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CONTENTS

Chairman: **Mr. Karel PETRŽELKA (Czechoslovakia).**

AGENDA ITEM 53

Report of the International Law Commission on the work of its eighth session (*continued*):

(*c*) Other matters

1. Mr. GARCIA AMADOR (Cuba), Chairman of the International Law Commission, speaking on a point of order, said that certain delegations intended to propose a draft resolution the purpose of which was to make it plain that the Fifth Committee's recent recommendation (A/3426) that a uniform rate of subsistence allowance be paid to members of all United Nations organs did not have the effect of rescinding the special arrangements made for the International Law Commission under General Assembly resolution 485 (V), which gave the Commission's members a special allowance fixed at $35 a day. He requested that time should be allowed for the draft resolution to be discussed once the general debate had been concluded.

2. Sir Gerald FITZMAURICE (United Kingdom) supported the request; clearly the Fifth Committee's recommendation, which referred only to "subsistence allowance", did not affect the "special allowance" paid to the members of the International Law Commission, which had always been regarded as comprising subsistence allowance plus an additional indemnity.

3. The CHAIRMAN agreed that the matter should be discussed once the general debate had been concluded.

(*a*) Final report on the régime of the high seas, the régime of the territorial seas and related problems (A/3159, A/C.6/L.378, A/C.6/L.385 and Add.1 to 3) (*continued*)

4. Mr. CANAL RIVAS (Colombia) said that the Principles of Mexico on the juridical régime of the sea, which had been approved by the Inter-American Council of Jurists on 3 February 1956 (A/CN.4/102, annex I), did not constitute rules of international law applicable throughout the American continent, as had been suggested by some delegations. That declaration had not been adopted unanimously: there had been four votes against it, two abstentions, and five reservations with respect to points of substance. Colombia, in particular, had voted against section A, paragraph 2, of the declaration, concerning the coastal State's competence to establish its own territorial waters "within reasonable limits" because such a system would lead to great diversity of international practice. The question of the breadth of the territorial sea had to be determined by a general agreement which should, if possible, be world-wide in scope or at least applicable at the regional level.

5. Moreover, at Mexico City the only function of the Inter-American Council of Jurists, a technical and consultative body, had been to make a preparatory study in contemplation of the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", which had been scheduled to meet at Ciudad Trujillo in March 1956. Indeed, the Council had made the position clear in the resolution it had adopted immediately after approving the principles of Mexico City.

6. Colombia had voted in favour of the resolution adopted by the Conference at Ciudad Trujillo on the understanding that the outstanding problems of the breadth of the territorial sea, the juridical régime of the superjacent waters of the continental shelf, and the nature and scope of the special interest of the coastal State in conservation, would be settled by international agreement in a spirit of compromise.

7. His delegation agreed with the definition of the continental shelf contained in article 67 of the International Law Commission's draft, which was similar to that contained in the resolution of Ciudad Trujillo.

8. The Colombian delegation could not help feeling that if the Proclamation of President Truman of 1945 on the continental shelf had been made through an international organ instead of unilaterally, its application would have been more universal and the issuing of similar proclamations by other States would perhaps have been avoided.

9. Referring to the question of the breadth of the territorial sea, he said that article 3 of the Commission's draft, though vague on certain points, definitely laid down that the breadth could not be less than three miles. It also made it clear that it was open to a coastal State to establish a greater breadth, provided that it was not in excess of twelve miles. A Colombian Act of 1923 provided for a breadth of twelve miles, but his delegation hoped that universal agreement on a specified limit would be reached. While recognizing that three miles might not be sufficient for many countries, Colombia could not accept the view that States had absolute freedom to determine the breadth of their own territorial sea.

10. He had noted with great interest the position adopted by the representatives of Peru, Ecuador and

Chile—which he hoped would be shared by the delegation of Costa Rica—to the effect that in claiming a 200-mile zone their countries did not mean to extend their territorial sea but only to exercise rights relating to the conservation of resources in that zone. His delegation viewed with favour the idea of recognizing the right of the coastal State to a conservation area in the high seas, distinct from the so-called "contiguous zone", provided that the conservation area was clearly defined.

