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**Summary record of the 256th meeting**

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50. Mr. CORDOVA said that he had voted in favour of article 5 which left States a certain latitude, subject, however, to a precise rule. Consequently, it would be illogical to allow the coastal State complete freedom of choice in the exceptional case referred to in article 6. He was unable to agree with the proposals of either Mr. Pal or the Chairman. It would be impossible to define with any precision the outer limits of the territorial sea, if the line where it began was not clearly established.

51. The CHAIRMAN pointed out that even the Special Rapporteur's text allowed States a certain latitude, for ten miles was only proposed as a maximum length.

52. Mr. LAUTERPACHT said the last remark supported his view, for it showed that the Special Rapporteur's proposals were not so rigid as had been alleged.

53. In reply to Mr. Amado he said that the Court's decision probably went beyond the law in force. In view of the situation with which the Court had been confronted, that did not imply a criticism of the decision. Unless it admitted of exceptions, the coastline principle was possibly too rigid. But it was a mistake to give those exceptions the dignity of a governing rule. No such result could properly be read into the Court's judgement, although the generality of its language lent itself to misinterpretation. With regard to Mr. Amado's second question, he agreed that the Court's decision was so general that it could not yield any practical rules for action. That was precisely the criticism which the judgement had encountered in a number of countries. The Court had left the matter in some uncertainty, and it was the Commission's function to dispel that uncertainty.

54. He was glad to note that Mr. Hsu did not object to the principle embodied in paragraph 2, but only to the form in which the provision was drafted.

The meeting rose at 1 p.m.

## 256th MEETING

Monday, 28 June 1954, at 4.30 p.m.

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*Chairman*: Mr. A. E. F. SANDSTRÖM

*Rapporteur*: Mr. J. P. A. FRANÇOIS

### *Present*:

*Members*: Mr. G. AMADO, Mr. R. CORDOVA, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK

*Secretariat*: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

### Filling of casual vacancy in the Commission

1. The CHAIRMAN announced that at a private meeting the members of the Commission had decided to elect Judge Douglas L. Edmonds a member of the Commission, to fill the casual vacancy caused by the resignation of Judge John J. Parker, who had been elected to the Commission by the General Assembly at its eighth session.<sup>1</sup>

### Date and place of the seventh session

2. The CHAIRMAN said that at a private meeting the members of the Commission had taken a preliminary decision to hold the seventh session at Geneva, for a period of ten weeks starting on 20 April 1955, and to consult with the Secretary-General concerning that preliminary decision.

**Régime of the territorial sea (item 2 of the agenda)**  
A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71  
and Add. 1 and 2, A/CN.4/77)<sup>2</sup> (continued)

### CHAPTER II: LIMITS OF THE TERRITORIAL SEA (continued)

#### Article 6: Straight base line (A/CN.4/77)<sup>3</sup> (continued)

3. Mr. PAL said that it was impossible to lay down a rigid rule fixing the length of the straight base line at five or ten miles. Article 6 should be as flexible as possible. In certain exceptional cases the length of the straight base line might well exceed ten miles and in those cases the length should be a "reasonable" one. He thought that the proposals of the Chairman<sup>4</sup> and Mr. Lauterpacht<sup>5</sup> were intended precisely to make the article more flexible, and proposed that the Commission consider them without delay.

4. Mr. SCELLE agreed with Mr. Pal that the article should be made as broad as possible. Since the Commission was drawing up a draft convention it could point out that the five- or ten-mile rule for the straight base line was not absolutely rigid, and recommend

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 17 (A/2630), p. viii.*

<sup>2</sup> *Vide supra*, 252nd meeting, para. 54 and footnotes.

<sup>3</sup> For the English text of the article, *vide supra*, 254th meeting, footnote 7.

<sup>4</sup> *Vide supra*, 255th meeting, paras. 8 and 9.

<sup>5</sup> *Ibid.*, paras. 1-4.

