Document:-

A/CN.4/SR.367

Summary record of the 367th meeting

Topic:

Law of the sea - régime of the territorial sea

Extract from the Yearbook of the International Law Commission:-

1956, vol. I

97. Mr. PAL said that the Israel Government appeared to consider that coastal States could not claim any territorial sea in straits constituting the only access to a harbour belonging to a third State. Such a claim called for serious consideration. He was not, however, prepared to accept it at that stage.

98. Faris Bey el-KHOURI said that he could not accept Sir Gerald Fitzmaurice's argument that a State was free to establish a port to which the only access would be through the territorial seas of other States. The case of rivers was quite different.

99. Mr. SPIROPOULOS wondered whether the problem could not be assimilated to that of bays. The right of access to a port such as that mentioned could be based on international agreements or on long usage. Strictly speaking, however, such a consideration was irrelevant, since the Commission was concerned with establishing general rules.

100. Mr. SANDSTRÖM thought that the case under consideration was governed by the provisions of article 16.

101. Sir Gerald FITZMAURICE agreed with Mr. Sandström that the case was governed by article 16 so far as the right of innocent passage was concerned. However, paragraph 3 of article 18 entitled the coastal State to suspend the right of passage under certain circumstances, while paragraph 4 stipulated that there must be no such suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two ports of the high seas. The issue raised in the Israel Government's comment was whether the exception provided for in paragraph 4 could be extended to the case of straits which did not communicate with two parts of the high seas but provided the only means of access to the port of another country.

102. Mr. KRYLOV said that the question sounded far more like a case for the International Court of Justice than a matter on which the Commission could enunciate a general rule. The most that could be done would be to refer to the problem in the commentary on article 18.

After further discussion, *it was decided that the question raised by the Israel Government related to an exceptional case which did not lend itself to the formulation of a general rule.*

103. Mr. ZOUREK proposed that the Drafting Committee consider the possibility of substituting the words " straits of international interest " for the words " straits normally used for international navigation " in paragraph 4 of article 18.

Article 18 was referred to the Drafting Committee for incorporation of the addendum suggested by the Norwegian Government and consideration of Mr. Zourek's amendment.

The meeting rose at 1.10 p.m.

367th MEETING

Thursday, 14 June 1956, at 9.30 a.m.

CONTENTS

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. 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 territorial sea (item 2 of the agenda) (A/2693, A/2934, A/CN.4/97/Add.2, A/CN.4/99 and Add.1-2) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles on the regime of the territorial sea.

Article 19: Duties of foreign vessels during their passage

2. Mr. FRANÇOIS, Special Rapporteur, said that the Government of India suggested the addition of the following text as sub-paragraph (*a*) of the article:

The traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried out directly or indirectly for the purpose of supplying a military establishment.

If the suggestion related to the safety of traffic, the case was covered by the existing sub-paragraph (*a*). If, however, as was more probable, it concerned intervention by a coastal State in the transport of material for the military forces of another country, it would constitute a serious restriction on the right of passage and so would require careful consideration.

3. The Government of Turkey suggested the addition of a second paragraph to read: " Submarines shall navigate on the surface." There was already such a stipulation in paragraph 3 of article 25 regarding the passage of warships, but the Government of Turkey was in favour of removing that paragraph from article 25

and inserting it in the general rules governing the right of innocent passage, so that it would then apply to both military and non-military submarines. As submarines had to his knowledge been used for non-military purposes only during the First World War, it seemed hardly necessary to make such a change. He would nonetheless have no objection to it if the Commission wished to provide for possible future cases.

4. The Government of the Union of South Africa suggested the addition of the words " and mineral or other resources " after the words " living resources ", in sub-paragraph (*c*). There again he saw no need for the change, but had no objection to it.

5. The Government of Yugoslavia suggested amending the article to read as follows:

> Foreign vessels using the right of innocent passage through the territorial sea must comply with the laws and regulations of the coastal State, unless otherwise provided by these rules, especially those concerning:
>
> (*a*) Flying the national flag;
>
> (*b*) Following the fixed international navigation route;
>
> (*c*) Complying with the regulations on public order and security as well as customs and sanitary regulations.
>
> (The former sub-paragraphs (*a*)-(*e*) becoming (*d*)-(*h*).

He had his doubts regarding certain points in the amendment. Substitution of the words " unless otherwise provided by these rules " for the words " in conformity with these rules and other rules of international law " would tend to strengthen the position of the coastal State, since there were bound to be matters for which the Commission's rules made no provision. He accordingly preferred the existing wording. He had, on the other hand, no objection to the suggested sub-paragraphs (*a*) and (*b*), though their inclusion was hardly essential. As for the suggested sub-paragraph (*c*), the concept of " public order " to which it referred had already been rejected by the Commission as too vague. Generally speaking, he doubted whether it was advisable to include three new points in a list which, as the words " in particular " showed, was never intended to be exhaustive.