11. With regard to the contiguous zone, he said that article 66, paragraph 2, stating that the zone "may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured", was not consistent with the provisions of article 3, which enabled a State to extend its territorial sea to twelve miles.

12. He agreed with the principle of the median line as the boundary in the continental shelf and the territorial sea in the case of adjacent States. In connexion with the statement of the Venezuelan representative at the 493rd meeting, that such boundaries should be fixed in accordance with the particular circumstances of each region and each State as well as of relevant geographical, economic and other factors, he pointed out that all States had economic, political and other interests. He therefore hoped that that statement by the Venezuelan representative did not represent an extreme view, and that the universally accepted formula would in due course be agreed upon by all.

13. The Colombian Government, for the reasons he had stated, reserved its right to accept or reject any unilateral measures that might be adopted by other States and to adopt itself all necessary measures until universal agreement on the questions at issue was reached.

14. The questions of the continental shelf, the territorial sea, the high seas and conservation of resources were all closely linked. The fact that those complex problems had to be dealt with as a whole should, however, be no justification for postponing their examination unduly.

15. His delegation would therefore support the proposal for the convening of an international conference (A/C.6/L.385), provided that the conference was held not later than the spring of 1958.

Mr. Castañeda (Mexico), Vice-Chairman, took the Chair.

16. Mr. GLASER (Romania) said he shared the view that the discussion should not be confined to the question whether a diplomatic conference should be convened in order to codify the law of the sea. There were many problems which such a conference would be unable to solve without the expert advice of jurists. He therefore felt it his duty to throw as much light as he could on the main controversial points, and regretted that some delegations seemed more concerned with bringing the Committee's discussions to a close before the Christmas recess, particularly as nearly a quarter of the Members of the United Nations, having only recently been admited, had not so far had an opportunity of expressing their views on the important questions involved in the law of the sea.

17. As it had not yet had time to study the International Law Commission's report (A/3159) in detail, his Government would give its substantive views later. In any case it was manifestly impossible in the course of the current discussion to deal with all the numerous points on which other representatives had touched. For example, the Turkish representative had implied that the Sea of Marmara was an internal sea (495th meeting). It was surely obvious that all the ships of any country adjoining the Black Sea had a free right of passage from that sea into and out of the Mediterranean.

18. The best tribute he could pay to the International Law Commission's work was to draw attention to certain parts of its report which needed special consideration on the part of all delegations with a view to arriving at an equitable and universally acceptable solution. For instance, the draft articles placed certain unwarranted restrictions on the coastal State's sovereign rights over its territorial sea. When a strait which was the sole egress from one area of the high seas to another lay within a coastal State's territorial sea, that State could clearly not be allowed to suspend the innocent passage of foreign warships through the strait; but when such a strait was only the normal and not the sole egress, the coastal State should, in his delegation's view, be allowed to make such passage subject to prior authorization.

19. The Commission's definition of piracy was also too restrictive and failed to take the facts of history or the realities of the modern world into account. Pirates had always infested not only the high seas but also what was now known as the territorial sea; the laws of the United Kingdom, for one, did not, like the Commission's draft, restrict piracy to acts committed on the high seas. Moreover it was indisputable, and had been recognized for example at the 1922 Washington Conference and in the 1937 Nyon Agreement, that nowadays piracy was committed much less commonly for private ends than under the orders and protection of public authorities. Piracy was piracy, regardless of where or by whom or for what purpose it was committed.

20. He would not discuss the substance of the Commission's draft articles on arbitration, for the fact that only very few States had so far accepted the compulsory jurisdiction of the International Court of Justice seemed to show that the international community as a whole did not desire any form of compulsory international jurisdiction. There was, however, a question to which he would draw particular attention, namely the need for prohibiting atomic tests in any form. The provisions of draft articles 27 and 48 were clearly inadequate, and the commentaries, which were moreover also rather inadequate, could not supply the deficiency, for it was the articles that would be binding on Governments, not the commentaries; in any case there was no reason for not banning tests in the territorial sea in the same way as tests in the high seas. He could not agree that the question of banning such tests should be left to the bodies dealing with disarmament. For they were clearly incompatible with such specifically maritime principles of international law as the freedom of fishing and of navigation and the right of innocent passage.

