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Summary record of the 361st meeting

Topic:

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361st MEETING

Wednesday, 6 June 1956, at 9.30 a.m.

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Chairman: Mr. F. V. GARCÍA-AMADOR.

Rapporteur: Mr. J. P. A. FRANÇOIS.

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. L. PADILLA-NERVO, Mr. Radhabinod PAL, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Secretary to the Commission.

Regime of the high seas (item 1 of the agenda) (A/2456, A/CN.4/97) (*continued*)

The continental shelf (continued)

Article 8 (continued)

1. The CHAIRMAN invited the Commission to vote on the various proposals submitted at the previous meeting concerning draft article 8. Mr. Zourek's proposal to delete the article,[1] being the farthest removed in substance from the original proposal, would be voted on first.

Mr. Zourek's proposal to delete draft article 8 was rejected by 7 votes to 3, with 3 abstentions.

2. The CHAIRMAN invited the Commission to vote on Faris Bey el-Khouri's proposal[2] to replace the words " submitted to arbitration " by the words " submitted to the International Court of Justice ". It was understood that the words " should be " would be changed to " shall be " in the English text.

Faris Bey el-Khouri's proposal was adopted by 7 votes to 3, with 3 abstentions.

3. Mr. KRYLOV explained that his vote for Faris Bey el-Khouri's proposal had been cast on the assumption that States would be bound by the judgment of the Court only if they had accepted its jurisdiction under the optional clause in article 36 of the Statute of the Court.

4. The CHAIRMAN observed that each member of the Commission was free to place his own interpretation of the text adopted. The implications of the draft article were the same as those of similar provisions in international conventions. Submission of a dispute to the Court by States would involve acceptance of the jurisdiction of the Court.

5. Speaking as a member of the Commission, he recalled that at the previous meeting he had declared himself[3] in favour of completing article 8 by the addition of detailed provisions analogous to those in articles 31-33 on the conservation of the living resources of the high seas. Since, however, all the necessary machinery and procedure for the compulsory settlement of disputes was available in the International Court, he was equally satisfied with Faris Bey el-Khouri's proposal.

6. Mr. SALAMANCA, on a point of order, recalled his own proposal at the previous meeting[4] that the reference to arbitration in draft article 8 be replaced by reference to the various means of peaceful settlement of disputes set forth in Article 33 of the Charter.

7. His amendment should have been put to the vote before Faris Bey el-Khouri's proposal, since it was farther removed in substance from the text of draft article 8. He had been unable to raise the point sooner as it was not until members had begun to explain their votes that the full import of Faris Bey el-Khouri's proposal had become clear.

8. After some discussion, the CHAIRMAN *declared the vote on Faris Bey el-Khouri's proposal cancelled* and invited the Commission to vote on Mr. Salamanca's amendment.

Mr. Salamanca's amendment was rejected by 9 votes to 6.

9. The CHAIRMAN invited the Commission to vote again on Faris Bey el-Khouri's proposal.

10. Mr. ZOUREK, explaining his vote in advance, said that his opposition to the proposal was not prompted by any lack of confidence in the International Court of Justice. He merely objected to the principle of imposing only one means of settling questions which might not all be of the same importance and for which other procedures might appear more appropriate. As the proposal was worded, States would be prevented from resorting to any other means of peaceful settlement than reference to the Court.

11. Faris Bey el-KHOURI said that article 8 as at present drafted would encourage States which stood to gain from arbitration to compel the States with which they were in dispute to resort to arbitration. Reference of disputes to the International Court of Justice was a much better solution.

Faris Bey el-Khouri's proposal was adopted by 7 votes to 4, with 4 abstentions.

12. Mr. KRYLOV suggested that the text of the article and that of the commentary be brought into line.

[1] A/CN.4/SR.360, para. 69.

[2] *Ibid.*, para. 88.

[3] *Ibid.*, para. 95.

[4] *Ibid.*, para. 78.

13. Mr. PADILLA-NERVO pointed out that paragraph 89 of the commentary (A/2456) on article 8 clearly stated that its provisions did not exclude any other procedure agreed upon by the parties as a means for the peaceful settlement of the dispute. If that observation still applied, the Commission might consider adding to the amended text of draft article 8 the last clause in article 31, paragraph 1, on the conservation of the living resources of the high seas—namely, " unless the parties agree to seek a solution by another method of peaceful settlement ".

14. Mr. SANDSTRÖM said that he had intended making the same suggestion. He did not agree with Mr. Zourek that the draft article as amended was to be interpreted as preventing States from resorting to other means of peaceful settlement than reference to the International Court of Justice.