6. The Lebanese Government suggested that the coastal State be permitted to suspend application of the article in time of war or in the event of exceptional circumstances officially proclaimed. He could not recommend the adoption of that suggestion. The question of suspension in time of war was already covered by the Commission's decision that the draft did not apply to a state of war, and the term " exceptional circumstances " was too vague.

7. Mr. PAL, referring to the suggestion of the Indian Government, said that the Special Rapporteur was quite correct in assuming that it did not concern the safety of navigation, but was directed against traffic in arms. It would be inadvisable to include the text as a sub-paragraph of article 19. If the laws and regulations of the coastal State governing traffic in arms were in conformity with the rules of international law, the question would already be covered by article 19. If, on the other hand, they were not in conformity with the rules of international law, a separate provision might be required, assuming that the Commission was prepared to develop international law in that direction. In his opinion, such laws and regulations were in complete conformity with international practice and so, without any particular clause to that effect, would be covered by the article.

8. Mr. HSU, referring to the suggestion of the Indian Government, said that when governments made observations it was the Commission's duty to reply to them and, if it did not adopt their suggestions, to give the reason why. The comment by the Indian Government raised a very serious problem calling, as the Special Rapporteur had said, for careful consideration by the Commission. He regarded the suggestion as somewhat premature and by no means sound. Indeed, he could not imagine in what circumstances it could apply. If all the countries of the world were united in a universal State, individual governments, which would be more in the nature of provincial administrations, would obviously have no right to apply their own regulations to arms traffic. Nor could the suggestion be acted upon in the existing state of the world. War had been outlawed, except in case of legitimate defence or in fulfilment of a State's obligations as a Member of the United Nations. That being so, if war broke out, no State could be neutral. It would be acting either in accordance with its obligations to the United Nations, or in legitimate self-defence. It was therefore still the duty of States to make military preparations, and the sending of supplies to their military establishments through the territorial sea of other States could not constitute an abuse of the right of innocent passage. Admittedly, in the period of transition towards greater unity through which the world was passing, it was often difficult to know what international conduct was correct. He nevertheless considered that the suggestion of the Indian Government went too far.

9. Mr. SANDSTRÖM said that he could not support the Indian Government's suggestion, although he had much sympathy for it as a further step towards creating a more peaceful world. It would be premature for the Commission to discuss such a question before it had been settled internationally. Moreover, the text was too general and a number of distinctions would have to be drawn as to the nature of the traffic in arms.

10. The Turkish Government's suggestion regarding non-military submarines was not without point and some such provision might, as he had understood the Special Rapporteur to suggest, be included in another context.

11. Referring to the suggestion of the Government of the Union of South Africa, he remarked that it was hard to see the need for any reference to mineral resources in connexion with the passage of foreign vessels through a territorial sea.

12. As for the amendment suggested by the Yugoslav Government, he was prepared to accept sub-paragraphs (*a*) and (*b*), but regarded sub-paragraph (*c*) as unnecessary; the question was already covered by article 18.

13. Mr. ZOUREK observed that the five matters listed in article 19 were not really the most important. Although the Commission, in its single article on the contiguous zone, had stated that the coastal State might exercise the control necessary to prevent and punish the infringement of its customs, fiscal or sanitary regulations, it had

omitted all reference to those regulations in article 19. The object of sub-paragraph (*c*) of the Yugoslav text appeared to be to repair that omission. Far from its doing any harm to lengthen the list, it would make the duties of foreign vessels clearer. He would therefore propose that the Commission include in article 19 both the addition regarding import and export controls suggested by the United Kingdom in connexion with article 16, and the three sub-paragraphs suggested by Yugoslavia, subject to the amendment, if necessary, of the reference to " public order " in sub-paragraph (*c*).

14. In that connexion, he must point out, however, that the concept of "public order " had won general acceptance at the Hague Codification Conference.

15. Mr. KRYLOV said that Mr. Zourek appeared to be drawing a parallel between the contiguous zone and the territorial sea. But the contiguous zone was part of the high seas over which the coastal State had certain limited powers, which it was necessary to specify. The territorial sea, on the other hand, was an area over which the State exercised sovereign rights. Thus the parallel was hardly sound. The list given in article 19 might be modified; as it stood at the moment it contained a little of everything. Perhaps the best course would be to refer the article to the drafting committee as it stood, with a request that it render the provision more systematic.

16. Mr. ZOUREK said that he had not sought to draw any parallel between the contiguous zone and the territorial sea and he agreed with Mr. Krylov that the coastal State had the sovereign right to enact whatever regulations it wished with respect to its territorial sea. It was strange, however, that in the article on the contiguous zone, where certain obligations were placed on foreign vessels, there should be a reference to customs, fiscal and sanitary regulations, whereas in the articles on the right of passage in the territorial sea, where the coastal State's rights were far more extensive, there should be no such reference. It was all the more strange in view of the reference in the article on the contiguous zone to the infringement of such regulations within the territory of the coastal State or in its territorial sea.

17. Mr. SPIROPOULOS wondered whether the list given in article 19 was really necessary. The Commission, after stating in article 1 that the sovereignty of the State extended to the territorial sea, had then in article 16 established a single exception to that rule—namely, the right of innocent passage for foreign vessels. It was therefore obvious that foreign vessels were obliged to comply with the laws and regulations of the coastal State, provided they were in conformity with the rules of international law. An incomplete list would merely raise doubts in the mind of the reader. He therefore proposed that the list be dispensed with.

18. Mr. AMADO pointed out that the addition of more items to the list would weaken the force of the words " in particular ". He was against including such lists in articles. They attempted to say more and in fact said less.

19. Sub-paragraph (*c*) of the article, in any case, appeared to be covered by sub-paragraph (*b*), since it was difficult to see how foreign vessels could prejudice the conservation of the living resources of the sea otherwise than by polluting the waters.

20. Mr. FRANÇOIS, Special Rapporteur, said that a compromise solution would be to remove the sub-paragraphs from the article and refer to the questions they covered in the comment on the article.

21. Mr. SANDSTRÖM, while viewing with sympathy the proposal to dispense with the list, thought that the Commission should retain a reference to matters relating specifically to navigation.

22. Sir Gerald FITZMAURICE said that the words " in particular " were misleading with reference to sub-paragraphs (*a*), (*b*) and (*e*) of the article, since they gave the impression that the items were of special importance. In point of fact, those items were not as important as items (*c*) and (*d*), or many other questions which were not mentioned at all. The word " including " might perhaps be better, though it might imply that there would otherwise have been some doubt as to whether such questions were covered by the article.

23. He agreed with Mr. Sandström that it would be best to retain only those items directly related to the process of passage—namely, sub-paragraphs (*a*), (*b*) and perhaps (*e*).

24. Mr. PAL was in favour of ending the article at the words " international law " and, if necessary, referring in the comment to the questions covered by the sub-paragraphs.

25. Faris Bey el-KHOURI said that all the matters dealt with in the sub-paragraphs were well known to be within the jurisdiction of the coastal State. It was not therefore necessary to list them. All that was needed was to lay down the general rule. If any dispute arose as to exactly what laws and regulations were involved, it could be referred to the International Court of Justice.

26. Mr. SPIROPOULOS was also in favour of enunciating only the general rule. The matters covered by the sub-paragraphs could be referred to in the comment.

27. Mr. FRANÇOIS, Special Rapporteur, said that one objection to retaining only the general rule, especially if no mention of the matters covered in the sub-paragraphs were made in the comment, was that as it stood the general rule alone might give the impression that foreign vessels were subject to all the laws and regulations of the coastal State, including its civil law. That was, of course, not so; the law of the flag still applied aboard the foreign vessel.

28. Mr. SPIROPOULOS said that he could not agree with the Special Rapporteur that without the sub-paragraphs the article would be misleading. The proviso that the laws and regulations must be " in conformity with these rules and other rules of international law " made the matter quite clear; general international law did not subject foreign vessels to the civil law of coastal States.

29. Mr. SANDSTRÖM said that he was anxious to retain those sub-paragraphs in article 19 which referred

to the process of passage, in order to make it clear that the right of innocent passage was subject to certain obligations of the ships exercising the right.

30. Sir Gerald FITZMAURICE was in favour of Mr. Spiropoulos' proposal to dispense with the list in article 19. He would, however, suggest adding, after the words " other rules of international law ", the following clause: " And in particular the laws and regulations concerning traffic and navigation ". In that case the words " in particular " would have some sense, as their object would be to draw special attention to the laws and regulations concerning traffic and navigation. The other laws and regulations enacted by the coastal State in conformity with rules of international law, would, of course, continue to apply.

31. Mr. SPIROPOULOS thought that Sir Gerald Fitzmaurice's suggestion would solve the whole problem.

32. Mr. FRANÇOIS, Special Rapporteur, said that he was not so enthusiastic about the suggestion as Mr. Spiropoulos. The object of the article was not to state that foreign vessels were subject in particular to the laws and regulations of the coastal State concerning traffic and navigation, but to make it clear that those regulations were the only ones that the Commission had in mind. If the wording proposed by Sir Gerald Fitzmaurice were adopted, the impression would be given that foreign vessels were subject to a host of other laws and regulations as well.

33. Mr. ZOUREK pointed out that the same impression would be derived from the text of the article as it stood. The addition of two or three examples would do nothing to change the scope of the article.

34. Mr. SPIROPOULOS agreed with Mr. Zourek. The article made no mention of the civil law of the coastal State, but if anyone had any doubts—and he personally had none—as to whether the civil law of the coastal State applied to foreign vessels exercising the right of passage, he would have the same doubts whether the article were left in its existing form, or were amended as proposed by Sir Gerald Fitzmaurice.

35. Mr. SANDSTRÖM wondered whether the use of the word " including " instead of " in particular " in the English text, and " y compris " instead of " notamment " in the French text, would solve the problem.

36. Mr. FRANÇOIS pointed out that, according to many experts, the sense of " notamment " was not " in particular " but " inter alia ".

37. Sir Gerald FITZMAURICE said that he would make another suggestion in the hope of solving the difficulty. The real object of the article was to make clear that the right of innocent passage did not imply that foreign vessels exercising the right were not subject to the laws of the coastal State so far as that was required by international law. The article might therefore be re-drafted to read as follows:

The exercise of the right of innocent passage does not exempt vessels from compliance with the laws of the coastal State so far as that is required by international law. In particular, the vessels shall comply with the laws of the coastal State concerning traffic and navigation.

38. Mr. ZOUREK wondered whether the Special Rapporteur might not agree, on closer examination, that his fears regarding the interpretation of the article were somewhat exaggerated. The article, after all, said that the laws and regulations must be in conformity with other rules of international law. Those rules of international law included the rule that vessels were subject to the law of the flag they flew.

39. Mr. SPIROPOULOS drew the Special Rapporteur's attention to the fact that article 22 limited a State's jurisdiction with regard to civil law; that should allay his misgivings. The Commission should therefore accept Sir Gerald Fitzmaurice's first suggestion which was based on Mr. Sandström's remark.

40. As regards the word " notamment " it was usually employed in international conventions to bring out what was intended in particular.

41. Mr. FRANÇOIS, Special Rapporteur, said he was prepared to accept Sir Gerald Fitzmaurice's suggestion to add at the end of the paragraph, instead of the words " in particular, as regards ", the words " in particular the laws and regulations concerning traffic and navigation ". The substance of the sub-paragraphs would then be included in the comment.

It was so agreed.

Article 19, as thus amended, was adopted.

Article 20: Charges to be levied upon foreign vessels

42. Mr. FRANÇOIS, Special Rapporteur, said that the Turkish Government had proposed the deletion from paragraph 2 of the words " rendered to the vessel ". The Turkish Government had explained that the deletion would give more elasticity to the text so that it might be applied in various ways in accordance with international agreements or other forms of established precedent. He did not quite understand the purport of that amendment.

43. The Turkish Government had also asked for the addition of a paragraph reading:

The right of the coastal State to demand and obtain information of the nationality, tonnage, destination and provenance of passing vessels in order to facilitate the levying of charges is reserved.

It should be sufficient to state in the comment that such a right would not be affected by the provisions of article 20.

44. The United Kingdom Government had suggested that the first paragraph of the comment on article 22 of the draft adopted at the sixth session (A/2693, p. 19) might be restored. It would in fact be restored, as the final report would include the relevant comments adopted at previous sessions, which, for the sake of simplicity, had not been reproduced in the 1955 report.

45. Mr. SANDSTRÖM thought that the deletion suggested by the Turkish Government was related to the comment cited by the United Kingdom Government, which read:

The object of this article is to exclude any charges in respect of general services to navigation (light or conservancy dues) and to allow payment to be demanded only for special services rendered to the vessel (pilotage, towage, etc.).

The Turkish Government evidently wished to be able to levy charges for services rendered to navigation in general. If that comment were reproduced, the words " rendered to the vessel " should be retained.

46. The additional paragraph requested by the Turkish Government could be referred to in the new comment.

47. Sir Gerald FITZMAURICE thought that the additional paragraph requested by the Turkish Government should not be included in the comment as it stood. While local authorities had a right to ask for certain information, the proposed paragraph went too far, since it would permit such authorities to conduct a general inquisition regarding the business of a vessel in passage, which was undesirable.

48. Mr. KRYLOV suggested that the procedure described in the additional paragraph was that employed by the Turkish Government under the Montreux Convention of 1936[1] in the case of vessels passing through the Straits.

49. Mr. FRANÇOIS, Special Rapporteur, agreed with Sir Gerald Fitzmaurice that the substance of the additional paragraph proposed by the Turkish Government might be included in the comment, but expressed less categorically.

On that understanding, article 20 was adopted.

Article 21: Arrest on board a foreign vessel

50. Mr. FRANÇOIS, Special Rapporteur, said that the Government of the Union of South Africa had proposed the deletion of the word " merchant " in paragraph 1. The word was in fact superfluous, since the whole section referred to merchant vessels.

51. The Government of Israel had commented that no mention was made of the right of the coastal State to take steps to suppress illicit traffic in narcotic drugs. The case was perhaps covered by sub-paragraph (*a*), but in view of the importance attached by the United Nations to the suppression of the illicit traffic in narcotic drugs, it was desirable that the Commission should decide.

52. The Norwegian Government had suggested that the jurisdiction of the coastal State should perhaps be limited to those cases where the consequences of the crime extended to its land or sea territory, and that, at any rate, the coastal State should not be entitled to assume jurisdiction in cases where the consequences of the crime extended merely to the territory of the State the nationality of which was possessed by the ship. Mr. Amado might be able to state the implications in criminal law.

53. Mr. AMADO said that a great deal of inconclusive discussion was still continuing as to whether crimes should be judged by their consequences or on the basis of the social danger of the criminal. Under the Italian fascist and the old Turkish codes, it was the consequences of a crime which determined the penalty, whereas in the majority of what might be called liberal States, where the emphasis was placed on the personality of the criminal, the criterion was the act itself, not the consequences. It was not for the Commission, however, to cope with such issues.

54. Mr. SPIROPOULOS observed that there had been cases in which the extradition of a person had been requested from a foreign vessel passing through a territorial sea. No provision had been made for such cases.

55. Mr. FRANÇOIS, Special Rapporteur, pointed out that the Commission had decided at its sixth session (A/2693, p. 19) that a coastal State had no authority to stop a foreign vessel passing through the territorial sea without entering inland waters, merely because some person happened to be on board who was wanted by the judicial authorities of that State in connexion with some punishable act committed elsewhere than on board the ship.

56. Mr. SANDSTRÖM said that the point raised by the Norwegian Government did not seem wholly relevant to the terms of article 21, paragraph 1 (*a*), although it might well be justified. The right which was sought related to the consequences of a crime as they affected a coastal State. In accordance with the rules of international law, it was generally accepted that the courts of the coastal State would have jurisdiction.

57. Mr. AMADO remarked that in many cases the problem was insoluble. For instance, a State might wish to arrest a potential criminal even before any positive act had been committed. The article, however, dealt not with the principles of criminal law, but with the right of passage. Paragraph 3, which affirmed that the local authorities should pay due regard to the interests of navigation, appeared to cover the situation.

58. Mr. ZOUREK asked the Special Rapporteur whether he thought that it might be useful to add a reference in the article itself to the suppression of illicit traffic in narcotic drugs, or whether it would be sufficient to include a reference in the comment. States were bound by the international conventions on narcotic drugs to take all requisite steps throughout their territory.

59. Mr. FRANÇOIS, Special Rapporteur, replied that all criminal acts were governed by paragraph 1, sub-paragraph (*a*), if their consequences extended beyond the vessel. As the consequences of crimes connected with the illicit traffic in narcotic drugs would almost always do so, there seemed no good grounds for singling out the illicit traffic in narcotic drugs for special mention.

Article 21 was adopted with the deletion of the word " merchant " in paragraph 1.

Article 22: Arrest of vessels for the purpose of exercising civil jurisdiction

60. Mr. FRANÇOIS, Special Rapporteur, observed that article 22 brought up the question of the International Convention for the Unification of certain Rules relating to the Arrest of Sea-going Ships, signed at Brussels on 10 May 1952.

[1] League of Nations *Treaty Series*, Vol. CLXXIII, 1936-37, No. 4015.

61. The Government of Israel considered it preferable for the article to set forth *seriatim* the cases in which arrest was justified rather than merely to refer to the Brussels Convention. The Commission had attempted to do so at its seventh session, but several countries had proposed that the full text of article 1 of the Brussels Convention should be incorporated in the article, owing to the divergencies between the Commission's text and that of the Convention.

62. The Government of Israel had also commented that no mention was made of the place where the arrest might be affected. Paragraph 1 made it clear that the article dealt with arrest of a ship passing through the territorial sea.

63. The Norwegian Government had objected that the article sanctioned the arrest of a vessel other than that to which the claim related. That raised the question of sister ships. The Commission had followed the Brussels Convention, which recognized seizure of sister ships. That might be regrettable, but it was the inevitable consequence of adopting the Brussels system.

64. In its comments on the draft adopted at the Commission's sixth session (A/2693) the United Kingdom Government had drawn attention to the possibility of some incompatibility between that draft and the 1952 Brussels Convention. It now considered that to extract short sections of that Convention in an attempt to summarize it in the draft articles was likely to lead to even greater difficulties, because of the danger of inconsistency between the terms of the summary included in the draft articles and the Convention itself, and the impossibility of covering the whole Convention in the draft articles. It therefore suggested the deletion of paragraphs 2 and 3.

65. The Yugoslav Government also suggested the deletion of those paragraphs.

66. He had at first been of opinion that it would be useful to have the rules in the draft articles. At the previous session, however, it had been decided for various reasons of weight, but particularly in order to avoid departing from the Brussels Convention, to draft the article in the terms of that convention. Admittedly, that had given rise to difficulties. There had been international conventions relating to matters dealt with in other articles, but only their general lines had been incorporated. He now wondered whether there was any appreciable advantage in the system the Commission had adopted. Countries which had acceded to the Brussels Convention would naturally have no objections to the article, but other countries, such as Norway, which had not acceded to it, would not be prepared to accept the Commission's text. The United Kingdom Government's proposal might perhaps be adopted and the reference to the Brussels Convention transferred to the comment.

67. Sir Gerald FITZMAURICE was of the opinion that if the rules laid down in the Convention were not general rules of international law, they should not be embodied in the draft article, since they were merely conventional. If the Convention expressed general rules of international law, a simple reference to that Convention would suffice, or else the whole of the rules should be quoted. Paragraphs 2 and 3 did neither, but merely incorporated part of the Convention.

68. Mr. ZOUREK said that the difficulties had arisen because certain clauses of the Brussels Convention, intended to limit interference with international navigation, had been reproduced in the article. By incorporating those clauses the Commission had in fact frustrated the very purpose of the Brussels Convention by greatly extending the possibility of arresting vessels passing through the territorial sea. As he had stated in his objection at the previous session,[2] the Brussels Convention had listed no less than seventeen categories of maritime claims for which arrest was permissible. It also permitted the arrest of other vessels belonging to the same shipping company. Freedom of navigation would be seriously impaired if in any of the seventeen cases in the Convention it was permissible to levy execution against or to arrest a vessel which was merely passing through the territorial sea.

69. The text adopted at the Commission's sixth session would be more acceptable in the interests of navigation; it would cover the responsibilities assumed by the vessel and conciliate the interest both of the vessel and of the coastal State. In view of the objections raised by governments, he proposed that the following text, taken from paragraph 1 of article 24 adopted at the sixth session (A/2693), be substituted for paragraphs 2 and 3 of article 22 in the present text. It would read as follows:

> A coastal State may not arrest or divert a foreign vessel passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the vessel. A coastal State may not levy execution against or arrest the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course or for the purpose of its voyage through the waters of a coastal State.

70. Mr. SPIROPOULOS observed that the text cited by Mr. Zourek had been based on the text drawn up by the Hague Conference.

71. In reply to Mr. SANDSTRÖM, Mr. LIANG, Secretary to the Commission, said that the 1952 Brussels Convention regarding the Arrest of Sea-going Ships had been open to accession by all States. Thirteen States had signed it, three—Egypt, France and Spain—had ratified it, and five—Burma, Costa Rica, Haiti, Switzerland and Viet-Nam—had acceded to it.

72. Mr. PAL pointed out that governments had commented adversely on the text proposed by Mr. Zourek, in particular the United Kingdom Government (A/2934, p. 45). It the Commission reverted to that text, it would still have to deal with those objections.

73. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Pal had raised a very pertinent point. The Commission had adopted a new text owing to the objections raised against the former text, but fresh objections had been adduced against the new text. The Commission

[2] A/CN.4/SR.306, paras. 43 and 44.

could not reintroduce the former text without once again examining the objections to it and seeing whether they were of such weight that it would have to be amended or deleted. There was no time to do that.

74. Mr. ZOUREK said that if there were objections to the text that he had suggested, the only solution would be to delete paragraphs 2 and 3, as proposed by the United Kingdom and Yugoslav Governments.

75. Mr. SPIROPOULOS observed that the text remaining after the deletion of paragraphs 2 and 3 would seem rather flimsy. It would not solve any basic problem.

76. Mr. SANDSTRÖM was inclined to agree with Mr. Spiropoulos.

77. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Zourek, but felt that a fairly full explanation should be given in the comment.

78. Mr. SPIROPOULOS thought that the comment should not go into too much detail on a matter that was still so controversial. It should consist merely of an account of the discussion and refer to the texts adopted at the sixth and seventh sessions with the comments thereon. A reference might also be made to the possibility of a final solution by the proposed diplomatic conference.

It was decided to delete paragraphs 2 and 3 of article 22 and to request the Drafting Committee to make the necessary drafting change in paragraph 4.

Article 22, as amended, was adopted, subject to the requisite drafting change in paragraph 4.

Article 23: Government vessels operated for commercial purposes and

Article 24: Government vessels operated for non-commercial purposes

79. Mr. FRANÇOIS, Special Rapporteur, said that it would be preferable to consider articles 23 and 24 together.

80. The Turkish Government had proposed the insertion of the word " unarmed " after the words " shall apply to " in article 23. That raised a somewhat thorny problem. Article 23 dealt with government vessels operated for commercial purposes, while under article 24 the status of government vessels operated for non-commercial purposes had been left in abeyance. In time of war all merchant vessels went armed; but there seemed to be no sufficient grounds for making a distinction between armed and unarmed government government vessels, and so no grounds for limiting the application of the article to unarmed government vessels operated for commercial purposes.

81. Mr. KRYLOV maintained the opinion he had expressed at the previous session that article 23 was far from being acceptable [3] because it did not cover the whole situation. Under Soviet law government vessels operated for commercial purposes had a special status and were not assimilated to privately owned merchant vessels. The United Kingdom Gonvernment comment rightly stressed that the ships to which State immunity was applicable needed to be very carefully defined (A/2934, p. 45). Consideration of what was a complicated subject should be deferred; he would vote against the article.

82. Mr. SPIROPOULOS agreed with Mr. Krylov that government vessels operated for commercial purposes had a special status, and it would be an over-simplification to say that they could be assimilated to privately owned merchant vessels. It would be advisable to adopt a more reserved attitude pending further study of the matter.