States to resort to arbitration in cases of dispute. Many rules or principles of municipal law had in practice been introduced in consequence of judicial decisions. Similarly, in the draft clauses relating to the territorial sea, provision should be made for arbitration, so that a body of case law could be built up. He inquired if it was intended to make provision for arbitration in cases arising out of article 6 only, or if an arbitration clause was to cover the draft convention as a whole.

5. Mr. FRANÇOIS, Special Rapporteur, said that the dimensions referred to in the articles before the Commission were not exact dimensions; they were to some extent arbitrary. The Commission could point out that the figures were not final and were intended to serve only as a general indication.

6. In reply to Mr. Scelle, he said that parties might resort to arbitration in all cases of disagreement concerning the interpretation of the convention. He proposed that the question of arbitration be postponed until later in the discussion.

7. Mr. SPIROPOULOS said that it was important to know whether, in its decision in the Fisheries case,<sup>6</sup> the International Court of Justice had merely expressed a general idea or had given a precise formulation of the law in force. In his opinion the Court was not in a position to lay down any exact limit of five or ten miles, and had made its decision as clear and precise as had been possible. It had, however, recognized certain situations, where the length of the base line exceeded five or ten miles, as being in accordance with international law.

8. He agreed with Mr. Lauterpacht that the Commission should draw up a fairly detailed text. For that purpose, and to ensure that the text would be acceptable to as many States as possible, the Commission had to obtain the views of Governments and consequently to submit certain proposals to them.

9. The Special Rapporteur proposed ten miles as the maximum length of the straight base line, whereas the Court had mentioned such base lines of up to thirty and forty miles. He proposed that in article 6, paragraph 2, the words "ten miles" should be replaced by a vaguer formula such as "not greatly exceeding ten miles", "ten miles in principle" or "ten, twenty or thirty miles". All references to "ten miles" in the text of the convention should be similarly qualified. If Governments rejected all the lengths proposed, the Commission would then draft the article in a vaguer form without quoting any precise length.

10. He did not disagree with Mr. Scelle's suggestion regarding arbitration but thought that it was only one of the possible solutions. The Commission could also set up an international body for the delimitation of the territorial sea and the drawing of charts.

11. However, the important question at the moment was the drafting of a set of rules. He agreed tentatively with the rules proposed by the Special Rapporteur, but thought that it would be necessary to obtain the views of Governments before reaching any final decision; his suggestions were intended to provoke a reaction on the part of the Governments.

12. Mr. CORDOVA was opposed for the time being to discussing the settlement of future disputes by special tribunal.

13. With regard to the fixing of the length of the base line, he said the Commission had neither the jurisdiction nor the technical qualifications to carry out that work. In the absence of a basis of established law, it could not make any proposal that could be described as codification. He was equally opposed to fixing "reasonable" length, as the Commission was not in a position to say what was "reasonable" and what was not. He therefore proposed that the Commission should adopt article 6 as submitted by the Special Rapporteur and add, not in the text of the article, but in the comments, that it did not have the power to fix the length of the straight base line, which was a matter for the States themselves.

14. Mr. SPIROPOULOS said there was no basic disagreement between Mr. Córdova, the Special Rapporteur and himself. All were agreed on the fact that the Commission should not fix any definite length for the straight base line. Mr. Córdova was, however, mistaken in saying that the Commission had no authority to lay down precise figures. The Commission had done so in the past, particularly in its discussions of the continental shelf.

15. The document under consideration was not a final draft. In his opinion the Commission should not commit itself to a final decision at the moment, but first consult Governments as to what approach would be most acceptable to them.

16. Mr. FRANÇOIS, Special Rapporteur, referring to the argument that the International Court of Justice had accepted straight base lines of more than ten miles, said that the Court's ruling only concerned the issue whether the Norwegian Government's method of drawing those base lines conflicted with existing international law. The Court had decided that the Norwegian Government's action was not inconsistent with international law. But the problem for the Commission was different. It was expected to establish, by means of a draft convention, a system which would protect the interests of all States, including those which had interests to safeguard in waters off the rugged coasts of other States. In the light of such considerations, the Commission could arrive at the conclusion that a maximum permissible length should be laid down for the straight base lines—a maximum permissible length which might perhaps be shorter than the longest base line drawn by the Norwegian Government.