15. Mr. SPIROPOULOS said that although it was axiomatic that States were free to seek solutions by other means of peaceful settlement, he had no objection to the addition proposed by Mr. Padilla-Nervo.

Mr. Padilla-Nervo's amendment was adopted.

It was decided to refer article 8, as thus amended, to the Drafting Committee.

16. Mr. ZOUREK thought it should be explained in the commentary that the draft articles on the continental shelf contained international rules recommended to governments for their approval and would become law only when accepted by them. It was necessary to include such an explanation, since some of the texts adopted by the Commission were a codification of existing law while others were recommendations for the development of international law. The matter might best be discussed in connexion with the Commission's draft report on the work of the session.

17. The CHAIRMAN agreed that the question raised by Mr. Zourek was very general in scope and would best be discussed in connexion with the draft report.

18. Speaking as a member of the Commission, he drew attention to his proposal for the addition of a preamble to the draft articles on the continental shelf.[5] While not considering such a preamble to be absolutely essential, he thought that the Commission should preface the draft articles by a general statement of fundamental principles, as in the case of the articles on the conservation of the living resources of the high seas.

19. The essential idea was that recognition of the sovereign rights of each State over the submarine areas adjacent to its territory was without prejudice to the rights of other States under the principle of the freedom of the seas. He would not press for inclusion of the preamble in the text, but suggested that the ideas it contained might be incorporated in the Commission's report.

20. Mr. FRANÇOIS, Special Rapporteur, said that the draft articles on the continental shelf did not require any preamble, as, unlike the draft articles on the conservation of the living resources of the high seas, they did not form a section distinct from the other articles on the regime of the high seas.

21. The ideas contained in the preamble might, however, be included in the commentary on the draft articles, in so far as they were not there already; the first and third paragraphs might, for instance, be included.

22. As regards the second paragraph, however, it had been his intention, as Special Rapporteur, to recommend that the Commission state in the commentary on the draft articles that it had departed in some respects from the geological concept of the continental shelf. He would therefore prefer to postpone further consideration of the second paragraph until the Commission came to consider the text of the commentary.

23. Mr. SANDSTRÖM approved the Special Rapporteur's proposal that consideration of the proposed preamble be deferred until the Commission discussed its draft report. He could not accept the last paragraph of the preamble: it was not existing law that recognized the rights of the coastal States over the submarine areas.

24. Mr. SCELLE also approved the Special Rapporteur's proposal. While the geological concept of the continental shelf was highly questionable, the legal concept of the continental shelf was more questionable still.

25. The CHAIRMAN said that the ideas contained in the preamble would accordingly be incorporated in the text of the draft report for the approval of the Commission.

Regime of the territorial sea (item 2 of the agenda) (A/2934, A/CN.4/99 and Add. 1-7) (*resumed from the 335th meeting*)

Article 1: Juridical status of the territorial sea

26. The CHAIRMAN invited the Special Rapporteur to bring the comments of governments on the draft articles on the regime of the territorial sea to the attention of the Commission.

27. Mr. FRANÇOIS, Special Rapporteur, said that the Government of India had suggested (A/CN.4/99) the insertion at the end of paragraph 2 of article 1 of the following proviso:

provided that nothing in these articles shall affect the rights and obligations of States existing by reason of any special relationship or custom or arising out of the provisions of any treaty or convention.

28. If so general a proviso, dealing with the difficult question of the relation between general rules of law and the provisions of international conventions, were to be inserted, there was no reason why it should not be repeated in connexion with every subject treated by the Commission. The Commission had already discussed the point at length [6] in connexion with the question raised by the Norwegian Government on the draft articles on

[5] A/CN.4/SR.357, para. 44.

[6] *Ibid.*, paras. 19-30.

the conservation of the living resources of the high seas, and had agreed that no proviso on the lines of that which he had just quoted should be inserted in the articles. Some conventions might be incompatible with the rules formulated by the Commission. If, for instance, two States separated by a strait were to conclude a convention dividing the waters of that strait between them and closing it to other States, was the Commission to say that draft article 1, paragraph 2, did not affect that convention, thereby implying that States were free to adopt any convention they wished? He was not in favour of inserting the clause suggested by the Government of India.

29. The Government of Israel had raised the question (A/CN.4/99/Add.1) of combining draft articles 1 and 2 on the regime of the territorial sea with draft article 1 concerning the regime of the high seas, so as to form a comprehensive introductory chapter to the two sets of articles. The question was one which the Commission could consider when it had the whole of its draft report before it. Since, however, it had always been its intention to deal separately with the regimes of the high seas and the territorial sea, he could not recommend merging the draft articles in question.

