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Summary record of the 328th meeting

Topic:
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teur on the topic of consular intercourse and immunities.

Mr. Zourek was unanimously elected Special Rapporteur on the topic of consular intercourse and immunities.

82. The CHAIRMAN said that consuls had very few privileges and immunities. The subject to be covered would therefore have to be of wider scope than those words suggested; it might entail the drafting of a model consular convention.

83. Mr. KRYLOV said he had had in mind not only the few privileges and immunities enjoyed by consuls, but, more broadly, their role as representative organs of a State.

84. It was highly desirable that the two branches of State representation abroad be dealt with concurrently, namely, the question of diplomatic intercourse and immunities on the one hand and, on the other, the wider but somewhat less controversial question of the status and role of consuls.

85. Mr. ZOUREK thanked the Commission for his appointment as Special Rapporteur on the topic of consular intercourse and immunities, and accepted the honour done to him.

86. The subject, as he saw it, covered the whole field of consular relations and consular representation, as well as those few privileges enjoyed by consuls.

87. At a later meeting of the Commission and before the end of the session, he would give a brief outline of the topic as he (Mr. Zourek) construed it, with a view to obtaining the general views of his fellow members of the Commission. Those views would prove of very great value in the preparation of his report.

The meeting rose at 12.40 p.m.

328th MEETING

Wednesday, 6 July 1955, at 10 a.m.

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Chairman: Mr. Jean SPIROPOULOS

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. 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.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1-2) (resumed from the 327th meeting)

CHAPTER III: RÉGIME OF THE TERRITORIAL SEA A/CN.4/L.59/Add.2)

INTRODUCTION

*Paragraphs 1-3 [19-21] **

Paragraphs 1-3 were adopted without comment.

*Paragraph 4 [22] **

1. Mr. FRANÇOIS (Rapporteur) said that in the French text the words *assortis de commentaires qui* should be placed after instead of before the words *pour autant qu'il s'agisse de modifications quant au fond*.

Paragraph 4 was adopted subject to the above correction of the French text.

*Paragraph 5 [23] **

2. Mr. GARCÍA AMADOR proposed that the final sentence of the paragraph be amended to read:

"The Commission submits them to governments so that they may send it any comments they may see fit to make on these or any other articles of the draft before they are adopted at its eighth session and included in the final report to be submitted in accordance with resolution 899 (IX) of the General Assembly."¹

3. Mr. FRANÇOIS (Rapporteur) accepted Mr. García Amador's proposal.

Paragraph 5 was adopted with the amendment proposed by Mr. García Amador.

Paragraph 6²

4. Mr. GARCÍA AMADOR proposed the deletion of paragraph 6, which laid undue emphasis on the technical character of the articles. In actual fact, only a few really dealt with subjects of a technical nature. Even if paragraph 6 was deleted, governments would still send their comments on all the relevant articles, and clarify any technical points that might arise in connexion with some of them.

* The numbers within brackets indicate the paragraph numbers in the "Report" of the Commission.

¹ In document A/CN.4/L.59/Add.2, para. 5 read as follows: ". . . before they are adopted on second reading at its eighth session."

² In document A/CN.4/L.59/Add.2, para. 6 read as follows: "In view of the technical nature of the subjects governed by these articles, the Commission expresses the hope that governments will provide clarifications of technical points calculated to simplify its task."

5. Mr. FRANÇOIS (Rapporteur) said that paragraph 6 referred only to those articles concerning the breadth of the territorial sea, bays, groups of islands and the delimitation of the territorial sea at the mouths of rivers—namely, the articles referred to in paragraph 5. A specific reference to those subjects might be made in paragraph 5, so that its scope would be clearly limited to them.

6. He recalled that the reference to the need for information from governments on technical points had been inserted following a suggestion made by Sir Gerald Fitzmaurice that a committee of experts be set up to advise the Commission on technical issues.

7. Mr. GARCÍA AMADOR pointed out that Sir Gerald Fitzmaurice's proposal had been concerned with technical issues involved in problems of fisheries conservation, and not with the subject of the breadth of the territorial sea and other questions mentioned in paragraph 5.