17. The Commission should not be too timid. The proposed maximum permissible length of ten miles

<sup>6</sup> *I.C.J. Reports 1951*, p. 116.

for the straight base lines, and that of five miles for their distance from the coast, were based on the unanimous recommendation of the eminent experts who had met at The Hague in 1953,<sup>7</sup> and who had certainly weighed their advice very carefully.

18. He added that the ten-mile (and five-mile) maximum was only a tentative suggestion. The draft articles prepared by the Commission would be submitted to the governments, who would in turn consult their own experts. By suggesting the limits in question, the Commission would not by any means imply that the figures given were the only possible ones.

19. Mr. SCELLE said that there was no fundamental disagreement between members of the Commission. They all agreed that some distance should be given in principle, or as a general indication.

20. He remained convinced that, when defining the extent of the territorial sea, base lines were much more important than outer limits. He was also convinced that no absolute general rule could be laid down: there were many special cases of States having a coastline of a peculiar character. In his commentary to article 6, the Special Rapporteur had described the Court's judgement in the Fisheries case as a statement of the law in force. Yet, a single court decision could not be said to lay down the law in force. The relevant rule of law would only be established in time, after a body of court decisions or precedents had been built up. The Commission should accept the recommendations of the committee of experts, while indicating that the figures given were not to be regarded as final.

21. Mr. SPIROPOULOS said that if the maximum permissible length for the straight base lines were to be indicated merely in the comment to article 6, there would be no reaction from Governments. Governments only commented on the articles of draft conventions, and rarely, if ever, discussed the comment attached to each article. It seemed to him best to leave the figures in article 6, while indicating, in the comment to it, that those figures were based on the opinion of the committee of experts.

22. Mr. CORDOVA feared that Governments would merely say that they disapproved of the ten-mile maximum without giving any reasons. If the Commission refrained from giving any definite maximum length and asked governments for their opinion, then the latter might perhaps express a preference for a particular maximum length. Already one State, Norway, had gone very much further than the ten miles suggested by the experts.

23. Mr. SCELLE said that Governments might comment on draft articles, but were hardly likely to comment on comments.

24. The CHAIRMAN proposed the following amendments to draft article 6:

(1) The first sentence of paragraph 1 to be replaced by the words:

"Where a coast is deeply indented or cut into or is bordered by islands, the base line may become independent of the low-water mark if this is desirable for the purpose of simplifying, to a reasonable degree, the perimeter of the territorial sea, or justified on historical grounds."

(2) Paragraph 2 to be replaced by the following:

"These base lines may be drawn, as the case may be, between headlands on the coastline, or between any such headland and an island, or between two islands. For the purpose of this provision drying rocks and shoals shall be deemed to be islands."

(3) The following paragraph, to be numbered paragraph 3, to be added:

"The base lines shall not exceed ten miles, except in special circumstances, such circumstances to include historical grounds."

(4) Paragraph 3 to be renumbered paragraph 4.

25. One important point was that in the case of an archipelago, the rule concerning the five-mile maximum distance of the base lines from the coast could not be adhered to.

26. It seemed to him natural that if the Commission was going to recommend a specified distance as the maximum permissible length of the straight base lines, its recommendation should be merely a tentative suggestion to States, whose replies would determine how the Commission would deal with the question later.

27. Mr. LAUTERPACHT proposed a redraft of article 6:

#### *"Straight Base Lines"*

"1. Where circumstances necessitate a special régime for the reason that the coast is deeply indented or that there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In those cases the method of base lines joining appropriate points on the coast may be employed provided that the base lines do not depart to an appreciable extent from the general direction of the coast and that the sea areas lying within these lines are closely linked to the land. In the sea areas thus enclosed the right of passage for foreign ships shall be the same as in territorial waters.

"2. Subject to the provisions of paragraph 3, the maximum permissible length for a 'straight base line' shall be ten miles. Such base lines may be drawn, if justified by the terms of paragraph 1 above, between headlands on the coastline or between any such headland and an island, or between two islands, provided that every line remains within five miles from the coast and provided further that such headlands and/or islands are not more than ten miles apart. Base lines shall not be drawn to and from drying rocks and shoals.