83. Sir Gerald FITZMAURICE said he would be interested to hear the views of the Special Rapporteur on the question. The point at issue was not really the status of government vessels, but the right of innocent passage as applied to them. The only question that arose in that respect was that of the distinction between government vessels operated for commercial purposes and those operated for non-commercial purposes. If it were decided that that distinction was not relevant, then article 23 could be made applicable to all government vessels, save warships. Article 24 could be deleted and the whole question would be greatly simplified. He failed to see any valid reason for such a distinction in respect of innocent passage, but that view, which had also been that of the United Kingdom Government (A/2934, p. 44, note 23), had not been accepted. In his opinion the distinction should be between merchant vessels and warships, and in respect of the former, the question whether they were operated for commercial or for non-commercial purposes was irrelevant.

84. Mr. KRYLOV said that Sir Gerald Fitzmaurice's observation led him to conclude that article 23 was out of place, for it purported to deal with right of passage, whereas the Commission was in fact considering the question of the status of the vessels concerned.

85. Mr. FRANÇOIS, Special Rapporteur, said that the principle adopted was that for warships the right of passage should be more closely restricted than for merchant vessels. The 1954 draft did not contain any provision requiring previous authorization for passage through the territorial sea; the coastal State, however, had the right to regulate the conditions of such passage. In 1955, the Commission had gone further and made the passage of warships through the territorial sea subject to previous authorization or notification. The question now was whether government vessels should be assimilated to merchant vessels or be made subject to the stricter rules applicable to warships. Article 23 provided that government vessels operated for commercial purposes should follow the regime of merchant vessels, but no decision had been taken with regard to other government vessels.

86. Sir Gerald Fitzmaurice's proposal to assimilate all government vessels other than warships to merchant vessels would mean that the coastal State would not have the right to regulate the conditions of passage through the territorial sea, nor would prior authorization be required. The proposal might present no greater dangers. Nevertheless, it did amount to a restriction

[3] A/CN.4/SR.306, para. 50.

of the rights of the coastal State and should therefore be carefully examined. It would be difficult to make a distinction between armed und unarmed government vessels operated for commercial purposes, if it were not also made for all merchant vessels.

87. Mr. LIANG, Secretary to the Commission, pointed out that the text in brackets under draft article 24 —" [the status of these vessels is left in abeyance] "— hardly squared with article 10 adopted at the Hague Conference for the Codification of International Law of 1930,[4] which was clearer and was the formula used by the Special Rapporteur in 1954. If the Commission took up a definite attitude, it should preferably be based on article 10 of the Hague Conference; if not, the position should be clarified.

88. In 1954 the Commission's report also referred to the Brussels Convention of 1926 concerning the immunity of state-owned vessels. He wondered how far the implications of that convention could be applied to the question of innocent passage. Article 10 of the Hague Conference was more explicit than the 1955 draft. The Commission should make it clear that the vessels in question should either be subject to the jurisdiction of the coastal State or be exempted entirely.

89. Mr. SANDSTRÖM assumed that the reason for the different treatment accorded to warships was based on immunity. The question was, therefore, whether government vessels operated for non-commercial purposes should enjoy similar immunity. Excessive classification of vessels should be avoided.

90. Mr. FRANÇOIS, Special Rapporteur, pointed out that the difference in treatment was based on the dangerous character of warships.

91. Mr. PAL said the question called for clarification. No distinction in respect of categories of vessel had been drawn in the preceding articles on right of innocent passage, although article 25 did impose certain restrictions on warships. Why, then, was it necessary to introduce a special category for government vessels operated for commercial purposes? Article 8 of the draft articles on the regime of the high seas—Immunity of other State ships—already assimilated government vessels to warships for certain purposes, such as immunity. There was no valid reason, therefore, for reversing that decision merely in respect of innocent passage. Government vessels operated for non-commercial purposes should be assimilated to warships. As to government vessels operated for commercial purposes, no special provision was required, for the case was covered by the preceding articles.

92. The CHAIRMAN suggested that, in the light of Mr. Krylov's point that the Commission was in fact considering the status of such vessels instead of their right of passage, articles 23 and 24 might conveniently be deleted and their subject-matter covered elsewhere.

93. Mr. FRANÇOIS, Special Rapporteur, thought that would be difficult. Admittedly the text might be improved so as to bring out that the articles dealt only with right of passage and not with the status of vessels. A chapter headed " Right of innocent passage ", which dealt with merchant vessels in one section and warships in another, would be incomplete if it disregarded the third, intermediate category of vessels.

94. Mr. SANDSTRÖM doubted whether the Special Rapporteur's reply to his previous point was adequate. Admittedly, the dangerous character of warships was a consideration. However, under article 25, warships were not subject to the jurisdiction of the coastal State, as were other vessels. The provisions governing other vessels were replaced in the case of warships by the provision that the coastal State might require the warship to leave the territorial sea. That difference derived from the immunity of the warship, which was really the point. Government vessels operated for non-commercial purposes and those operated for commercial purposes should be treated on the same footing. The aspect of the dangerous character of the former was of no consequence and could be disregarded.

95. Mr. LIANG, Secretary to the Commission, said that the implication of taking articles 23 and 24 together was that government vessels operated for non-commercial purposes would be assimilated to merchant vessels.