30. The Government of Norway had asked (A/CN.4/99/Add.1) that it be stated expressly in draft article 1 that the draft articles did not apply to internal waters, while the Yugoslav Government had made a similar request and had also suggested (A/CN.4/99/Add.1) the omission of the words "and other rules of internal law" at the end of paragraph 2 of draft article 1. He was not in favour of either suggestion. The Commission had always held that it was impossible to cover in its rules the whole field of international law relating to the sea and that reference must be made to other rules of international law. In short, he proposed that draft article 1 be adopted unchanged.

31. Mr. ZOUREK said that, although he did not wish to reopen the discussion on the question raised by the Indian suggestion, he must point out its capital importance from the practical standpoint. States, when invited to accept the Commission's rules, would naturally ask themselves whether such acceptance would invalidate all previous conventions. In the illustration given by the Special Rapporteur, the rule involved was a customary one which the Commission was merely called upon to codify. Some of its other proposals, however, were of a *de lege ferenda* character. To give a further illustration, if a coastal State concluded a convention with a continental State giving the latter certain rights in the former's territorial sea, it was hard to see why that convention should be overridden.

32. The idea behind the Indian suggestion was acceptable, and even to be recommended. It need not be incorporated in the article itself, but could be explained in the comment.

33. Mr. SPIROPOULOS was opposed to embarking on a fresh discussion of draft article 1. If the rules formulated by the Commission were merely accepted by the General Assembly of the United Nations, they would not replace existing law. Their only effect would be to determine international law in accordance with article 38 of the Statute of the International Court of Justice. The draft would become effective only if States decided to establish a convention containing the rule formulated in draft article 1. It was not the moment to try to divine what questions would need to be settled in such a convention. The draft article should be adopted as it stood.

34. Mr. PAL said that the Special Rapporteur appeared to consider that draft article 1 as at present worded contained adequate safeguards. He (Mr. Pal) feared, however, that paragraph 2 as it stood might raise the very difficulty which the Government of India wished to avoid. Though it might be argued that the binding force of treaties came implicitly under the heading of " other rules of international law ", the reference to it was a rather obscure one.

35. He formally proposed that it be made clear, either in the body of the article or in the comment on it, that nothing in the articles affected conventional relations between States.

36. Sir Gerald FITZMAURICE considered that the proviso suggested by the Indian Government could not be inserted in article 1, since it might not correspond to the facts of the situation. As Mr. Spiropoulos had rightly pointed out, the rule would affect existing treaties only if incorporated in an international convention and, as long at it was adopted by the General Assembly only, would not necessarily be binding on governments. Assuming, however, that such a new convention were established, two States which were both parties to other conventions would know that if both decided to accede to the new convention, obligations under that convention would supersede those under previous conventions. If, on the other hand, one of two States parties to the same convention accepted the new convention and the other did not, the former treaty relations between those two States would automatically continue. In short, the whole matter was self-regulating.

37. Mr. PAL said that any State that accepted the rules in article 3 in the form of a convention would have to make a reservation similar to that suggested in the Indian Government's comment. The provision suggested in that comment should be incorporated in article 1 so that governments would not have to make too many reservations or be deterred from signing the convention altogether. The Commission was endeavouring to prepare a complete draft. If the provision suggested by the Indian Government were not included, governments with obligations under bilateral treaties would not be able to accede to it. The Commission undoubtedly intended to state that acceptance of the new Convention would in no way prejudice rights and obligations under existing treaties.

38. Mr. SPIROPOULOS observed that Mr. Pal was raising a theoretical problem which might be argued *ad infinitum*. Basically it dealt with the relation between *lex specialis* and *lex generalis ulterior*. The same problem arose in all attempts to codify international law; no provision such as that suggested by Mr. Pal had ever been included in any previous drafts. Certainly the problem was of the utmost importance, but the Commission would not be able to settle it.

39. Mr. SANDSTRÖM appreciated the inadvisability of including such a provision in the text of the article, but rather favoured Mr. Zourek's suggestion that the problem should be referred to in the comment, if that could be done briefly and without going too far into the substance.

40. Mr. SCELLE entirely agreed with Mr. Spiropoulos. The problem of successive conventional obligations had long engaged the attention of all international jurists and no solution had yet emerged. He doubted very much whether that problem could be settled in the comment.

41. Mr. SANDSTRÖM replied that he had intended only that the existence of the problem should be noted in the comment.

42. Mr. ZOUREK said that there was obviously no question of solving the problem, but merely of inserting in the comment a note to warn readers that the problem was a practical one, in order to forestall subsequent complications.

