of dissenting opinions were not inserted in the report, but merely a footnote to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report.

18. In accordance with that rule, it was not permissible for members to attach to the footnotes in question any reasons: they could only refer to the reasons given by them in the summary records.

19. A more important point was that only members who had voted against a particular text, or at least ab-

stained from voting for it, were entitled to put their dissent on record in a footnote to the general report.

20. He hoped that Mr. Edmonds would modify his proposed footnotes accordingly.

21. Mr. FRANÇOIS (Rapporteur) said that Mr. Edmonds, in describing the articles on fisheries as a useful basis for future discussion, was toning down his reservation. There did not seem, therefore, anything very objectionable in that turn of phrase.

22. Mr. ZOUREK said that under the rule in force a footnote recording dissent could only contain a reference to the summary records. A member could, however, explain his reasons for dissent at the present meeting, in which case they would appear in the summary record of the meeting.

23. The CHAIRMAN said that Mr. Edmonds' proposed footnotes did not infringe the rule at present in force in any very material way. It was undesirable that that rule should be interpreted in too strict and literal a way. He therefore ruled that the proposed footnotes could be included in the report.

24. Mr. EDMONDS recalled that, in 1954, the following statement was contained in a footnote to the Report of the Commission (A/2693):

"Mr. Sandström declared that, in voting for the draft articles, he wished to enter a reservation in respect of the provisions of article 5 for the reasons he had stated at the 281th meeting."

25. Clearly the rule on footnotes had been interpreted by the Commission in a manner which allowed a member voting in favour of draft articles to enter a reservation in respect of the provisions of one of them.

26. With regard to Mr. García Amador's other objection, he amended his reference to the article on fisheries to read:

"Mr. Edmonds entered a reservation to the articles on fisheries (articles 24-33) for the reasons stated by him in the course of the discussions."

27. Sir Gerald FITZMAURICE requested the following reservations to be included in the summary record of the present meeting:

In Chapter II, on the régime of the high seas, he dissented from the last section of article 22, paragraph 1, reading: "If the foreign vessel is within a zone contiguous to the territorial sea, pursuit may only be undertaken if there has been trespass against the rights for the protection of which the said zone was established." There was no right of hot pursuit in the contiguous zone; a foreign vessel could not infringe the laws of the coastal State in the contiguous zone, because the coastal State had no jurisdiction over the contiguous zone; the contiguous zone was simply an area in which the coastal State had certain limited powers;

With regard to articles 24-33 on fisheries, he wished to explain his vote in favour of them. He regarded those articles as a very useful contribution to work on the

<sup>2</sup> 323rd meeting, para. 53.

problem of fisheries conservation. They constituted an entirely adequate basis for future discussion, but they were still unduly weighted in favour of the coastal State. They could be interpreted in such a manner as to claim very wide powers in the matter of fisheries in the high seas for the benefit of the coastal State. With that reservation, he accepted the articles ;

With regard to the articles on the régime of the territorial sea, he wished to put on record his abstention from voting on article 5. He had not voted against that article because some provision on straight base lines was necessary. Unfortunately, with the suppression of the second paragraph of the 1954 text<sup>3</sup> there was no longer any definition of the effect of the judgement of the International Court of Justice in the Fisheries Case.<sup>4</sup> Moreover, without that paragraph, article 5 no longer reflected the ruling of the International Court of Justice. The Court had not accepted economic interests peculiar to a region as a sufficient justification for adopting the straight base lines system. That system could only be adopted on the basis of valid geographical considerations ; the International Court of Justice had only made reference to the economic interests of a region in connexion with the validity of certain specific base lines which were founded on geographical grounds ;

He wished also to record his abstention from voting on article 7 on bays. He had not voted against it, because he believed that some limit had to be laid down for the closing line of bays, but while he would have accepted a distance of more than 10 miles, he considered the distance of 25 miles, which the Commission had adopted, unduly long ;

Finally, he wished to record his dissent from article 25 on passage. As already stated in the course of the discussions, he considered that article unduly restrictive. Articles 18 and 19, which were applicable to warships as well as to every other ship, contained in them all that was necessary to protect the coastal State. It was extremely undesirable to make passage of foreign warships subject to authorization or notification ;

As to the other articles on passage, he had abstained from voting on some of them and had voted in favour of the others with considerable hesitation : they were drafted somewhat restrictively and could lend themselves to an interpretation which would authorize claims by coastal States to restrict the right of passage unduly.

28. Finally, he requested the Rapporteur to include the following footnotes in the report :

*Chapter II (Régime of the high seas)*: Sir Gerald Fitzmaurice recorded dissent from the last sentence of paragraph 1 of article 22 (hot pursuit from a contiguous zone) for the reasons given in the summary record for 8 July 1955 (330th meeting) ;

<sup>3</sup> "Report of the International Law Commission covering the work of its sixth session" (A/2693), Ch. IV, in *Yearbook of the International Law Commission, 1954*, vol. II.

<sup>4</sup> *I.C.J. Reports 1951*.

*Chapter III (Régime of the territorial sea)*: Sir Gerald Fitzmaurice recorded dissent from the first sentence of paragraph 1 of article 25 (passage of warships) and abstention on article 5 (straight base lines) and article 7 (bays)—in each case for the reasons given in the summary record for 8 July 1955 (330th meeting).

29. Mr. SALAMANCA requested that a footnote be inserted in Chapter III of the report to the effect that he was opposed to article 3, and to the comment to that article with the exception of the last three sentences of the fourth paragraph of that comment, for the reasons given at the 312th and 328th meetings.