96. Article 10 of the Hague Conference might not afford much assistance, for it left it open to governments to take any action in the matter that they saw fit. It would be desirable for the Commission to arrive at a decision; otherwise, the inference to be drawn from article 23 was that government vessels operated for non-commercial purposes would be entirely exempted from the application of the rules.

97. Sir Gerald FITZMAURICE said that the question was obviously more complicated than he had thought. It had two aspects, the first being the question he had raised on the need to draw the same distinction for government vessels operated for non-commercial purposes as for warships. The Special Rapporteur was right in suggesting that the distinction derived from the supposition that warships must constitute a danger. If that were so—and without admitting the validity of such a distinction, he would agree that it was the sole possible ground for drawing one—it seemed to follow that a government vessel which was not a warship need not be subjected to the regime of warships. The question accordingly arose whether such vessels could be subjected to all the rules applicable to merchant vessels. The question of immunity referred to by Mr. Sandström was pertinent, for the provisions of articles 21 and 22 would not apply. It followed that certain additional rules or exceptions might have to be introduced. The first question to be decided, however, was whether for the purpose of innocent passage, such vessels should be regarded as warships.

98. Mr. ZOUREK said that the discussion had brought out the difficulties of the whole question. Immunity of the State being the logical corollary to the sovereignty of the State, it followed that government vessels could not be subjected to the jurisdiction of a foreign State

[4] League of Nations Publications: C. 351 (*b*). M. 145 (*b*). 1930.V, p. 216.

without the consent of the State to which they belonged. Government vessels constituted a special problem. On the one hand, a right of innocent passage for merchant vessels must certainly be recognized; on the other hand, there was the very important question of the immunity of State property. It was for that reason that at the previous session he had favoured reserving a decision on the matter.[5] Adequate treatment of the question of the immunity of the State and its property would require a detailed study, to the necessity for which the United Kingdom Government had already drawn attention (A/2934, p. 45). The Commission must choose between a fully explicit text or, as the Chairman had suggested, deletion of the articles.

99. Mr. AMADO said that the Commission's task was the codification of existing rules. The only possible solution was to refer to the relevant preceding articles in respect of the right of innocent passage, stating that they were applicable to the cases in question.

100. Mr. SPIROPOULOS said that there would be no difficulties if the question were restricted to right of innocent passage. Other aspects, however, were involved —e.g., in articles 21 and 22. As article 23 was drafted, it referred to preceding articles which bore on factors other than innocent passage. It should, however, be limited to the question of passage only.

101. Fundamentally, the restriction imposed on warships arose from their character as units of the armed forces of a State which sought passage through the territorial sea of a coastal State. The right of passage for government vessels, whether operated for commercial or non-commercial purposes, had no link with that granted to units of the armed forces and there was therefore no reason to apply the same strict provisions. It would be advisable simply to state that the Commission had been unable in the time at its disposal to study adequately the two cases in question, which could be taken up by a possible international conference.

102. Mr. AMADO said that, alternatively, the Commission could accept the United Kingdom view, in which case the provisions of article 16 could be applicable. It was clear that certain provisions of the preceding articles would not be applicable to government vessels.

103. Mr. PAL pointed out that the 1954 draft of article 26, referring to passage of warships, had been modified in 1955 as a result of government comments stressing the dangerous character of such vessels. Would it not meet the case if the Commission adopted the 1954 text, relating to warships, for government vessels? That text did not require previous authorization or notification.

104. The CHAIRMAN said that there seemed to be general agreement that articles 23 and 24 should be applicable to government vessels only in respect of right of innocent passage. It that were agreed, the question could be left in the hands of the Drafting Committee.

On that understanding, articles 23 and 24 were referred to the Drafting Committee.

[5] A/CN.4/SR.306, para. 58.

Article 25: Passage of warships

105. Mr. FRANÇOIS, Special Rapporteur, said that with regard to the right of passage for warships, opinion was equally divided between the Belgian and Danish Governments, on the one hand, which held that it was a concession contingent on the consent of the coastal State and that the requirement of previous authorization was justifiable, and the United Kingdom and Netherlands Governments on the other hand, which did not accept the requirement of previous authorization.

106. The comment of the Turkish Government raised no difficulties.

107. Mr. AMADO said it was important to know what was the existing practice of governments in respect of previous authorization or notification. He doubted whether such a provision was applied by the Latin-American States.

108. Mr. FRANÇOIS, Special Rapporteur, said that the Netherlands Government was opposed to the provision because it did not itself require previous notification from foreign warships.

The meeting rose at 1.10 p.m.

368th MEETING

Friday, 15 June 1956, at 9.30 a.m.

CONTENTS

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. 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 territorial sea (item 2 of the agenda) (A/2693, A/2934, A/CN.4/97/Add.2, A/CN.4/99 anp Add.1) (*concluded*)

Article 25: Passage of warships (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 25 of the draft articles on the regime of the territorial sea.