43. Mr. PAL maintained that if the problem was of such difficulty, it was easy to imagine what the attitude of States called upon to sign the convention would be if they lacked any such safeguard as he had suggested. If the matter was so important, the reservation should preferably be written into the article. Otherwise, States would undoubtedly hesitate to sign, precisely because of the very great difficulties pointed out by Mr. Scelle. No State would abandon its existing treaty rights. He would, however, be satisfied with a reference in the comment.

44. Faris Bey el-KHOURI believed that the provisions suggested by Mr. Pal need not be inserted either in the article or even in the comment because it was self-evident from the words " rules of international law " in paragraph 2 that the obligations would be binding on the parties, unless the stipulations of some other international convention prevailed.

45. A stipulation had been written into the United Nations Charter to the effect that in the event of a conflict between obligations of members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail. If any provision such as that advocated by Mr. Pal were to be inserted in the draft articles on the regime of the territorial sea, it should reproduce Article 103 of the Charter, but that would in fact frustrate the Indian Government's intention. The phrase " rules of international law " in paragraph 2 was quite sufficient and should safeguard the Indian Government's position, since it would be impossible to state either that international agreements between States should prevail over the rules or that the rules should prevail over previous agreements. Any disputes would be solved in the usual way by recourse to the International Court of Justice.

46. Mr. AMADO pointed out that subsequent agreements annulled previous agreements; the discussion was therefore pointless. If a State did not accede to the proposed convention, its previous obligations would of course prevail.

It was decided that the substance of the Indian Government's suggestion with regard to article 1 should be incorporated in the comment.

Article 1 was adopted.

Article 2: Juridical status of the air space over the territorial sea and of its bed and subsoil

47. Mr. FRANÇOIS, Special Rapporteur, observed that the only comment on article *2* was the proposal by the Turkish Government (A/CN.4/99) for the addition of a paragraph reading: " The provisions of the articles regarding passage by sea are not applicable to air navigation of any kind." A similar stipulation had appeared in the comment to article 2 adopted by the Commission at its sixth session.[7] It had not been repeated in the report of the seventh session for the sake of simplification, but would appear eventually, and the Turkish Government would therefore receive full satisfaction. He therefore proposed that the text of article 2 be accepted as it stood, together with the comment.

Article 2 was adopted.

Article 3: Breadth of the territorial sea

48. Mr. FRANÇOIS, Special Rapporteur, pointed out that the Commission had stated in its commentary that it had been anxious to have the comments of governments, particularly on the view it had put forward in paragraph 3, before drawing up a specific text for article 3. The present text had originated with Mr. Amado,[8] and was an endeavour to depict the existing situation in international law. Not all the governments which had been consulted had understood that. Their replies might be divided into those which stressed that the Commission had not supplied any solution, those which advocated a specific solution and indicated a very definite breadth for the territorial sea, and those which criticized everything that the Commission had achieved, just as Mr. Hsu had done in the Commission itself.

49. The Belgian Government (A/CN.4/99) came into the first category; it recognized that the Commission's solution was correct in international law, but that it did not solve the practical difficulties.

50. The Chinese Government (A/CN.4/99) had reserved its position.

51. The Government of the Dominican Republic (A/CN.4/99) recognized the three-mile limit, but was willing to extend the contiguous zone to a distance of 12 nautical miles.

52. The Indian Government (A/CN.4/99) objected to paragraph 3 and proposed a re-draft of paragraph 2.

53. The Philippine Government (A/CN.4/99) took the view that the breadth of the territorial sea might extend beyond 12 miles and that special provision should be made for the archipelagic nature of certain States. That point would arise in connexion with article 10, dealing with islands, and in any reconsideration of the Com-

[7] *Official Records of the General Assembly, Ninth session, Supplement No. 9* (A/2693), p. 14.

[8] A/CN.4/SR.309, para. 14.

mission's decision not to include a special article for groups of islands.

54. The Swedish Government (A/CN.4/99) had very well appreciated the Commission's intentions and had supported its views in many respects.

55. The Turkish Government (A/CN.4/99) held a view similar to that of Mr. Hsu and the Indian Government; it advocated the deletion of paragraph 3.

56. The Government of the Union of South Africa (A/CN.4/99) had been fairly satisfied with the Commission's draft.

57. The Israel Government (A/CN.4/99/Add.1) strongly criticized the Commission's solution.

58. The Norwegian Government (A/CN.4/99/Add.1) wished to support efforts to prevent unreasonable extensions of the breadth of the territorial sea, but would find it impossible to accept a breadth of less than four miles for its own territorial sea.

59. The United Kingdom Government (A/CN.4/99/Add.1) welcomed the statement by the Commission that States were not required to recognize claims to a breadth of territorial sea of more than three miles.

60. The United States Government (A/CN.4/99/Add.1) considered that claims in excess of three miles were not justified under international law.

61. The Yugoslav Government (A/CN.4/99/Add.1) said that the six-mile limit was historically more valid than the three-mile limit and pointed out that only one-quarter of the members of the United Nations claimed a three-mile breadth of territorial sea, whereas three-quarters claimed a greater breadth. It did not regard the provisions of article 3 as introducing a rule, but merely as a statement to the effect that a different practice was applied by various States.

62. The Government of Cambodia (A/CN.4/99/Add.2) in its first reply to the Commission, advocated the three-mile formula.

63. The Government of Iceland (A/CN.4/99/Add.2) had obviously failed to understand the Commission's intentions, and strongly criticized the draft.

64. The Lebanese Government (A/CN.4/99/Add.2) thought it desirable that upper and lower limits for the breadth of the territorial sea should be formally fixed.

65. After studying the replies from governments, he had reached the conclusion that the only thing the Commission could do was to continue on the lines agreed on at the seventh session, and endeavour to frame the rules in the form of an article. It could not reconcile divergencies of views, but could merely give a picture of the existing situation in international law. The mere fact that such a picture could be given might be of some use in solving the problem. He therefore submitted for the Commission's consideration the following draft:

1. Save as provided in paragraphs 2 and 3 of this article, the breadth of the territorial sea is three miles.

2. A greater breadth shall be recognized if it is based on customary law.

3. A State may fix the breadth of the territorial sea at a distance exceeding that laid down in paragraphs 1 and 2, but such an extension may not be claimed against States which have not recognized it and have not adopted an equal or greater distance.

4. The breadth of the territorial sea may not exceed 12 miles.

66. Paragraph 2 of that proposal simply recognized historical facts. Paragraph 4 incorporated a provision already accepted by the Commission which had not been criticized to any great extent by governments. Paragraph 3 dealt with the most difficult question, where a State might exceed the breadth of the territorial sea, even if based on customary law, if it came to the conclusion that the existing breadth was no longer adequate; but, as stipulated in paragraph 4, such extension might not exceed twelve miles. A State could therefore extend the breadth of its territorial sea from three to twelve miles, but such extension might not be claimed against States which had not recognized it. That was consistent with the stand taken by the Commission at its seventh session.

67. A new restriction had, however, been added—namely, that such extension would be valid *vis-à-vis* all States which had adopted an equal or greater distance. As Special Rapporteur he had already attempted to introduce the same idea in one of his earlier reports, but it had been criticized by some members of the Commission —by Mr. Scelle,[9] he thought—who had objected that it would not be justified from a juridical point of view; a State might claim an extension for itself and refuse it to another State on the grounds that it was not justified in the latter's case. That point of view might be accepted academically, but could hardly be incorporated in a convention such as the Commission was now preparing. No State would accept it. The principle of reciprocity must come into play, and that was the gist of his proposal.

68. He would draw the Commission's attention, without comment, to a proposal by Mr. Zourek, for a new text for article 3, reading as follows:

1. Every coastal State, in the exercice of its sovereign powers, has the right to fix the breadth of its territorial sea.

2. Since the power of the coastal State to fix the limits of the territorial sea is limited by the principle of the freedom of the high seas, in order to conform with international law, the breadth of the territorial sea must not infringe that principle.

3. In all cases where its delimitation of the territorial sea is justified by the real needs of the coastal State, the breadth of the territorial sea is in conformity with international law. This applies, in particular, to those States which have fixed the breadth of their territorial sea at between three and twelve miles.

69. Mr. AMADO said that he had indeed initiated the proposal for a text simply depicting the situation as it stood in international law.[10] He still maintained the view he had expressed at that time, that it would be idle for the Commission to suppose that it could change the rules which had grown up through custom and long practice.[11] It was not the invariable practice in international law to limit the breadth of the territorial sea to three miles or to recognize a greater breadth than twelve miles. The

[9] A/CN.4/SR.312, para. 28 and A/CN.4/SR.313, para. 38.

[10] A/CN.4/SR.168, para. 45 and A/CN.4/SR.309, para. 14.

[11] A/CN.4/SR.309, para. 4.

Commission had not been able to reach an agreed formula.

70. He could not accept the implication in paragraph 3 of the Special Rapporteur's proposal that the breadth of the territorial sea was three miles, since less than one-quarter of the members of the United Nations recognized that limit, as the Yugoslav Government had pointed out. The Belgian Government, among others, had proposed a breadth of twelve miles as the juridical basis, and it would accordingly be most inadvisable to start from three miles. The Commission itself had recognized that international practice was not uniform.

71. He of course respected the very strong historical reasons for retaining the three-mile limit, particularly in the light of the prospect of establishing contiguous zones. Public opinion, however, would be extremely puzzled as to why some Latin American States claimed a breadth of territorial sea extending for hundreds of miles, while powerful States such as the United States and the United Kingdom, which might be expected to be in favour of exercising their power, were adamant for retaining the three-mile limit. It seemed impossible to reconcile the divergencies, and it was to be feared that a diplomatic conference would fail in the same way as the Commission was bound to fail. The Commission would be wasting its time if it tried to find a formula other than that which it had already adopted, because that formula presented a picture of the real situation.

72. Mr. HSU observed that the Special Rapporteur had singled him out for special mention as a critic of the formula adopted by the Commission at its seventh session. He still thought that it was a very poor formula. He had, however, kept an open mind at the seventh session, and at the last moment had proposed a second vote [12] and tried to bring in a formula not inconsistent with that adopted.[13] He had been voted down, but still maintained that he had been right, because the Commission, after a year's reflection, was still precisely where it had been at the seventh session.

73. The Special Rapporteur's proposal was not as satisfactory as might have been expected. Paragraph 1 raised a question which the Commission would probably have to discuss at great length. By no means all States agreed that the breadth of the territorial sea was three miles. Paragraph 2 used the expression "customary law ". It was hard to see what that meant in the context. International practice was not uniform in that respect, as the Commission had already admitted. Furthermore, paragraphs 2 and 4 were inconsistent.

74. But the worst point about the Special Rapporteur's proposal was that it offered no solution to a problem which had engaged the attention of the Commission's members for a whole year. If accepted at all, it would require extensive amendment.

75. Mr. Zourek's proposal was open to the same objection, and would require far more discussion than the Commission could afford to give it. Everyone would agree with the substance of his paragraph 2, which was unnecessary and might even be harmful. The term " real needs " in paragraph 3 was not defined; the needs might be political, psychological, or even what was called historical. The paragraph was far too vague. Only one of the two sides voting on the formula last year could possibly accept Mr. Zourek's solution, so that it was not really a solution at all. The problem could, of course, be solved by vote; but in that case it would merely be referred back to the Commission. Any proposal that did not provide a practical way of solving the problem which the Commission had created for itself at its seventh session would be unsatisfactory.

76. Since he would not wish his own contribution to be restricted to negative criticism, he proposed the following text for article 3:

1. The breadth of the territorial sea may be determined by each coastal State in accordance with its economic and strategic needs within the limits of three and twelve miles, subject to recognition by States maintaining a narrower belt.
2. In the event of disagreement, the matter shall be referred to arbitration.

77. He had specified the economic and strategic needs of the coastal State. He would not press the former, however, if they were to be covered by the articles on conservation of the living resources of the high seas.

78. Mr. ZOUREK said that the problem could be approached in two ways. Either the existing situation could be described without putting forward any definite solution, which was Mr. Amado's view; or the Commission could recommend an article based on the accepted provisions of international law.

79. The Special Rapporteur's proposal was based on the unacceptable postulate that, under international law, there was a uniform definition of the breadth of the territorial sea. He (Mr. Zourek) had contested that view at the previous session,[14] for it was a fact that the three-mile limit to the territorial sea had never been accepted as a part of general international law; the four-mile limit, for instance, was an institution at least fifty years older, for it had been established by Sweden in 1679. Spain and certain Latin-American countries had defined the breadth of the territorial sea at six miles in the mid-nineteenth century and the figure of twelve miles had been adopted by Russia in 1909. At the present time, three-quarters of the members of the United Nations had established the breadth of their territorial sea at a figure exceeding three miles. The starting-point, therefore, must be acceptance of the lack of uniformity in the provisions of existing international law, from which it followed that, in the absence of any uniform rule of international law, each coastal State was free to fix the breadth of its territorial sea according to its own needs. That was the principle he had formulated in paragraph 1 of his proposal, which he hoped would be accepted as a constructive solution to the problem.

80. The great difficulty in finding an equitable solution to the problem was that there were two major principles

[12] A/CN.4/SR.315, para. 66.

[13] *Ibid.*, para. 10.

[14] A/CN.4/SR.309, para. 15.

that must be respected—the sovereignty of the coastal State and the freedom of the high seas. It was for that reason that, in paragraph 2 of his proposal, he had provided a limitation which restricted the sovereignty of the coastal State by the application of the principle of the freedom of the high seas.