30. Mr. ZOUREK requested inclusion of the following footnotes :

*Chapter II (Régime of the high seas)*: Mr. Zourek stated that, while voting for the draft articles on the régime of the high seas as a whole, he was opposed to articles 5, 6, 9, 31 and 33 for the reasons given in the course of the discussions. He further maintained his reservations on the subject of the definition of piracy contained in article 14 ; finally he was opposed to the comment to article 14.

*Chapter III (Régime of the territorial sea)*: Mr. Zourek stated, that, while voting for the articles on the territorial sea as a whole, he did not accept, for the reasons given in the course of the discussions, article 3, the provisions concerning straits—article 12, paragraph 4, article 18, paragraph 4 and article 25, paragraph 2—article 22 and article 23, or the comments on those articles. He further maintained his reservations on article 7 on bays.

31. As explained by him in the course of the discussions on the articles in question, he did not consider them as the expression of existing international law. Article 22, on the arrest of vessels in the territorial sea, was furthermore calculated to hinder international navigation. Article 5 of the draft on the high seas did not constitute a complete text concerning the right to a flag. For the rest, he referred to the explanations already given by him at previous meetings.

32. Mr. SCALLE requested the inclusion at the beginning of Chapters II and III of the report of footnotes referring to his reservations concerning the continental shelf, the freedom of the high seas and the right of innocent passage, for the reasons indicated in the relevant summary records.

33. Mr. HSU requested that a footnote be included in the report regarding his reservations concerning the final part of the text adopted at the present meeting for inclusion in the comment to article 14 on the régime of the territorial sea.

34. The sentences in question were entirely lacking in clarity.

35. Mr. GARCÍA AMADOR requested a footnote to be inserted in Chapter III to the effect that, on the adoption of the draft articles on the territorial sea, he had formulated reservations regarding articles 3 and 7

and the comments to those articles, for the reasons given in the course of the discussions.

36. The CHAIRMAN, speaking in his capacity as a member of the Commission, requested the following reservations to be put on record:

With regard to Chapter II, on the régime of the high seas, he had abstained from voting on article 9 because he did not consider that the criterion of tonnage was a satisfactory one: the reference should have been to the great majority of maritime States. He also wished to record his reservations on article 14, on the definition of piracy, particularly with regard to the comment on that article. He had voted against article 31, because the differences between States covered by that article should, in his opinion, be submitted to a technical commission having a different composition and competence from the one laid down in the article.

With regard to Chapter III, on the régime of the territorial sea, he had voted against article 3. He had abstained from voting on article 23 and had voted against article 24 as state-owned ships should not, in his view, be treated like ships belonging to private persons. He had also abstained from voting on article 18, paragraph 4, and article 25, paragraph 2, because, in his opinion, passage through straits used for international navigation between two parts of the high seas could, in exceptional circumstances, be the subject of regulation by the coastal State.

37. Faris Bey el-KHOURI requested the insertion of a footnote under section VII of Chapter IV (Other decisions of the Commission), relating to the question of stating dissenting opinions, to the effect that he opposed not only Mr. Zourek's proposal, but even the inclusion of footnotes relating to dissenting opinions and referring to the relevant summary records, and that he did so for the reasons given at the present (330th) meeting.

38. Those reasons were that, as he had stated before, the authority of the Commission's recommendations and proposals was weakened, in the eyes of the General Assembly and of public opinion in general, by footnotes relating to dissenting opinions.

39. For his part, he had objections to a great many of the articles which had been adopted by the Commission. He was faithful, however, to his principle that a resolution, once adopted by the majority of the Commission, should receive the wholehearted support of the Commission as a whole, and that dissenting members should refrain from diminishing the prestige of the Commission's pronouncements. He therefore would not ask for

any dissenting view of his to be put on record in the report, except for the statement above referred to relating to the inadvisability of inserting footnotes at all.

*The Commission's draft report (A/CN.4/L.59 and Add.1 to 3) was adopted as amended.*

#### Consular intercourse and immunities

40. Mr. ZOUREK reminded the Commission that at the 327th meeting he had undertaken to give, towards the end of the session, a brief outline of the subject on which he had been appointed Special Rapporteur.

41. Mr. SANDSTRÖM suggested that, as there was little time left to enable members to comment on Mr. Zourek's statement, it should be postponed until the following session.

42. Mr. SCELLE viewed the proposed procedure with some apprehension. Special Rapporteurs had, in the past, always enjoyed absolute freedom in preparing their reports and there was no call for them to consult the Commission before they embarked upon their work.

43. Mr. SALAMANCA pointed out that when appointing Mr. Zourek Special Rapporteur the Commission had not discussed the scope or nature of the report on consular intercourse and immunities.

44. Mr. ZOUREK said that he had only undertaken to make a brief statement in the event of the Commission completing its work on the draft report well before the end of the session. As that had proved impossible, he would be perfectly prepared to send a written statement outlining the way in which he intended to deal with the topic assigned to him, and would be grateful for comments.

#### Closure of the session

45. The CHAIRMAN said that he had had the greatest pleasure in working with old friends and new in the Commission.

46. On behalf of the Commission, he wished to thank Mr. François who, as Special and General Rapporteur, had worked unremittingly throughout the session. He also thanked the Secretariat for its assistance.

47. He then *declared* the seventh session of the Commission closed.

The meeting rose at 12 noon.