<sup>7</sup> Cf. *supra*, 255th meeting, para. 6.

“3. In exceptional cases in which equitable considerations permit the drawing of base lines of a length and at distances exceeding those laid down in paragraph 2, the coastal State shall be entitled to draw such lines provided that, at the request of any interested State, the International Court of Justice shall have the power, in conformity with paragraph 2 of article 38 of its statute, to maintain, modify or annul the lines thus drawn.

“4. Due publicity shall be given by the coastal State to straight base lines drawn in conformity with the preceding paragraphs.”

28. The redraft did not depart materially from the Special Rapporteur's proposals. It was largely a rewording of the latter's draft article 6 with a number of changes of form. Some of the changes, however, affected substance. Firstly, at the end of paragraph 1, the following words were new: “In the sea areas thus enclosed the right of passage for foreign ships shall be the same as in territorial waters.” As certain areas of the high seas were going to be incorporated in the territorial sea, it was proper that the right of passage should be safeguarded. Such a course would be in conformity with the International Court's judgement in the Fisheries case; that case had merely been concerned with fishing rights, the right of passage not being involved.

29. In paragraph 3 he had tried to meet the wishes of those members of the Commission who regarded the ten-mile maximum permissible length as too rigid. Paragraph 3 would enable States to exceed that limit in exceptional cases, subject to a power of review vested in the International Court. It was clear that some authority had to determine the limit to which a State would be allowed to go. The Commission might argue that it could not itself lay down rules; but it could provide the International Court with a legal basis for acting as final arbiter.

30. It might well be that for geographical, economic or historical reasons, the ten-mile maximum would prove far too short in a particular case; such exceptional cases should be recognized and the Commission should admit that in such cases the State concerned was entitled to draw a straight base line longer than the ten-mile maximum. But clearly if another State objected, the only solution was to let the International Court decide the matter *ex aequo et bono* in conformity with article 38, paragraph 2, of its statute. It was clearly impossible to lay down any legal rules about such equitable considerations as economic, geographical or historical grounds. For that reason, there seemed to be no option but to admit, in that case, the right of the Court to decide *ex aequo et bono*, although, in general, there were serious objections to conferring general powers of that nature upon the Court.

31. Mr. SPIROPOULOS said there were some important differences between Mr. Lauterpacht's amendment and the draft originally proposed by the Special Rapporteur.

32. In the first place, it seemed to him that the right of passage through internal waters should not be referred to in article 6. It should be discussed at a later stage, when the whole issue of the right of passage was considered by the Commission.

33. With regard to the length of the straight base lines, he still thought that no maximum should be specified; any indication given should be merely tentative.

34. He was in disagreement with paragraph 3 of Mr. Lauterpacht's draft, for surely the Court had no authority to modify or annul straight base lines drawn by States or, indeed, even to maintain them. What the Court could do was merely to state whether a base line drawn by a State was or was not consistent with international law. Paragraph 3 should be worded so as to provide that States could apply to the International Court for a decision as to whether a base line had been drawn in conformity with paragraphs 1 and 2 of article 6 or not.

35. Mr. SCELLE agreed with Mr. Lauterpacht. It was perfectly lawful to provide in a convention that the International Court could decide on an issue *ex aequo et bono* by simply referring to article 39, paragraph 2, of the Court's statute.

36. It should be clearly understood that there were no existing rules of international law on the subject of the maximum permissible length of straight base lines. Rules of international law would in time be evolved by judicial decisions; when a sufficient number of concurring court decisions had been given on a certain point, a new rule of unwritten international law would be established. If the International Court was to fulfil its essential role in the formation of case-law, it had to have the power to rule *ex aequo et bono*, and hence the freedom to evolve new law on the particular subject. For those reasons, he considered paragraph 3 of Mr. Lauterpacht's draft as an extremely valuable provision.

The meeting rose at 6 p.m.

## 257th MEETING

Tuesday, 29 June 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS