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Summary record of the 206th meeting

Topic:
Law of the sea - régime of the high seas

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in view of the fact that the latter expression had sometimes been taken to include also inland waters.¹⁰ That decision could, of course, be reversed, but so long as it stood it should be respected, although the commentary might indicate that there was still some doubt as to whether the term "territorial sea" was the best and that the Commission therefore reserved the right to change it at a later stage, when it reverted to the subject.

82. Mr. KOZHEVNIKOV recalled that the decision to use the term "territorial sea" had been taken by a very narrow majority, and had never been intended to be other than provisional. He would have no objection to an indication being included in the commentary along the lines suggested by Mr. François, provided it was made clear that the decision taken at the fourth session was provisional.

83. Mr. CORDOVA felt that such an indication would correspond with the facts, since all the Commission's work to date on the territorial sea had been subject to review.

84. Mr. SPIROPOULOS said that the importance of the question should not be over-rated. The Commission was not at present discussing the régime of the territorial sea; it was discussing the continental shelf, which was one aspect of the régime of the high seas. It was the intention that its work on that subject should be completed at the present session and then submitted to the General Assembly; it could not submit a provisional text to the General Assembly, and had therefore no choice but to use the term which had been provisionally adopted in connexion with another subject, namely, the term "territorial sea".

It was agreed that the term "territorial sea" should be retained in the draft articles on the continental shelf and related subjects, and that a reference to the question should be made in the commentary along the lines suggested by Mr. François and Mr. Kozhevnikov.

85. Mr. FRANÇOIS recalled that another terminological point remained to be settled, with regard to the term "contiguous to the coast". The question might be referred to the Drafting Committee.

86. Mr. LAUTERPACHT feared that the question was not one of drafting. The Commission had adopted a rigid limit of 200 metres, which had met with serious objections from governments. After very careful consideration the Special Rapporteur had submitted a new proposal, which had important substantive implications and which would have to be thoroughly discussed by the Commission itself.

87. The CHAIRMAN agreed.

88. Mr. KOZHEVNIKOV asked whether it was the intention that a vote should be taken on part I of the

draft articles on the continental shelf and related subjects. In his view that would be desirable.

89. Mr. LAUTERPACHT agreed that a vote should be taken on part I as a whole, once it had been reviewed by the Drafting Committee.

90. Mr. LIANG (Secretary to the Commission) pointed out that the various questions dealt with in part II were not directly "related" to the continental shelf at all. That being the case, it might be desirable to split up part II, making each sub-section independent, and it certainly seemed desirable that a vote should be taken on part I as a whole.

It was agreed that a vote should be taken on part I as a whole.

The meeting rose at 1 p.m.

206th MEETING

Wednesday, 1 July 1953, at 9.30 a.m.

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Chairman: Mr. Gilberto AMADO, *First Vice-Chairman.*

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCHELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/60) (*continued*)

CHAPTER IV: REVISED DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS.

PART I: CONTINENTAL SHELF

Additional article proposed by Mr. Yepes

1. Mr. YEPES proposed the addition to the revised draft articles on the continental shelf of a new article reading as follows:

¹⁰ See "Report of the International Law Commission covering the work of its fourth session", *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), para. 37.

"The rights of the coastal State over the continental shelf are independent of any occupation by that State."

2. It was essential that such a statement should be included in the text itself, and not merely in the commentary, where it would not command the same authority. It might be argued that the statement was a truism. He would draw attention, however, to the United Kingdom Government's comment that "In the opinion of Her Majesty's Government, such submerged plateaux are either *res communis* capable of acquisition by prescription or *res nullius* capable of occupation and exploitation by any State according to the normal law of occupation".¹ In the face of that statement by one of the most important and influential of governments in maritime matters, a statement which was directly contrary to the Commission's expressed intentions concerning sovereignty over the continental shelf, he thought that the need for the article he proposed was clear. It was doubly necessary in view of the way in which the continental shelf was defined in article 1.

3. Mr. HSU said that he himself had no objection to the substance of Mr. Yepes' proposed additional article, although he realized that other members of the Commission might well oppose it.

4. As to whether such a statement should be included in the text, he was content to leave the decision to the majority; if it was included, however, he suggested that, for the sake of completeness, the following words should be added to it:

"or of any assertion of the rights, or of the States being contiguous to the shelf, or of the shelf's difference in substance from the superjacent waters and air, or of the requirements of economic exploitation."

5. Mr. LAUTERPACHT said that Mr. Yepes' proposal, and the amendment to it suggested by Mr. Hsu, might give rise to a long and interesting discussion. He doubted, however, whether the Commission could afford the time for a discussion of the matter. It had already decided to state in the text that the coastal State should exercise sovereignty over the continental shelf. If it was really considered necessary, the various implications of that statement could be indicated in the commentary. Certainly no special provision was required for the purpose, and if a special article was inserted in respect of each point on which a single government had raised certain doubts, the text would soon become unwieldy.

6. Mr. FRANÇOIS (Special Rapporteur) agreed that the proposed new article was unnecessary. The Commission had purposely kept the text to the bare minimum, and in its present form it constituted a balanced whole. If a new article were inserted to give emphasis to one, and only one, of the important points in the comments, its balance would be destroyed. The right place for Mr. Yepes' proposed statement was in the commentary.

7. Mr. YEPES pointed out that Mr. Lauterpacht and Mr. François had raised no objections to the substance of his proposal, but had only suggested that it should be relegated to the commentary. He had already explained why that would represent an insufficient safeguard.

8. Mr. CORDOVA felt that the Commission had introduced so many qualifications of the principle of sovereignty over the continental shelf that it would be difficult to know what remained unless some such clear statement as that proposed by Mr. Yepes were included either in the text or in the commentary.

9. Mr. SCELLE pointed out that there were no objections to the statement's being included in the commentary; Mr. Yepes, however, was proposing that it be placed in the text, and had given as his main reason for doing so the comment attributed to the United Kingdom Government. He (Mr. Scelle) wondered, however, whether the United Kingdom Government's views had not perhaps been misinterpreted, as he could not understand, for example, what was meant by describing "*res communis*" as "capable of acquisition by prescription".

10. Mr. YEPES replied that the phrase he had quoted from the United Kingdom Government's comments was taken word for word from the Special Rapporteur's report (A/CN.4/60).

11. Mr. ALFARO said that on balance he was in favour of making clear in the text itself that the coastal State's rights over the continental shelf were independent of any occupation by it. The Commission had limited sovereignty to the right of use, the right of control and the right of jurisdiction, and it was important that it should be understood beyond any possibility of doubt that the exercise of those rights was independent of any occupation. Ambiguity might sometimes be harmful, excess of clarity never.

12. Mr. SPIROPOULOS felt that the importance of the question should not be overrated. Once it had been clearly stated that the coastal State exercised sovereignty over the continental shelf, there was nothing more to be said.

13. The CHAIRMAN, speaking as a member of the Commission, said that he was in complete agreement with Mr. Spiropoulos. He would even suggest that if the statement in question were to be included in the commentary, it should be prefaced by some such words as "Superfluous though it may appear to say so, the Commission feels it desirable to state explicitly that the rights of the coastal State etc."

14. Mr. HSU said that he would have no objection at all to the sentence proposed by Mr. Yepes being included in the commentary, but hoped that the addition to it which he had suggested would be borne in mind as well.

Mr. Yepes' proposal for a new article was rejected by 6 votes to 3, with 3 abstentions.

¹ See document A/CN.4/60 (mimeographed English text, p. 20; printed French text, No. 46).

15. The CHAIRMAN recalled that on pages 103 to 104 for his fourth report (A/CN.4/60, mimeographed English text, pp. 103-104; printed French text, paras. 36-38), and again during the discussions, the Special Rapporteur had drawn attention to the ambiguities that still attended the phrase "contiguous to the coast". At the previous meeting, he (the Chairman) had agreed with the view that that question would have to be further considered by the Commission itself.²

16. Mr. FRANÇOIS recalled that at the 197th meeting he and Mr. Pal had both submitted texts designed to remove those ambiguities.³ He suggested, however, that if it was the intention that what the Commission meant should be made clear in the commentary, further consideration of the question should be deferred until the commentary came to be discussed.

It was so agreed.

PART II: RELATED SUBJECTS

17. The CHAIRMAN then invited the Commission to discuss the four draft articles on the resources of the sea, sedentary fisheries and contiguous zones, which were at present grouped together as part II of the revised draft articles on the continental shelf and related subjects (A/CN.4/60, chapter IV). The substance of the four articles had been thoroughly discussed at the third session; there should therefore be no need to cover the same ground again, and he hoped that members would limit their remarks to suggestions specifically designed to improve or clarify the text.

18. Mr. FRANÇOIS said that the comments of a number of governments on the text of article 1 of the draft adopted at the third session showed that it had not been fully understood. He had therefore revised the text without altering its sense; the new text would be found in chapter IV, part II of his report (A/CN.4/60).

Articles 1 and 2: Resources of the sea

19. Mr. LAUTERPACHT felt that articles 1 and 2, both of which dealt with the resources of the sea, should be considered together. He feared that in their present form they were the least satisfactory of all the articles the Commission had drafted. It was important that the Commission should preserve a clear distinction between what it considered the existing law to be and what it considered the law should be. In articles 1 and 2, however, those two ideas had become confused.

20. Article 1 contained a number of statements concerning the existing law which were so obvious as to be little more than platitudes; it also contained two controversial proposals *de lege ferenda*. The first sentence, particularly if read in conjunction with the last sentence, merely expressed an obvious rule of international law, except that inclusion of the words "where the nationals of other States do not carry on fishing" introduced an inaccuracy; there was no reason why

a State whose nationals were engaged in fishing in any area of the high seas should not regulate and control their fishing activities in that area even if the nationals of other States fished there as well.

21. The second sentence and the third sentence appeared to be recommendations. That contained in the third sentence was controversial. If Norway and Sweden, for example, agreed to regulate the fishing activities of their nationals in an area of the high sea situated fifty or eighty miles from Danish territorial waters, it was not obvious why Denmark should be entitled to take part on an equal footing in the system of regulation on which they agreed.

22. The most important issue connected with articles 1 and 2, however, was what was to be done to improve the present clearly unsatisfactory situation, in which the regulations drawn up by one State, or by a number of States, were binding on their own nationals but not on the nationals of other States. The proposal in article 2 was that a permanent international body should be set up and empowered to make binding requirements for conservatory measures to be applied by all States whose nationals were engaged in fishing in any particular area; the establishment of such a body might well be beneficial, but the Commission should realise the full implications of the proposal it was making.

23. Mr. KOZHEVNIKOV felt that it would be preferable for the Commission to consider the articles one by one. He did not think there should be any serious objections to the substance of article 1.

24. Mr. CORDOVA said that he had been far from satisfied with the texts which the Commission had provisionally approved at its third session for the two articles on the resources of the sea. Those articles were closely related, and he thought that a general discussion covering them both would be more useful. In his view, the resources of the high seas were *res communis*, and their rational exploitation was in the interests of all mankind. The present situation in that respect was clearly unsatisfactory, and the ultimate aim of any development of international law in that field must be the establishment of a permanent international body empowered to frame the necessary regulations in all cases, and not only, as was proposed in article 2, in cases where the States concerned were unable to agree among themselves. It was, perhaps, impossible to go so far as that at the present time, but at any rate the third sentence of article 1 must be retained, since without it it would be possible for the fisheries situated within a State's territorial sea to be destroyed by action taken outside it.

25. Mr. YEPES drew attention to the first sentence of the Special Rapporteur's comments on the two articles under consideration, which read as follows:

"As was to be anticipated, the Governments of Chile and Ecuador said in their replies that they could not accept these articles."⁴

² See *supra*, 205th meeting, para. 87.

³ See *supra*, 197th meeting, paras. 1 and 8.

⁴ See document A/CN.4/60 (mimeographed English text, p. 115; printed French text, para. 71).

In the absence of any member with first-hand knowledge of the legal systems of those two countries, which were among those most directly interested in fishing, he felt he should remind the Commission that it was its duty to take into account all the legal systems in force throughout the world, and draw attention to the actual text of the relevant passages in the replies received from the Governments of Chile and Ecuador, which were to be found in Mr. François' report (A/CN.4/60; mimeographed English text, pp. 77 and 79; printed French text, Nos. 154 and 156). The Chilean Government stated that it was in favour of the establishment of an exclusive hunting and fishing zone two hundred sea miles wide, for the following four reasons: the special configuration of the submarine shelf along the coasts of Chile; the exploitation of the fisheries, which was of vital concern to Chile; the inadequacy of three miles of territorial sea for conservation purposes; and the unfair competition from certain foreign vessels both in the past and at present, with Chilean fishermen whose livelihood came mainly from the sea. The Government of Ecuador stated merely that the laws of Ecuador contained no conditions comparable to the draft articles 1 and 2, owing to the fact that the Civil Code recognized the principle that fishing in the sea was free.

26. Mr. FRANÇOIS pointed out that it was recognized in his report (*Ibid.*, p. 115 or para. 71) that, apart from the third sentence, article 1 added nothing to existing law. The third sentence had been criticized by Mr. Lauterpacht, as it had been criticized by the United Kingdom Government, which had observed "that it is contrary to international law to prevent or even to regulate fishing by the nationals of a foreign state in any area of the high seas except with the agreement of that State" (*Ibid.*, p. 83 or No. 162). He thought that neither Mr. Lauterpacht nor the United Kingdom Government had quite understood the purpose of the proposal, which had been described by Mr. Córdova, and was also clearly indicated in the following terms in the commentary on the two articles to be found in the Commission's report on its third session:

"Where the fishing area is so close to a coast that regulations or the failure to adopt regulations might affect the fishing in the territorial waters of a coastal State, that State should be entitled to participate in drawing up regulations to be applied even if its nationals do not fish in the area".⁵

27. Mr. SCELLE agreed with Mr. Kozhevnikov that it would be preferable to deal with each article in turn. With regard to article 1, it was generally speaking true, as Mr. Lauterpacht had said, that the second sentence went farther than existing law, although there were notable instances where conservatory measures had been taken by a number of States in concert, as in the case of the North Sea fisheries. It was also true that the present situation resulted in anarchy, since no two

States had drawn up regulations that were the same. It must therefore be recommended that the necessary measures should be taken in concert by the States concerned. It was also essential that a permanent international body be set up and empowered to frame the necessary regulations where the States concerned were unable to agree among themselves. It was also necessary, however, to provide, as a bridge between the two recommendations—a bridge that was lacking in the present text—that in the event of failure to agree among themselves, the States concerned should be under an obligation to submit the question to the permanent international body for decision.

28. Mr. LIANG (Secretary to the Commission) said that Mr. Lauterpacht's remarks had brought home to him the fact that article 1 dealt with a problem of which there were two closely related, but distinct aspects, namely: jurisdiction over fishing activities with a view to the conservation of maritime resources; and jurisdiction over fishing activities with a view to the immediate economic interests of the State. It seemed to him that, although many of Mr. Lauterpacht's remarks were very pertinent if applied to the question of jurisdiction over fishing activities with a view to the immediate economic interests of the State, the question appeared in a somewhat different light if viewed from the angle of jurisdiction over fishing activities with a view to the conservation of maritime resources. The considerations to which the two aspects of the problem of jurisdiction over fishing activities gave rise were not necessarily the same—although they might well be—in cases such as the Behring Sea fishing dispute. Also the exercise by a State of the jurisdiction over fishing activities might raise the question of the abuse of rights resulting in great damage to the common maritime resources. Article 1, however, dealt solely with jurisdiction over fishing activities with a view to the conservation of maritime resources, and that fact should perhaps be made clearer in the text.

29. Mr. SPIROPOULOS asked, as a general question, whether it was the intention that the four articles at present under consideration should be submitted to the General Assembly at the same time as the draft articles on the continental shelf. He saw no reason why they should be, as they were in quite a different category, and if they were not to be submitted to the General Assembly, it was not imperative that the Commission should complete its work on them at the present session. If, however, such was the intention, consideration of other items on the Commission's agenda for the session might have to be deferred.

30. Mr. FRANÇOIS said that it was quite impossible to divorce the four articles grouped together as part II of the revised draft articles on the continental shelf and related subjects from part I, which dealt with the continental shelf itself. The subjects they covered were indeed "related subjects", as their special concern was with the high seas above the continental shelf, since it was there that the vast majority of spawning grounds were to be found. Most of the countries which claimed

⁵ See "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), Annex, Part II*.

exclusive rights over their continental shelf were primarily concerned to protect the fish in the superjacent waters. It was because it realized how close was the link between the problem of the continental shelf and the problems dealt with in the four articles at present under consideration that the Commission had from the very outset been treating them together.

31. Mr. SANDSTRÖM said that he was not altogether in agreement with the very first point which Mr. Lauterpacht had made. It was not always possible—or desirable—to separate *lex lata* from *lex ferenda*.

32. Mr. LAUTERPACHT felt that it was desirable that article 1 should be confined to stating the existing law. For that purpose he proposed the following text, which was shorter and simpler than the present article 1:

“A State may regulate, either separately or by agreement with other States, the fishing activities of its nationals on the high seas. Such regulation is not binding upon the nationals or other States.”

33. Article 2 would then be devoted to the Commission's recommendations for improving the present situation. The key to such improvement lay, he believed, in the question to which the Secretary had referred in passing, namely, that of abuse of rights. In that connexion he was bound to agree with Mr. Sandström that it was not perhaps always possible to dissociate *lex lata* from *lex ferenda*. For, although it would be going too far to say that international law had adopted the principle of abuse of rights, it would also be going too far to say that it had altogether disregarded it. If a State unreasonably and obstructively refused to accept measures which were essential for the protection of fisheries, he doubted whether it could be regarded as altogether free of international responsibility for its action. If that idea were combined with the idea of a permanent international body, already contained in article 2, a contribution could be made to a solution of the problem. For article 2, therefore, he wished to propose the following text:

“A State which unreasonably refuses to accept, so far as its nationals are concerned, measures adopted by other States and essential for protecting fisheries from wasteful exploitation, incurs international responsibility. An international organ—or pending its establishment, the International Court of Justice—shall have jurisdiction, in such cases, to prescribe such measures as it may deem necessary.”

34. Mr. SCELLE said that he was entirely in agreement with what Mr. Lauterpacht had said and warmly supported his proposal. It was unfortunate that the principle of abuse of rights received too little attention in international law; it was none the less true that that principle existed.

35. The CHAIRMAN, speaking as a member of the Commission, said that, although he fully appreciated the desire of several members to achieve perfection, he was in favour of the text adopted by the Commission at its third session. In the present instance, the Commission's

task was to ensure the protection of the resources of the sea, and not to solve general questions arising in international law in regard to the high seas. He made that comment in no spirit of pessimism: on the contrary, he was always inspired by the hope that ultimately international relations would improve, and States come to act together in harmony. But in his capacity as Acting Chairman of the Commission it was his duty to point out that for the time being the Commission was concerned with one particular concrete problem.

36. Mr. LAUTERPACHT asked Mr. François to explain the exact meaning of the third sentence of article 1, which read: “If any part of an area is situated within 100 miles of the territorial sea of a coastal State, that State is entitled to take part on an equal footing in any system of regulation even though its nationals do not carry on fishing in the area.” He would illustrate his difficulty about that sentence by the following example: assuming that the United Kingdom regulated fishing activities in an area situated 100 miles from Norway or Sweden, why should either of the latter be entitled to take part in a system of regulation which would, by definition, be binding only on the nationals of the United Kingdom?

37. Mr. KOZHEVNIKOV said that the Chairman's approach to the problem was the correct one. Article 1 contained concrete proposals for the protection of the resources of the sea in relation to the exploration and exploitation of the continental shelf. In his (Mr. Kozhevnikov's) view, article 1 provided guarantees which answered the realities of the situation, and he was perfectly ready to vote for it. As to Mr. Lauterpacht's proposal, he needed time to consider it more closely.

38. Mr. ZOUREK also considered that article 1 was in harmony with international law as at present formulated and applied. But he, too, had some hesitation about the third sentence. Was it implicit therein that if an area was more than 100 miles away from the territorial sea the coastal State would be excluded from the regulations? In that connexion, he noted the emphasis placed by several speakers on the fact that the measures would affect only the nationals of States parties to the regulations.

39. He had heard with the greatest interest the suggestions made by Mr. Lauterpacht and Mr. Scelle regarding the means of completing and developing the rules of international law. The one had suggested arbitration, the other the International Court of Justice. It was somewhat strange that neither should have thought of the simple method of negotiating an international convention along the lines of the existing convention for the regulation of whaling. That was the proper method of completing the rules of international law which—and he must once again emphasize the fact—was created through agreement between sovereign States. It was impossible to delegate to international organs the right to negotiate conventions. There was no need for him to dwell further on an issue which had been discussed at length at the San Francisco Conference; he would merely recall that, in relation with

the International Convention for the North-west Atlantic Fisheries of 8 February 1949, governments had rejected the suggestion that an international organ should be created and had only accepted an organ empowered to submit proposals to the interested parties—a solution which was wholly in accordance with existing international law. It was impossible to invoke in the present instance the doctrine of the abuse of rights, which in any event was no part of international law. The tendency to translate the doctrines of domestic law to the international plane was dangerous. In particular cases, where international rules existed, the appeal to the principle of the abuse of rights might be valid, but in general the doctrine was inadmissible, because there were sectors of international relations which were not regulated by international law. But all that was theory and as such irrelevant to the problem before the Commission.

40. Mr. FRANÇOIS was under the impression that Mr. Lauterpacht had worked out his proposal from a starting point that differed from the Commission's. Mr. Lauterpacht began by laying down the rule that States could always regulate the fishing activities of their nationals. But the Commission's concern was not for such rules as a State might prescribe for its nationals, but for the setting-up of an international organ competent to regulate fisheries in given areas. Clearly, when two States were engaged in fishing activities in a certain region they would have to draw up the necessary rules jointly, and when four or five States were so engaged the responsible body would have to assume a more international character. Conversely, when only one State was concerned, that State alone would draw up the rules and control the fishing. It was certainly possible to approach the problem as Mr. Lauterpacht had done, but that would mean a fundamental change in the conception elaborated by the Commission two years previously.

41. To Mr. Zourek he would point out that beyond the 100-mile limit a State would have no right to participate in any system of regulation, which must of necessity be based on the criterion of proximity.

42. Mr. PAL said that, although he could add very little to the highly interesting discussion, he would like to enlarge on the Special Rapporteur's comments on Mr. Lauterpacht's proposal. The reason for permitting a coastal State to take part in regulations applying within a 100-mile limit of the territorial sea was that that State might be particularly interested in the preservation of fish within that area. That was why its claim to participate was justified. The Secretary had made it clear that article 1 was concerned only with the conservation of the fish population.

43. To Mr. Zourek's arguments about the doctrine of the abuse of rights he would reply that when several States possessed co-existing rights in relation to a given situation, the rights of each State were limited by the existence of the rights of the others. Thence it followed that international responsibility was obviously incurred by any State which failed to act in concert with the others. No State could exercise its rights to the detriment

of the rights of others. For his part, he could see no difficulty in the concept.

44. Mr. HSU considered that Mr. Lauterpacht's proposal was not in accordance with the purpose of the articles adopted by the Commission, particularly in respect of the provision relating to the 100-mile limit. His proposal omitted all reference to a permanent international body competent to conduct continuous investigations and to frame conservatory regulations. That was an important provision which must be retained. He preferred the Special Rapporteur's text.

45. As to the 100-mile zone, he would submit that if contiguity were held to justify the claim of sovereignty over the continental shelf, then the claim to participate in the regulation of fisheries was *a fortiori* justified.

46. Mr. SANDSTRÖM drew attention to the last sentence of article 1 and to the first sentence of article 2 in Mr. Lauterpacht's proposal. He suggested recourse to arbitral procedure in cases where a State unreasonably refused to accept, so far as its nationals were concerned, measures adopted by other States. But if a State had good reason for refusing to accept those measures, why should it not proceed to arbitration or to the International Court? Surely a reasonable refusal to collaborate should be examined by an international organ as much as an unreasonable one.

47. He was somewhat concerned about the drafting of the last sentence of article 1 of the Special Rapporteur's text ("The measures taken in a particular area, either by the only State whose nationals are engaged in fishing there or by several States in concert, shall not be binding on the nationals of other States who wish to fish there."), and would suggest that it be amended to read:

"In case nationals of other States want to fish in the area, and these States do not abide by the regulation, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 2."

48. That formula would, he believed, cover Mr. Córdova's point.

49. Mr. SPIROPOULOS said that the main difference between the text for article 1 proposed by Mr. Lauterpacht and the text adopted by the Commission at its third session was that the former stated the rule, whereas the latter imposed upon States the duty to take measures in concert.

50. As to article 2, earlier discussions had brought to light all the dangers and difficulties involved in the use of the words "unreasonable" or "unreasonably". Further, he doubted whether it was wise in the present instance to refer to the international responsibility of States in the negative form chosen by Mr. Lauterpacht. If the Commission wanted to accept the idea of international responsibility it should express it positively, and stipulate that such regulations should be binding on other States. In the present instance a great many difficulties were involved. Should the regulations agreed upon by, say, three States be binding on all others? And what if the regulations thus drafted were bad?

51. Nor was it wise to refer in the text to a plurality of organs, e.g., an international organ *or* the International Court of Justice. Only one organ should be specified. Actually, he was not sure that the International Court of Justice could, according to its Statute, exercise the function of drawing up regulations. For all those reasons he considered that Mr. Sandström's proposal was preferable to Mr. Lauterpacht's.

52. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Lauterpacht's text for article 1 would destroy all that the Commission had achieved by adopting the first sentence of article 1 at the third session. That sentence read:

"States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of preserving its resources from extermination."

53. Mr. SCELLE said that he must confess that Mr. Lauterpacht's proposal was not quite what he had expected. It went beyond his (Mr. Scelle's) ideas. He had thought that Mr. Lauterpacht wished first to establish existing law and then to introduce the doctrine of the abuse of rights, a concept which had been defended by Politis as long ago as 1924. But in his version of article 2, Mr. Lauterpacht merely recalled that the International Court of Justice had the right to pronounce on an abuse of rights—in the present instance the abuse would have been committed by a State which refused to observe the regulations and so injured the fishing activities of others. By so doing, he brought the Commission back to the well-beaten track of the Behring Sea dispute, upon which the arbitral tribunal had been unable to reach a satisfactory solution. The International Court of Justice consistently refused to draw up regulations. It had done so in relation to free zones, and on several other occasions. He feared that the cause of international law would not be furthered if a purely jurisdictional organ were invited to act like a regulatory organ. That was the type of organ which he had expected Mr. Lauterpacht to provide for in article 2. Instead, by inserting the clause "pending its establishment", Mr. Lauterpacht provisionally transferred competence to the International Court of Justice. The effect would be indefinitely to postpone the setting up of an international organ entrusted with ensuring implementation of article 1. What was wanted was regulation. But Mr. Lauterpacht's text for article 2 did not offer a solution and he could only describe it as being neither fish, flesh nor good red herring.

54. Mr. CORDOVA was glad that Mr. Lauterpacht had come closer to his (Mr. Córdova's) conception of the kind of international organ that was needed, but must draw attention to some of the shortcomings of the proposal. It granted the interested parties the right to regulate fishing activities in the high seas. It then laid down that such regulation would not be binding upon nationals of other States. In article 2, however, Mr. Lauterpacht insisted that the nationals of a State must abide by the regulations; if they did not, that State would incur international responsibility. The two

articles were thus contradictory. Further, they provided for jurisdiction by an international organ only after an abuse had been committed. The point was that an international organ should draw up regulations before remedies became necessary. Its main task should be prevention, not cure.

55. Mr. LAUTERPACHT drew Mr. Scelle's attention to the fact that he had suggested jurisdiction by the International Court of Justice only *pending* the establishment of an international organ. Hence that suggestion was not an essential feature of the proposal. Further, he would remind Mr. Scelle that regulation by a tribunal was a constant in international law. For instance, the tribunal on the Behring Sea dispute had first made an award (15 August 1893), and had then drawn up detailed regulations.⁶ The same procedure had been applied in the *North Atlantic Coast Fisheries* case.

56. Mr. Spiropoulos had made constructive suggestions, and he agreed that the notion of international responsibility should be expressed positively. But, even so, it was necessary to have an organ to decide on the reasonableness or unreasonableness of a State's action.

57. Mr. François had said that the Commission had settled the whole issue two years ago. That argument carried little weight, since throughout the present session the Commission had done little else but change its earlier decisions. And he could not see why Mr. Hsu should express such partiality for article 2 in its original form simply because it had been adopted two years ago.

58. As to Mr. Córdova's comment that articles 1 and 2 were mutually contradictory, he thought that the remedy lay in improving the drafting. He agreed that it would be preferable for the international organ to have initiative *proprio motu*, rather than be restricted to dealing with complaints and offences. The question should be viewed from that angle, but what was to him absolutely clear was that the Commission should not be guided entirely by the decisions it had taken at its third session.

59. Mr. ALFARO said that the views expressed by members had clarified the issue and paved the way for the vote. Article 1, as originally drafted, provided for different situations in the first two sentences.⁷ The first provided that a State might regulate and control the fishing activities of its nationals; the second covered the case of an area where the nationals of several states were thus engaged, in which case the measures of regulation and control were to be taken by those States in concert. The first sentence was optional; the second imposed an obligation. The next logical step was to provide for cases where a State refused to take measures in concert, such provision being necessary in order to ensure the conservation of the resources of the sea.

⁶ See *American Journal of International Law*, vol. 6 (1912), pp. 233-240.

⁷ See "Report of the International Law Commission covering the work of its third session", *op. cit.*, Annex, Part II.

That issue had been very clearly stated by the Secretary. He was unable to agree with Mr. Lauterpacht's text for article 1, the first sentence of which covered two different situations and made regulation dependent on the pleasure of States. For it read:

"A State *may* regulate, either separately or by agreement with other States,"

60. Furthermore, he held that the regulations adopted by one State which was engaged in fishing activities should be binding on other States in a given area. He agreed with Mr. Córdova that the two articles were contradictory—indeed, Mr. Lauterpacht himself had admitted as much.

61. As to the participation of several States in the framing of regulations applicable within the 100-mile limit, he agreed with Mr. Pal that the participation of a coastal State was fully justified in the interests of the conservation of the resources of the sea.

62. The several issues involved should be taken *seriatim*.

63. Mr. LIANG (Secretary to the Commission) said that the intentions and scope of Mr. Lauterpacht's proposal on article 1 were perfectly clear if the sentence "either separately or by agreement with other States" were deleted. The insertion of that clause immediately raised the issues of the international interests involved in regulation and control in areas where several States were engaged in fishing. That was why the sentence reading, "If the nationals of several States are thus engaged in an area, such measures should be taken by those States in concert", which figured in the Special Rapporteur's re-draft of article 1 in his fourth report (A/CN.4/60, Chapter IV, Part II), was of crucial importance.

64. As to article 2 as given in the Special Rapporteur's fourth report (A/CN.4/60, page 131), it reflected the views of the Commission at its third session. The international body which the Commission had had in mind was the United Nations Food and Agriculture Organization of the United Nations, as had been made clear in the Commission's report on its third session (A/1858). The reference in the first sentence of article 2 to the conduct of continuous investigations of the world's capacity of the permanent international body, but the second sentence empowered that body to take conservatory measures. Those powers could be conferred on the international body by agreement between States expressed in conventional form, article 2 thus paving the way for such agreement. But Mr. Lauterpacht's version of article 2 was only concerned with remedies, and therefore the proposed international organ could of course not be the United Nations Food and Agriculture Organization.

65. As regards the jurisdictional powers of the International Court of Justice, he would submit that no difficulty would arise if agreement were embodied in a convention, but what struck him most about Mr. Lauterpacht's text was the absence from it of preventive

measures. Mr. Lauterpacht had entirely discarded the valuable features of the original text, investigation, research and so on.

66. He would note in passing that since the publication of the Commission's report on its third session (A/1858), the United Nations Food and Agriculture Organization had not made any statement to the effect that those functions would be beyond its competence. Certain specific powers might have to be conferred upon the agency, but the situation was clear in respect of its general competence. He wondered, therefore, why there should be any need to speculate about a new and different kind of international organ.

67. Mr. HSU wished to correct what had seemed to be a misapprehension on Mr. Lauterpacht's part. He (Mr. Hsu) had said that he preferred the original text to the new proposal, not because he wished to abide by earlier decisions, but because, in his view, that text served the purposes which the Commission had had in mind.

68. He was in favour of Mr. Sandström's amendment.

69. Mr. CORDOVA asked Mr. Lauterpacht whether he had considered that the phrase "either separately or by agreement with other States" in his text of article 1 conferred very wide powers both on the one State or on several States. No provision was made for protecting the fisheries, and all responsibility would devolve on the unhappy fishermen, who did not participate in the counsels of governments.

70. As to article 2, Mr. Lauterpacht provided for an international organ or for action by the International Court of Justice. He would have thought it wiser to set up a new and special organ composed of all States which were directly interested in the protection of fisheries. Could States whose nationals had fished a certain area for centuries be invited to participate in an organ on which Bolivia, for instance, was represented? Obviously the answer was in the negative. Only interested States must be members of the proposed organ, which should be entrusted with the drawing up of regulations binding on all States engaged in fishing.

71. In any case, he was opposed to the reference to the International Court of Justice, because the whole question of fishing and fisheries was highly specialized and the Court was not empowered to draw up regulations. It could only deliver judgement on violations.

72. Since the discussion had already been prolonged, he would suggest that the Special Rapporteur re-draft articles 1 and 2 in the light of the views expressed by members at the present meeting.

73. Mr. SCALLE wished briefly to draw attention to one point arising out of Mr. Córdova's suggestion. What he had proposed was a regional organ concerned with fishing activities. The position of that organ vis-à-vis the United Nations would be much the same as the position of regional defence organs vis-à-vis the Security

Council. That was a point which he was prepared to elaborate at a later stage.

The meeting rose at 1 p.m.

207th MEETING

Thursday, 2 July 1953, at 9.30 a.m.

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Chairman : Mr. Gilberto AMADO, *First Vice-Chairman*.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/60) (*continued*)

CHAPTER IV : REVISED DRAFT ARTICLES ON THE CONTINENTAL SHELF AND RELATED SUBJECTS.

PART II : RELATED SUBJECTS

Articles 1 and 2 : Resources of the sea (continued)

1. The CHAIRMAN said that the Special Rapporteur and Mr. Lauterpacht had acted on Mr. Córdova's suggestion, and had drafted a joint text to replace the existing articles 1 and 2 on the resources of the sea. The text would be distributed shortly. He assumed that in the meantime the Commission would be prepared to examine article 3, which dealt with sedentary fisheries.

2. He would, however, first call upon Mr. Kozhevnikov, who wished to make some general comments on article 2.

3. Mr. KOZHEVNIKOV recalled that he had stated that article 1, as adopted by the Commission, was, despite a certain lack of clarity, on the whole acceptable to him, since governments were therein invited to act

within the framework of sovereignty.¹ Furthermore, the article contained elements for international collaboration. The proposals submitted at the preceding meeting did not improve the text.

4. As to article 2, he was utterly opposed to its main features. Fishing in the high seas had been regulated in the past, and was regulated at present, on the basis of agreement between the States concerned. Consequently, the setting up of an international organ might violate the rights of those States. He then referred to several agreements in support of his argument. Indeed, he was convinced that, for the sake of securing acceptance of the draft, that article should be left out.

5. Furthermore, he must express his growing concern at the Commission's tendency to lay down dictatorial provisions for international organs, for jurisdiction by the International Court of Justice, for sanctions, and so on. Not only was that tendency dangerous; it was anti-democratic. According to the democratic interpretation of international law, States had to seek agreement of their own free will. The position was becoming very curious. Governments, which were responsible for creating the norms of international law, could not take a step without being threatened by international authority or the International Court, or police measures. He feared that the Commission was setting out along a path that would lead it into very strong criticism from the progressive public.

6. Article 2 should be deleted.

7. The CHAIRMAN noted that the representative of one of the world's legal systems had expressed his views with considerable vigour. He invited members to consider article 3 on sedentary fisheries.²

Article 3 : Sedentary fisheries

8. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Commission's decision taken at its 205th meeting,³ to use the term "natural resources" instead of "mineral resources", raised some very delicate questions with regard to sedentary fisheries. He would draw attention to the comment which accompanied the text in the Commission's report on its third session (A/1858, Annex, Part II), and which read, in part, as follows :

"The Commission considers that sedentary fisheries should be regulated independently of the problem of the continental shelf. The proposals relating to the continental shelf are concerned with the exploitation of the mineral resources of the subsoil. . . ."

9. The Commission had taken the view that a coastal State could only regulate sedentary fisheries on the continental shelf if it possessed historic rights thereto. Rights over the continental shelf allowed only for the

¹ See *supra*, 206th meeting, paras. 23 and 37.

² Discussion of articles 1 and 2 was resumed at the 208th meeting, para. 38.

³ See *supra*, 205th meeting, paras. 69-79.