8. Mr. KRYLOV supported Mr. García Amador's proposal for the deletion of paragraph 6.

Mr. García Amador's proposal was adopted.

DRAFT ARTICLES ON THE RÉGIME OF THE TERRITORIAL SEA

9. Mr. FRANÇOIS (Rapporteur) proposed deletion of the word "provisional". That term could properly only be applied to a few articles, such as that on the breadth of the territorial sea. The others had already been adopted by the Commission on second reading.

10. Mr. SALAMANCA agreed to deletion of the term "provisional" from the title of the draft articles, provided the provisional character of article 3 on the breadth of the territorial sea was made clear.

11. Mr. ZOUREK said that governments would submit their comments on all the articles, even those adopted by the Commission on second reading. He was therefore inclined to favour retention of the term "provisional".

12. Mr. KRYLOV said it was preferable to omit the term "provisional". The use of that term in the very title of the draft articles could lead to the competent government departments paying less attention than they might otherwise do to the Commission's work.

13. Mr. EDMONDS said that the footnote to article 3 made it clear that the text adopted by the Commission did not constitute a final one; that satisfied Mr. Salamanca's requirements.

14. Mr. SCALLE said that it was undesirable to describe as provisional a set of articles which represented what the Commission sincerely believed to be the expression of scientific truth.

15. Mr. GARCÍA AMADOR said paragraph 5 made the position clear, particularly with regard to the provisional character of certain articles. In view of that

fact, and also of the very explicit note attached to article 3, it was totally unnecessary to weaken the draft articles by using the term "provisional" in their title.

16. Faris Bey el-KHOURI said that the articles were indeed provisional inasmuch as they did not constitute the Commission's last word on the subject of the territorial sea. But he agreed that it was undesirable to use the term "provisional" in the very title of the draft articles, as that term tended to lower the prestige of the whole draft.

17. Mr. LIANG (Secretary to the Commission) drew attention to the desirability of adopting a single term throughout the comments to the articles instead of using occasionally the term "amend" (see comment to article 2) and sometimes the term "change" (see comment to article 1).

18. The comments in question were indeed too laconic, and a statement such as "The change does not affect the substance of the article", which appeared by way of a comment under article 1, would not be easily understood by a reader other than a member of the Commission.

19. Mr. FRANÇOIS (Rapporteur) agreed to making the comments to the articles more explicit by specifying that whenever a change or an amendment was referred to, the amendment was in relation to the 1954 text.

The Commission agreed, by 11 votes to none, with 1 abstention, to delete the term "provisional" from the title of the draft articles.

Article 1: Juridical status of the territorial sea

20. Mr. KRYLOV drew attention to the necessity of making the comment more explicit in the manner just agreed to by the Rapporteur.

The comment to article 1 was adopted subject to the necessary modification.

Article 2: Juridical status of the air space over the territorial sea and of its bed and sub-soil

21. Mr. FRANÇOIS (Rapporteur) said the comment to article 2 would be re-drafted along the same lines as the comment to article 1.

On that understanding, the comment to article 2 was adopted.

Article 3: Breadth of the territorial sea

22. Mr. FRANÇOIS (Rapporteur) said that in the English text the sixth sentence of the third paragraph of the comment should read: "The claim to a territorial sea up to twelve miles..." (instead of *over* twelve miles).

23. Mr. HSU proposed that the third sentence of the third paragraph of the comment be amended to read: "This view was not supported by the majority of the members of the Commission although they did not propose any other line of demarcation" instead of "... although they could not agree on the adoption of

any other line of demarcation". In the text submitted by the Rapporteur, the term "they" seemed to refer to the majority of the members of the Commission and not to the Commission itself.

24. He further proposed that the seventh sentence of the third paragraph be amended to read: "But subject to such cases, the Commission, by a vote of 7 against 6, declined to question the right of other States not to recognize..." instead of "...the Commission did not see fit to question the right of other States..."

25. Mr. EDMONDS said that the term "delimitation" should be substituted for the inaccurate one "demarcation" in the third sentence of the third paragraph.

26. With regard to the seventh sentence of the same paragraph, he did not think it at all necessary to mention the number of members who had voted in favour of and against the decision in question.

27. Mr. FRANÇOIS (Rapporteur) agreed to Mr. Edmonds' proposal to substitute the word "delimitation" for the word "demarcation". In the same sentence he proposed that the words "the Commission" be used instead of the pronoun "they" and hoped that amendment would satisfy Mr. Hsu.

28. With regard to the seventh sentence of the same paragraph, he proposed that it be amended to read "But subject to such cases, the majority of the Commission did not see fit..."

29. Mr. HSU recalled that in certain exceptional cases the Commission had noted in its report the actual votes cast for and against a resolution. The question of the breadth of the territorial sea was of such exceptional character as to justify such a reference.

30. Mr. GARCÍA AMADOR proposed that the comment to article 3 be deleted.

31. The text proposed contained a number of statements which could give rise to contradictory interpretations. According to the second paragraph, the Commission wished to state explicitly that in its opinion extensions of the territorial sea beyond twelve miles were contrary to international law. Yet the third paragraph suggested that the Commission had not taken a decision on the actual extent of the territorial sea. The fourth paragraph contained a different idea altogether when it stated: "With regard to the zone between the three and the twelve-mile limits, the Commission is not at present in a position to formulate any resolution."

Finally, it was suggested in the fourth sentence of the same paragraph that a diplomatic conference be entrusted with the task of harmonizing the different views on the breadth of the territorial sea. That suggestion was not based on any decision by the Commission.

32. The Commission had not been able to adopt a final text for article 3 and it was impossible to draft a satisfactory comment to the text which had been provisionally inserted. The best course was to delete the comment and to leave in its place simply the note explaining that

before drafting the final text of an article on the breadth of the territorial sea, the Commission wished to have the comments of governments, particularly on paragraph 3 of the text provisionally inserted.

33. Sir Gerald FITZMAURICE, with reference to Mr. Hsu's proposals, made the following two suggestions:

(i) That the third sentence of the third paragraph of the comment be amended to read: "This view was not supported by the majority of the members of the Commission, although the Commission did not reach agreement on the adoption of any other line of delimitation."

(ii) That the words "by a small majority" be inserted in the seventh sentence of the third paragraph after the words "But subject to such cases, the Commission".

34. He did not agree with Mr. García Amador's proposal to delete the comment. The article on the breadth of the territorial sea was an extremely important one and a comment thereto was necessary. Governments would expect an explanatory comment from the Commission on the vital question of the breadth of the territorial sea.

35. There was no contradiction between the various paragraphs of the proposed text. The second paragraph dealt solely with the question of extensions beyond twelve miles—which were declared contrary to international law. The third paragraph dealt exclusively with claims to a territorial sea of more than three, but less than twelve, miles: it was only with regard to such claims that it was stated that the Commission had taken no decision.

36. Nor was there any contradiction between the third and fourth paragraphs. The third stated that a claim to a territorial sea of more than three miles (but less than twelve miles) could in certain circumstances be made by the coastal State, but that other States were not obliged to recognize such extensions. The fourth paragraph quite correctly said that the Commission was not in a position to formulate any solution with regard to the zone between the three- and the twelve-mile limits.

37. Mr. HSU accepted the amendments which Sir Gerald Fitzmaurice had suggested to the third and seventh sentences of the third paragraph, and in favour of which he withdrew his own.

38. Mr. SALAMANCA said that the third paragraph of the comment as drafted by the Rapporteur set out very clearly the opinion of those members who favoured the three-mile rule, but did not adequately reflect the contrary view, which was held by so many of the Commission's members.

39. The second sentence of the second paragraph of the comment, which stated that the extension of the territorial sea beyond twelve miles was contrary to international law, did not reflect the decision of the Com-

mission. He therefore proposed that that sentence be deleted.

40. Mr. FRANÇOIS (Rapporteur) said that the third paragraph referred to the three-mile rule as being advocated by some members of the Commission only; the paragraph went on to state that that view "was not supported by the majority of the members of the Commission". Nothing could be more satisfactory to the opponents of the three-mile rule.

41. With regard to the second question raised by Mr. Salamanca, he pointed out that paragraph 2 of the text voted by the Commission clearly stated:

"The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles."

42. He could not agree to Mr. García Amador's proposal to delete the comment to article 3. The provisional character of the text adopted did not make an explanatory comment any less necessary, particularly in view of the fact that it had already given rise to divergent interpretations, both within and without the Commission.

43. Nor could he agree that the last two sentences of the third paragraph of the comment contradicted the statement that the Commission had not adopted the three-mile rule. It was quite common to acknowledge to a State a right in international law, while recognizing the right of other States not to acknowledge the first State's claims.

44. Mr. SANDSTRÖM agreed with the Rapporteur on the necessity for a comment. The various statements made in the comment contained no contradictions.

45. He suggested two amendments to the English text which would bring it nearer to the meaning of the French:

(i) In the second sentence of the third paragraph, to substitute the words "applicable to all States" for the words "binding on all States";

(ii) In the fourth sentence of the same paragraph, to substitute the word "characterized" for the word "regarded".

46. Mr. FRANÇOIS (Rapporteur) accepted Mr. Sandström's amendments.

47. Mr. KRYLOV said it was impossible to omit the comment.

48. He agreed with Sir Gerald Fitzmaurice's proposal to qualify by means of the words "by a small majority" the statement that the Commission did not see fit to question the rights of States other than the coastal State not to recognize an extension of the territorial sea beyond the three-mile limit.

49. Mr. ZOUREK agreed with Mr. Salamanca that the views of members who opposed the three-mile rule had not been given much prominence. The comment should be amplified in that respect so as to make it clear that several members had expressed the view that the twelve-

mile rule was just as valid in international law as the three-mile rule. Article 20 of the Commission's Statute required comments to contain reference to divergencies and disagreements which existed in legal opinion. The various divergent viewpoints expressed in the Commission gave concrete form to such doctrinal differences.

50. The last two sentences of the third paragraph of the comment³ were also unsatisfactory, particularly in view of the vital importance of the subject with which they were concerned.

51. Mr. SALAMANCA repeated his proposal that the second sentence in the second paragraph of the comment be omitted altogether because it was in conflict with paragraph 3 of the text inserted under article 3. In making that proposal he was not, of course, taking any stand on the substance of the question but was only anxious that the comment should accurately reflect the course of the discussion and should not belie the deliberately vague formulation of the text inserted under article 3.

52. The CHAIRMAN, speaking in his personal capacity, pointed out that the Commission had, in fact, taken a firm decision as to extensions beyond twelve miles and that, after considerable discussion, it had been finally decided to substitute the words "international law" for the words "international practice" in paragraph 2 of the text adopted.

53. Mr. SALAMANCA explained that his proposal had been prompted by the fact that to the best of his knowledge the Commission had never stated explicitly that extensions beyond twelve miles infringed the principle of the freedom of the seas and were therefore contrary to international law. His amendment, which was quite innocuous, would render the comment more accurate. In any event governments would interpret the text inserted under article 3 in their own way.

Mr. Salamanca's amendment was rejected by 4 votes to 3 with 4 abstentions.

54. Mr. GARCÍA AMADOR withdrew his proposal to delete the whole comment.

The first paragraph of the comment was adopted without change.

The second paragraph of the comment was adopted without change by 8 votes to 1 with 2 abstentions.

Sir Gerald Fitzmaurice's suggestion for substitution of the words "the Commission did not reach agreement" for the words "they could not agree" in the third sentence of the third paragraph was adopted by 8 votes to none with 4 abstentions.

55. Sir Gerald FITZMAURICE considered the fourth

³ They read as follows: "But subject to such cases, the Commission did not see fit to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit, since by doing so it would implicitly grant all States the right to extend the breadth of their territorial sea to twelve miles. Although some members claimed this right for States, the Commission could not accept their view."

sentence in the third paragraph to be somewhat misleading because it was followed by a statement about the cases when an extension of the territorial sea to between three and twelve miles would not be a violation of international law. He therefore proposed the insertion of the words "being in itself" after the words "is not characterized by the Commission as".

56. Mr. FRANÇOIS (Rapporteur) said that such an amendment would require some explanation in the text. He would therefore be reluctant to accept it.

57. He added that in the interests of style the word "Hence" should be deleted from the beginning of the fourth sentence.

58. Sir Gerald FITZMAURICE said that he would not press his point concerning the fourth sentence.

59. Mr. ZOUREK proposed that a new sentence be inserted reading:

"Some members of the Commission upheld the view that the breadth of six or twelve nautical miles fixed by certain States for their territorial sea had the same juridical validity from the point of view of international law as the breadth of three miles applied by other States."

60. Mr. FRANÇOIS (Rapporteur) said that he would have no objection to that addition, which was an accurate statement of fact.

61. Mr. EDMONDS said that he could not accept the amendment unless the word "claimed" were substituted for the word "fixed".

62. Mr. ZOUREK said that he could not agree to such a change, which would entirely alter the purport of his amendment. As the amendment was designed to explain the attitude taken by certain members, they should have a decisive say about the way in which it should be drafted.

Mr. Zourek's amendment was accepted.

63. Mr. GARCÍA AMADOR, referring to the mention of historical rights in the sixth sentence of the third paragraph, pointed out that the Commission had taken no decision about historical rights as a criterion to justify extensions of the territorial sea beyond three miles and that the text referring to historical rights had been withdrawn. The criterion which the Commission had endorsed was the legitimate interests of States.

64. Sir Gerald FITZMAURICE said that to the best of his recollection, although Faris Bey el-Khoury's amendment, which had spoken of "national necessities" had been adopted, the amended text as a whole had finally been rejected⁴ and it would, therefore, be untrue to say that the Commission had endorsed the highly controversial criterion to which Mr. García Amador had referred. The cases in which a claim to an extension could be justified were enumerated in the fifth sentence of the third paragraph.

65. Mr. SANDSTRÖM did not think that there was any need to modify the sixth sentence in the third paragraph since extensions of the territorial sea on the basis of historical rights had never been contested in the Commission.

66. Mr. GARCÍA AMADOR pointed out that in fact the Commission had taken no decision, whether explicit or implicit, about the validity of historical rights in that domain. He was not objecting to the criterion itself, but to the inaccurate account of the Commission's proceedings.

67. Mr. FRANÇOIS (Rapporteur) said that the Commission's general rapporteurs would be unnecessarily restricted if they were not allowed to record agreement on certain issues even when it had not been expressed by a formal vote.

68. Mr. GARCÍA AMADOR said that he was aware of the need to give the General Rapporteur some latitude but other members of the Commission might have their own ideas about the points which should be brought out in the report and in the present instance he wondered what the reaction would be of those governments which claimed a wider belt than three miles on other than historical grounds. He personally proposed to abstain on the whole paragraph, but hoped that the Rapporteur would agree either to delete the sentence in question or to amend it.

Sir Gerald Fitzmaurice's suggestion for insertion of the words "by a small majority" after the words "But subject so such cases, the Commission" in the seventh sentence was adopted.

The third paragraph of the comment as amended was adopted by 9 votes to none, with 3 abstentions.

69. Mr. GARCÍA AMADOR considered the fourth sentence in the fourth paragraph to be misleading since the Commission had made no recommendation concerning the convening of a diplomatic conference, a recommendation which could only be put forward after careful study of all the implications.

70. Mr. FRANÇOIS (Rapporteur) observed that the idea had been mooted in the discussion and appeared to have won general approval.

71. Mr. SALAMANCA agreed with Mr. François.

The fourth paragraph of the comment was adopted without change by 8 votes to none, with 4 abstentions.

The fifth paragraph of the comment was adopted by 11 votes to none, with 1 abstention.

Article 4: Normal base line

72. Mr. KRYLOV suggested that the last sentence of the comment was unnecessary. It would be enough to say that the Commission had deleted the final sentence of the article adopted at the previous session.

73. Mr. FRANÇOIS (Rapporteur) pointed out that it was true that the Commission had suppressed the final sentence of the article because it might be misleading and also because it was of no great importance. He

⁴ 314th meeting, para. 100.

would, however, be prepared to meet Mr. Krylov's point by changing the last sentence of the comment to read "The Commission therefore decided to delete it" instead of "Since it did not attach much importance to this provision, the Commission deleted it".

The comment to article 4 was adopted as amended.

Article 5: Straight base lines

74. Mr. KRYLOV suggested that it was unnecessary to refer in the comment to paragraph 2 of the original text of the article since it had now been deleted. He particularly disliked the second sentence in the second paragraph of the comment which seemed to criticize the judgement of the International Court in the Fisheries Case.⁵

75. Mr. FRANÇOIS (Rapporteur) pointed out that the suppression of paragraph 2 in the original text of the article on straight base lines had given rise to very considerable discussion and criticism which must be somehow reflected in the comment.

76. He did not feel that there was any implied criticism of the Court, which had not enunciated a general rule about base lines but had simply rendered a decision in a special case.

77. Mr. KRYLOV withdrew his objection in the light of Mr. François' arguments.

78. Sir Gerald FITZMAURICE suggested that Mr. Krylov might be given satisfaction by amending the second sentence in the second paragraph of the comment so as to show that it expressed the view only of certain members of the Commission.⁶

It was so agreed.

The comment to article 5 was adopted as amended.

Article 6: Outer limit of the territorial sea

79. Mr. FRANÇOIS (Rapporteur) pointed out that as the text of the article had been left unchanged, it was unnecessary to insert a comment to it.

Article 7: Bays

80. Mr. KRYLOV suggested that the quotation from the report of Sub-Committee II of the 1930 Conference for the Codification of International Law was somewhat extensive and perhaps a little out of proportion to the length of the remainder of the comment. He suggested that it be replaced by a brief summary.

81. Mr. FRANÇOIS (Rapporteur)¹ agreeing with Mr. Krylov, explained that he had inserted the passage verbatim because it seemed to him an excellent statement which could not be improved upon. He would, however, be prepared to delete the whole paragraph.

82. Mr. ZOUREK, referring to the last paragraph of the comment, said that as all governments might not submit comments on the article it would be useful if the Secretariat could prepare a survey of the present regulations of individual States in time for the next session.

83. Mr. GARCÍA AMADOR said that the comment should make some mention of the view held by certain members that there should be no limitation in terms of length on the closing line of bays. The attention of governments should also be drawn to the Court's categorical rejection of the ten-mile limit as a rule of international law.

Further discussion on the comment to article 7 was deferred.

Statement by the chairman

84. The CHAIRMAN expressed his great regret at having to leave before the end of the session. He did so with a quiet conscience knowing that his duties would be admirably carried out by the First Vice-Chairman.

85. The Commission had again done good work, having dealt with the régime of the high seas, the conservation of the living resources of the sea, the régime of the territorial sea and its breadth, which was a separate problem in itself. The draft articles on the conservation of the living resources of the sea were of great practical importance and had been adopted by a considerable majority. He hoped that when the final text was submitted to the General Assembly it would have a favourable reception. Sir Gerald Fitzmaurice had made a distinguished contribution to the Commission's work and he looked forward to the other new members finding it possible to attend the next session.

86. In conclusion, he thanked the two Vice-Presidents, the General and Special Rapporteur, the Secretary and members of the Secretariat for their help and support.

87. Mr. EDMONDS, extending the Commission's good wishes to the Chairman, expressed appreciation of the way in which he had conducted the often difficult and arduous discussions.

88. Mr. KRYLOV said that the Commission had been fortunate in having so eminent and able a Chairman, who had done much to advance its work. He had been proud to serve under Mr. Spiropoulos and looked forward to the day when they would again be working together.

89. The CHAIRMAN thanked the Vice-Chairman and Mr. Edmonds for their kind remarks.

The meeting rose at 1.10 p.m.

⁵ *I.C.J. Reports 1951.*

⁶ Instead of "Against this it might be contended that the Commission had drafted . . ."