21. Turning finally to the key question of the breadth of the territorial sea, he expressed doubts concerning draft article 3, paragraph 4. In that paragraph the Commission seemed to be evading its clear duty. For

hile it was the sovereign right and the responsibility f Governments to lay down the breadth of the erritorial sea, it was the task of jurists to advise hem concerning the principles which they should pply in doing so.

2. Romania's decision in 1951 to fix the breadth of s territorial sea as twelve miles had aroused some pposition from certain States which were not even lack Sea countries. No generally acceptable solution f the problem of the breadth of the territorial sea ould be found, however, except on the basis of the undamental principles of international collaboration nd respect for the sovereignty of States. All States ecognized that, in the words used in draft article 1, "The sovereignty of a State extends to a belt of sea djacent to its coast, described as the territorial sea." The rules of law governing that belt of sea were different from those governing the high seas and also different from those governing internal waters. Although there would be an obvious advantage in having a uniform breadth of territorial sea, the fact that the coastal States' needs varied so much from one country to another, and from one epoch to another—depending on geographical, geological, security and, above all, economic conditions—meant that one and the same breadth might be excessive in the case of one State, just right for a second State and too small for a third. That was borne out, moreover, by the diversity of practice, which had been the main stumbling-block for the 1930 Codification Conference held at The Hague, and which might well prove the stumbling-block for the prospective conference if States persisted in their efforts to fix a uniform breadth for the territorial sea.

3. That diversity was not surprising. It was not surprising that a great maritime Power, which had no fears of attack from an enemy fleet, should be content with a narrow territorial sea and should attach a great deal of importance to the concept of the freedom of fishing and navigation on the high seas. Conversely, for States which had only small naval forces and inadequate land resources, a broad territorial sea was of the greatest importance for security reasons—still more so for the development of coastal fisheries—and constituted no infringement of the freedom of the seas. It seemed indeed that, at any rate for certain stretches of the high seas adjacent to the territorial sea, one of the traditional components of the freedom of the high seas would have to be jettisoned, namely, the right to uncontrolled fishing. Under the pressure of economic need, many Governments had already agreed that either the breadth of the territorial sea should be increased or the coastal States' special fishing rights in the adjoining waters should be recognized.

4. It was in fact necesary to establish a new rule of international law, and that could only be done by reconciling the principle of the freedom of the high seas with the coastal State's sovereign right to fix the breadth of its territorial sea. It was claimed that, in case of doubt, the collective interests of the international community, as reflected in the principle of the freedom of the sea, must predominate. The international community, however, did not include only the few great maritime Powers who maintained that the territorial sea was an exception to the rule of the freedom of the seas; the international community was all the States, both coastal States and the small number of States without a maritime coastline; and it was in the interest of all those States that the resources of the sea should be used for the benefit of all, and not only for the profit of the great maritime Powers which in actual fact were the only ones to fish in the high seas today.

25. For all those reasons, the three-mile rule, if it had ever been a general rule, had long ceased to be one. No more than eleven States now adhered to it strictly, while another six retained it but claimed a contiguous zone as well.

26. It followed from the multiplicity, the diversity and the varying character of the needs and interests of the different coastal States that the breadth of the territorial sea could only be determined by the coastal State itself; it must of course do so without violating the accepted rules of international law—and above all the freedom of the high seas—any more than it violated them in other fields in which it was competent to legislate.

27. The validity of the coastal State's decision could not be made to depend on its recognition by other States. It was sufficient that it notified them in order that they might give the appropriate instructions so as to avoid any unfortunate incidents resulting from infringement of its sovereign rights. And States which refused to recognize its decision were acting at variance with international law, and were in fact interfering in a matter which fell within its sovereign jurisdiction.

28. In the light of what he had said, certain provisions of the Commission's draft article 3 seemed open to criticism. Thus, there was a flagrant contradiction between paragraphs 1 and 2. International practice was not uniform precisely because all the needs and interests involved could not be reduced to a common denominator; and hence it could not be said that an extension of the territorial sea beyond twelve miles was in no circumstances legitimate. Although paragraph 3 was literally true, the States which presumed to sit in judgement on the coastal States' claims were exceeding their rights, for the reasons he had just indicated. There would, moreover, be undeniable practical disadvantages in a situation where a particular breadth of territorial sea was binding on some States but not on others. A situation of that kind was not what the United Nations had had in mind when it had asked the Commission to prepare a draft code of maritime law.

29. Before such a code could be formulated, certain fundamentals had to be agreed upon. Above all, the sole limitation on the extent of the territorial sea was the duty to respect the principle of the freedom of the high seas. In particular, the supposed three-mile limit had no longer legal validity. No just or permanent solution could be based exclusively on the wishes of the few great maritime Powers which claimed to represent 80 per cent of world tonnage, but only on the international collaboration of all States, in equality before the law. The three principles which should underlie whatever solution was adopted were first, that every State's sovereignty extended to a belt of sea adjacent to its coast, described as the territorial sea; secondly, that every State should determine the breadth of its territorial sea without interfering with the normal exercise of the rights inherent in the freedom of the

high seas, and that it should notify all other States of any change in the breadth; and thirdly, that States had the sovereign right to determine the breadth of their territorial seas by international agreement. Those principles could be formulated in whatever manner seemed the most appropriate, but it would be very desirable if they could be formulated in a code of maritime law.

30. Mr. WINKLER (Czechoslovakia) said that the International Law Commission's draft articles concerning the law of the sea (A/3159, chap. II) could be counted among the great works of codification, alongside The Hague rules on land warfare of 1907 and the 1949 Geneva Conventions on the protection of victims of war.

31. Czechoslovakia, although a land-locked State, was highly interested in maritime questions, both because sea-going merchant ships flew its flag and because any universal agreement on those questions would have a favourable influence on the further development of peaceful international relations. Moreover, increasing economic co-operation tended to reduce the importance of the distinction between maritime States and land-locked States. A code of rules governing the law of the sea should take that factor into account and confirm the right of land-locked States to utilize the sea, in common with the maritime States, as a means of communication and as a source of natural wealth.

32. A code covering any field of international law should reflect universally recognized principles governing peaceful coexistence and democratic co-operation between States. The most important of those was the principle of respect for the sovereignty of States and for their legitimate economic security and interests. In the codification of the law of the sea, therefore, the most important problem was how to reconcile the sovereignty of the coastal State with the interests of other States.

33. The law of the sea had certain distinctive features. In the first place, those of its rules which applied to the high seas were concerned with parts of the earth's surface in which no individual State could claim sovereign rights. Such rules should consequently be designed to safeguard the interests of all the users of the high seas. Secondly, the law of the sea consisted largely of customary rules, which were far more difficult to ascertain than those established by international conventions. A convention on the law of the sea would thus clarify many issues.

34. In his delegation's opinion, all work of codification should begin with an analysis of existing rules and of current international practice. The latter, which reflected the requirements of States, must serve not only as a basis of codification, but also as a criterion of its effectiveness. For that reason, his delegation attributed great importance to the comments of Governments on the International Law Commission's draft.

35. In general, the draft articles were based on sound principles. For the moment he would deal with only a few questions which his delegation considered important. With reference to the territorial sea, it was unfortunate that the Commission, after rightly recognizing the extent of the coastal State's sovereignty in article 2, had failed to solve the fundamental question of delimitation. As there was no rule of international law on that point, the determining factor must be the established practice of States. There was clearly no possibility of arriving at a uniform solution, because the breadth of the territorial sea would always depend on the special needs of individual countries. Moreover, a search for a uniform rule was largely wasted effort, because the breadth could be established in each individual area merely by striking an equitable balance between the legitimate needs of the coastal State and the principle of the freedom of navigation. In that connexion, he quoted the proposal submitted to the eighth session of the International Law Commission by its Czechoslovak member, Mr. Zourek (A/CN.4/SR.361, para. 68).

36. The Commission's draft recognized in articles 17 to 21 the right of a coastal State to exercise its jurisdiction over vessels passing through its waters. Without any apparent justification, however, the Commission had also included in the category of ships subject to the jurisdiction of the coastal State government ships operated for commercial purposes (article 22). That provision conflicted with the rule of international law which recognized the immunity of all government ships without distinction. The principle that State property was immune against civil process was in no way affected by the fact that some States had voluntarily accepted the jurisdiction of foreign courts in the interests of economic co-operation. The Brussels Convention of 1926 could not be regarded as a general rule of international law; it was, in fact, a voluntary contractual departure from the accepted rule.

37. The draft articles on the régime of the high seas were mainly concerned with safeguarding free passage and equal rights in the exploitation of the natural wealth of the sea. Article 27 seemed a correct summary of the main attributes of the freedom of the high seas, as accepted by international practice. In his delegation's opinion, that article necessarily implied that no State could impose any restriction whatsoever on any of the freedoms listed. In that connexion, he agreed with those who had expressed concern over the threat to the freedom of the high seas arising from tests with weapons of mass destruction. The resulting radioactive fallout polluted both the sea and the air above it, and, in addition to endangering the population, caused the destruction of living resources.

38. The Commission had rightly stated in article 28 that every State had the right to sail ships under its flags on the high seas. International law recognized that inland States also enjoyed that right. The Commission had encountered some difficulty in drafting detailed provisions on the nationality of ships, by reason of the great diversity in the practice of individual States. In his delegation's opinion, the Commission had succeeded in laying down the appropriate criterion, namely, that there must exist a genuine link between the State and the ship (article 29, para. 1). The determination of the nature of that link would, of course, fall within the exclusive domestic jurisdiction of the State concerned.

39. A serious problem connected with the status of ships was that of ships possessing two or more nationalities. Every effort should be made to prevent such situations, and article 31 was perhaps not sufficiently far-reaching. Provisions might be adopted, for example, similar to those contained in the Convention on International Civil Aviation signed in Chicago on 7 December 1944.

40. His delegation felt that article 39 was somewhat cautious. The article was a correct definition of piracy as known in the nineteenth century, but it failed to take account of more recent developments such as the Lyon Agreement. Piracy unfortunately still existed, in forms more dangerous than ever before.

41. With reference to the question of fisheries, his delegation appreciated the Commission's recognition of the special interests of coastal States, whose economy frequently depended on the exploitation of the living resources of the sea. For that reason, the principle embodied in article 54 seemed wholly acceptable.

42. The application and interpretation of rules regarding fisheries might admittedly lead to controversy. There was, therefore, every reason for establishing machinery to deal with the settlement of disputes, provided that the relevant provisions were consistent with accepted rules of international law. Unfortunately, the solution proposed by the International Law Commission failed to fulfil that condition. The concept of compulsory arbitration had been convincingly denounced by previous speakers as incompatible with the traditional rules of arbitral procedure. The purpose of international arbitration was, in the words of article 37 of The Hague Convention for the Pacific Settlement of International Disputes, 1907, "the settlement of disputes between States by judges of their own choice and on the basis of respect for law."

43. The rules governing the law of the sea were of such significance that the greatest possible variety of views should be considered. All States were capable of making contributions of inestimable value. For that reason, his delegation welcomed the suggestion made by the representatives of Indonesia (495th meeting, para. 31) and Ceylon (496th meeting, para. 66) that States which were neither Members of the United Nations nor members of the specialized agencies should also be invited to the proposed conference. With reference to the joint draft resolution (A/C.6/L.385), his delegation reserved its right to present its comments at a later stage.

The meeting rose at 12.55 p.m.

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