81. That raised the question of the criterion for judging whether that principle had been infringed. There were two possible criteria; either a fixed numerical limit or a general criterion. The latter, as set forth in paragraph 3, was his own choice, which Mr. Hsu had criticized as being far too vague. That criticism was due to the completely mistaken idea that States could be induced to accept a uniform breadth for their territorial waters, whereas in every case that breadth was the result of a long evolutionary process and answered particular needs.

82. It was not possible to give a precise definition of the " real needs of the coastal State ", because those needs varied so much from country to country according to geographical, geological, security or economic conditions, according to the nature of the coastline and, more especially, according to the urgent needs of the population, not to mention historical factors.

83. The criterion he had chosen offered the great advantage of reconciling the two major principles involved, while leaving for settlement at some future date the case where exceptional conditions might make it necessary to go farther than was permissible under the decision taken by the Commission at its previous session. He had in mind as an example the exceptional case of an island State, such as the Philippines. Paragraph 3 did not specify the " real needs ", but left it to international practice and, in cases of dispute, to international tribunals to decide, on the merits of each case, whether the breadth to be adopted was justified by the needs of the coastal State. Both legislative instruments and international conventions sometimes employed terms which allowed a certain latitude of interpretation to the parties concerned.

84. Paragraph 3 noted that, in conformity with international law, a breadth of six, nine or twelve miles was, from a legal standpoint, just as valid as a breadth of three miles.

85. Adoption of his proposal would ensure the elimination of possible conflict and, with regard to its acceptability, in view of the recognition by the Commission of the special interest of the coastal State in the protection of the living resources of the high seas and in the contiguous zone, the prospects of general adoption of the proposed rule were brighter than in the past. Any attempt to recommend a uniform limit would be neither scientific nor realistic; it would be doomed to failure, because States would not accept any provision that did not take account of their needs.

86. Mr. SALAMANCA recalled that at the previous session Mr. Amado's proposal,[15] which he had supported, had led to a re-drafting of the earlier text by the Special Rapporteur, so that article 3 as it stood was a combination of the original draft and the Special Rapporteur's amendments. It could be said, therefore, that Mr. Amado and the Special Rapporteur were co-sponsors of the text. The question he would put to the Special Rapporteur was how exactly did the draft article represent an improvement on the previous year's text?

87. The Special Rapporteur said he had now incorporated the principle that an extension might not be claimed against a State which had not adopted an equal or greater distance, and had referred to a remark by Mr. Scelle[16] that a State which adopted a six- or twelve-mile limit could still refuse to recognize a similar limit for other States. He (Mr. Salamanca) thought the problem could be solved, not in static terms, but in dynamic terms. He thought that a State with a three-mile limit could recognize another State's six- or twelve-mile limit as the outcome of conventional negotiations, and that that would solve the problem. Consequently, he could not understand the statement in paragraph 3 that " such an extension may not be claimed against States which have not recognized it ". He asked how that paragraph improved the chances of finding a satisfactory formula?

88. Mr. FRANÇOIS, Special Rapporteur, explained that the modifications he had made to the text were very slight, for his main purpose had been to embody the Commission's views in an article, while at the same time clarifying them in order to meet criticisms that had been raised in the Commission itself. The judgment of the International Court of Justice in the Nottebohm case[17] formed the basis of the 1955 draft article, which he had attempted to clarify.

89. Mr. SPIROPOULOS said it was essential that the text, shorn of all possibilities of misinterpretation, should be crystal clear. The judgment of the International Court of Justice referred to by the Special Rapporteur might be valid in cases of disputed nationality, but he doubted whether it could be applied in cases involving the territorial sea. Let them take as an example the case of a coastal State that had fixed for itself a six-mile limit, claiming absolute sovereignty within that breadth. Nationals of another State might engage in fishing in that area, whereupon the coastal State might object, invoking the first part of the Special Rapporteur's paragraph 3; but the other State, quoting the second part of paragraph 3, might reply that it did not recognize such a claim. In effect, the paragraph granted similar rights to both States.

90. Mr. FRANÇOIS, Special Rapporteur, pointed out that he had not claimed that he was providing a solution and that Mr. Spiropoulos' example in fact reflected the existing situation.

91. Mr. SPIROPOULOS, continuing, said that the inevitable result would be a dispute which could not be decided by the International Court of Justice. Indeed, on the basis of the text of the article, the dispute could never be settled. Despite the Special Rapporteur's attempt, which he fully appreciated, his proposal provided no valid juridical solution to the problem.

[15] A/CN.4/SR.309, para. 14.

[16] A/CN.4/SR.312, para. 28.

[17] I.C.J. Reports 1955, p. 4.

92. Mr. SALAMANCA said that, after listening to the Special Rapporteur and Mr. Spiropoulos, he felt the Commission had reached the point where it could discuss the critical problem that must be settled before fixing the breadth of the territorial sea. That problem was how to persuade the great maritime Powers, which themselves observed a three-mile limit, to recognize the possibility of a greater breadth than three miles. Some States with no sea power had adopted a breadth greater than three miles and there was no gainsaying that fact. Naturally the great maritime Powers were not going to accept that fact in general terms; they would have to accept it in the light of all the economic forces involved in each case.

93. He did not think the Commission could find a formula acceptable to both parties any more than it could the previous year.

94. Mr. LIANG, Secretary to the Commission, thought that paragraph 2 of the Special Rapporteur's proposal needed clarification. It stated that a greater breadth than three miles would be recognized if it were based on customary law. The same criterion would of course apply to paragraph 1, for the juridical basis of the three-mile limit was generally understood to be customary international law. If the Special Rapporteur wished to draw a distinction between the legal imports of paragraphs 1 and 2, it would be necessary in paragraph 2 to refer to such specific bases of customary law as " long usage " in connexion with claims to a greater breadth than three miles, which was the situation envisaged in paragraph 2.

95. With regard to paragraph 3, he thought that the Special Rapporteur added a new situation to the situations contemplated in the 1955 formula. In article 3 of the 1955 draft, three situations were contemplated. First, the Commission recognized that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles. Secondly, the Commission expressed its disapproval of claims beyond twelve miles. Thirdly, the Commission did not express any view as to whether claims to a distance beyond three miles but within twelve miles were in accordance with international law. The proposal of the Special Rapporteur now before the Commission contemplated a fourth situation where the States had a duty to recognize a claim to a greater breadth than three miles if it was based upon customary law. He thought it proper to draw the attention of the Commission to that new element in the proposal as compared with the 1955 formula.

96. Faris Bey el-KHOURI said that the proposal of the Special Rapporteur in paragraphs 1 and 4 recognized a minimum of three miles and a maximum of twelve miles for the breadth of the territorial sea. In paragraphs 2 and 3, however, he recognized the right of the coastal State to claim an unspecified limit. In that respect, his proposal was unsatisfactory, for he should have indicated the reasons—economic, historical or whatever they might be—for which the coastal State could put forward a claim in excess of three miles; it was quite inadequate to base any claim to a greater breadth merely on customary law.

97. Again, who was to judge whether those reasons were valid in any particular case? In the absence of an answer to that question, the only certainty was that disputes would arise. As he saw it, the Special Rapporteur had done no more than recognize an existing situation.

98. A radical solution would be to fix a minimum and a maximum breadth of the territorial sea and to provide for the possibility of a coastal State wishing to extend that range, putting forward its claim supported by reasons that could be assessed by a qualified international authority which would decide the question. The International Court of Justice, which had been set up for the purpose of settling international disputes—including disputes of that kind—was the most appropriate authority.

99. Mr. SPIROPOULOS said that the Secretary's comment on paragraph 2 of the Special Rapporteur's proposal was pertinent. Obviously, customary law was a general basis of legislative provisions, and it was the Commission's task to codify it.

100. With regard to paragraph 3, he agreed with Mr. Amado and the Special Rapporteur that it reflected the existing situation. Unfortunately, that was the core of the whole problem. No solution was being offered and, *a priori*, the text itself precluded a solution. The question must be settled, however, and he would propose that article 3 be re-drafted along some such lines as the following: paragraph 1 would provide that all States should recognize a breadth of territorial sea not exceeding three miles; paragraph 2 would state that a greater breadth should be recognized if it were based on customary law or on a legitimate interest of the coastal State; and a final paragraph would contain a compulsory arbitration clause. That proposal provided for the settlement of any dispute. It would be noted that he had not attempted to define the legitimate interest of the coastal State, but that provision did provide a basis for a judgment by the International Court of Justice.

101. Mr. KRYLOV, while reserving the right to refer to the question later, said that the Commission, and in particular Mr. Spiropoulos, seemed to be adopting an unnecessarily pessimistic attitude. He would draw attention to the fact that, on 25 May of that year, the Governments of the Soviet Union and the United Kingdom had signed an agreement relating to fisheries off the northern coast of the Soviet Union settling such a question in a manner quite different from that erroneously proposed by the Special Rapporteur. The provisions of the agreement were preceded by statements in which each Government set forth reasoned arguments for its own point of view, and the conclusion of the agreement had been followed by an explanatory statement by the United Kingdom Government in the House of Commons. The agreement, which was based on an approach entirely different from the rigid method proposed by the Special Rapporteur, could be studied with advantage by members of the Commission.

The meeting rose at 1 p.m.